

15-29 November 2006
Communication No. 322/2006

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Fortieth Ordinary Session
15-29 November 2006

TSATSU TSIKATA
v.
REPUBLIC OF GHANA

DECISION

BEFORE: CHAIRPERSON: Salamata Sawadogo
VICE CHAIRPERSON: Yassir Sid Ahmed El Hassan
COMMISSIONERS: Kamel Rezag-Bara, Musa Ngary Bitaye, Reine Alapini-Gansou, Mumba Malila, Angela Melo, Sanji Mmasenono Monageng, Bahame Tom Mukirya Nyanduga, Faith Pansy Tlakula

Citation: Tsikata v. Ghana, Comm. 322/2006, 21st ACHPR AAR Annex II (2006-2007)
Publications: Documents of the African Commission on Human and Peoples' Rights, Vol. 2, at 907 (Malcolm D. Evans & Rachel Murray eds., 2009); (2006) AHRLR 112 (ACHPR 2006)

SUMMARY OF THE FACTS

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat") received the Communication from the Complainant - Redmond, Tsatsu Tsikata, in accordance with Article 55 of the African Charter on Human and Peoples' Rights (the "African Charter").
2. The author of the present Communication, who is himself the Complainant, submitted the Communication against the Republic of Ghana ("Ghana"), alleging that the latter is in the process of trying him for "wilfully causing financial loss to the State" contrary to Section 179A (3) of the Criminal Code, 1960 (Act 29); an act, which did not constitute an offence at the time of the commission. He alleges that this is contrary to Article 19 (5) of the Constitution of Ghana, which prohibits retroactive criminalization, and Article 7 (2) of the African Charter. He had challenged this in the High Court in Ghana, and his contention was upheld.
3. He further alleges that in the course of his trial, he has been denied the right to a fair trial, in violation of Article 7 (1) of the African Charter. He alleged that he had been summoned "in the

name of the President" to appear before a "Fast-Track Court"; and he had challenged the constitutionality of both at the Supreme Court, which claims were upheld on 28th February 2002. However, after the Executive's alleged interference with the decision, and the "questionable" appointment of a new Justice of the Supreme Court, the decision was "reversed" by an 11-member panel of the Supreme Court, including the newly-appointed Justice, on 26th June 2002. The case was further "remitted" to the "Fast-Track Court", which had now been declared Constitutional.

4. The author also notes that the Chief Justice had prior to the Supreme Court's latter decision, publicly and explicitly stated his determination to have the earlier decision of the case reversed.

5. The author also contends that both the manner of appointment of the new Justice of the Supreme Court and the conduct of the Executive towards the Judiciary in relation to his case constituted a violation of Article 26 of the African Charter, which obliges States to guarantee the independence of the Judiciary.

6. The author stated that on 9th October 2002, he was again charged before the "High Court of Accra" on four counts, including the retroactive charge of "wilfully causing financial loss to the State" (paragraph 2 above); and intentionally misapplying public property contrary to section 1 (2) of the Public Property Decree 1977, (SMCD 140). He alleges that the facts on which the charges were based are the same as those on which he had been charged before three (3) previous courts: a) Circuit Tribunal; b) Fast Track Court; and c) the normal High Court.

7. The author further alleges a violation of his right to fair trial under Article 7(1) of the African Charter when the trial judge of the High Court of Accra overruled his Counsel's submission of "no-case-to-answer", without giving reasons; thereby violating his right to be presumed innocent until proven guilty by a competent court or tribunal, as well as right to have the violations of his fundamental rights redressed.

8. He further alleges that he had appealed to the Court of Appeal, and that in upholding the decision of the lower court, the Court of Appeal had relied on a repealed law, which was neither cited in the charge sheet, nor at any point in the trial proceedings at the High Court, except in response to the submission of "no-case-to-answer". He alleges that the Court of Appeal thereby denied him of his right to defence guaranteed under Article 7 (1) (c) of the African Charter as he could not have known before the trial, that a repealed law, which he had no (prior) notice of in the charge sheet or at any point in the trial, would be the basis of his charge. He also alleges a further breach of his right to be presumed innocent until proven guilty by a competent court or tribunal guaranteed by Article 7 (1) (b) of the African Charter.

9. He submits that there is a further violation of Article 7 (2) of the African Charter, and a failure to enforce Articles 19 (5) and (11) of the Constitution of Ghana, which accord him certain fundamental rights as an accused person.

10. He contends that he was further denied the right to defence guaranteed under Article 7 (1) (c) of the African Charter when upon his subpoena, the counsel for the International Finance Commission (IFC) appeared before the Court and argued that the IFC was immune from the court's jurisdiction; and this argument was upheld, even by the Court of Appeal, despite the provision of Article 19 (2) (g) of the Constitution of Ghana, which guarantees the accused's right to call witnesses, and the fact that the statutory provisions on the IFC in Ghana do not grant them the claimed immunity from testifying.

11. He noted that Article 19 (2) (g) of the Constitution of Ghana is similar to the paragraph 2 (e) (iii) of the provisions of the Elaboration of the Right to Fair Trial by the African Commission on Human and Peoples' Rights, meeting at its 11th Ordinary Session in Tunisia, 2-9 May 1992.

12. Lastly, he contended that the continuation of his trial on charges and in the manner that offend the provisions of the African Charter would cause him irreparable damage.

THE COMPLAINT

13. The author of this Communication contends that the charge on which his trial is based constitutes a violation of the right against non-retroactive criminalization under Article 7 (2) of the African Charter.

14. He also contends that the manners in which the trial has been, and is being carried out violate Article 7 (1) of the African Charter.

15. He seeks the intervention of the African Commission on Human and Peoples' Rights, and urges the Commission to invoke Rule 111 of its Rules of Procedure on Provisional measures, and request the Republic of Ghana not to proceed further with his trial until his case has been heard by the African Commission.

THE PROCEDURE

16. The present Communication was received by the Secretariat of the African Commission on 27th April, 2006.

17. The Secretariat of the Commission acknowledged receipt of the Communication to the Complainants under letter ACHPR/LPROT/COMM/322/2006/RE of 2nd May 2006, providing the references of the Communication and informing the Complainant that the Communication would be scheduled for consideration by the African Commission at its 39th Ordinary Session to be held in May 2006, in Banjul, The Gambia.

18. At its 39th Ordinary Session, held from 11th to 25th May 2006, in Banjul, The Gambia, the Commission decided to be seized of the Communication, but declined to request the Respondent State to take provisional measures in accordance with Rule 111(1) of its Rules of Procedure because the Complainant did not demonstrate the irreparable damage that would be caused if the provisional measures were not taken.

19. On 1st June 2006, the Secretariat of the African Commission informed the parties of the above-mentioned decision and asked them to provide it with more information on the admissibility of the Communication, in accordance with Article 56 of the African Charter. It also sent a copy of the Communication to the Respondent State. It requested the parties to send their written observations to the Secretariat within three (3) months after notification of the decision.

20. On 31st August and 5th September 2006, the Secretariat of the Commission received the submissions of the Respondent State by fax & mail, respectively.

21. At its 40th Ordinary Session held from 15th to 29th November 2006 in Banjul, The Gambia, the African Commission considered this Communication on admissibility.

LAW

ADMISSIBILITY

THE COMPLAINANT'S SUBMISSION

22. In the case under consideration, the Complainant makes reference to several recourses to the domestic courts for redress of the alleged violations of his rights, but gives no indication of the exhaustion of all available domestic remedies, particularly in view of the alleged on-going violation.

From the facts presented, the alleged on-going violation of his rights involves an on-going trial, the legality of which he challenges on the basis of the provisions of the Charter. He however failed to present evidence of the conclusion of this trial, and or to prove that it has been unduly prolonged.

23. The Complainant contended that the continuation of his trial based on charges and in the manner that offend the provisions of the African Charter would cause him irreparable damage, but without elaborating how.

THE RESPONDENT STATE'S SUBMISSION

24. In its response in accordance with Rule 116 of the Rules of Procedure of the African Commission, the Respondent State referred to the provisions of Article 56 (5) of the African Charter which provides for the exhaustion of local remedies as a requirement for the African Commission to rule on the admissibility of Communications, unless it is obvious that this procedure is unduly prolonged. It therefore submitted that since the matter of the Complainant's Communication is still pending in the High Court of Justice, Ghana, with further unexplored rights of appeal to the Court of Appeal and Supreme Court of Ghana, in accordance with Articles 137 & 131 respectively of the Constitution of Ghana, the Communication should be declared inadmissible by the Commission.

25. The Respondent State also recalled that the guidelines for submission of Communications provide that each Communication should particularly indicate that local remedies have been exhausted, and observed that the Complainant failed to provide any evidence of the domestic legal remedies pursued.

26. The Respondent State also argued that the Complainant further failed to meet the requirement of Article 56(5) of the Charter as he could not show in his complaint that the procedure in the High Court of Justice has been protracted or unduly delayed. It further submitted that if indeed any delay has been occasioned, it would be due to the Complainant's own repeated requests for adjournments and interlocutory appeals.

27. The Respondent State also made reference to Article 56(6) of the Charter, which provides for Communications to be submitted "within a reasonable period from the time local remedies are exhausted...", and submitted that the Complainant acted impetuously given that the matter has not been concluded, and time has not begun to run so as to afford the complainant an opportunity to bring his complaint.

28. Furthermore, the Respondent State noted Article 56(3) of the Charter and the guidelines for submission of Communications which provide that a Communication shall be considered "if it is not written in disparaging or insulting language directed against the State concerned..."; and submitted that the language in paragraphs 15, 16 and 17 of the Complainant's Communication is insulting to Ghana and its Judiciary where lack of integrity, impropriety, bias and prejudice are imputed to the Executive and the Judiciary of the Republic of Ghana. To this effect, the Respondent State cited the Complainant's statement in paragraph 17 of his Communication whereby he stated that: "Far from guaranteeing the independence of the Court in relation to my trial, the Government of Ghana has shown an irrevocable determination to have me found guilty by hook or crook and incarcerated".

THE COMMISSION'S DECISION

29. The admissibility of the Communications submitted before the African Commission is governed by the seven conditions set out in Article 56 of the African Charter.

30. The parties' submissions only relate to the provisions of Articles 56(3) (5) and (6).

31. Article 56(3) specifically stipulates that Communications shall be considered if they "are not written in disparaging or insulting language directed against the State concerned and its institutions..."

32. In respect of the Respondent's State's submission that paragraphs 15, 16 and 17 of the complaint is written in disparaging or insulting language directed against the former, the Commission holds that this is not the case. The Commission notes that these stipulated paragraphs of the complaint are only facts of allegations of Charter violations; and expressions of the complainant's fear in this regard. It is on the basis of these allegations and fear that the Complainant had submitted this Communication. The Commission reiterates that the purpose of its mandate is to consider complaints alleging such perceived judicial bias and prejudice, and undue interference by the executive with judicial independence, in accordance with Article 7 of the Charter, its Resolution on the Respect and the Strengthening on the Independence of the Judiciary (1996) [FN1], and other relevant international human rights norms; in accordance with articles 60 and 61 of the Charter.

[FN1] ACHPR /Res. 21(XIX) 96.

33. In this light, the Commission wishes to distinguish these paragraphs, for instance, from its decision in the case of *Ligue Camerounaise des Droits de l'Homme vs. Cameroon* [Comm. 65/92], where the Commission condemned the use of words such as "Paul Biya must respond to crimes against humanity"; "30 years of the criminal neo-colonial regime incarnated by the duo Ahidjio/Biya"; "regime of torturers"; and "government barbarisms"; as insulting language.

34. In respect of Article 56(5), which stipulates that Communications shall be considered if they "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged...", the Commission notes the importance of this rule as a condition for the admissibility of a claim before an international forum. It notes that the rule is based on the premise 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.

35. In light of the parties' submissions, the African Commission notes that the Complainant's allegations are in respect of an on-going/unconcluded trial. The information provided by the Complainant himself states that the communication is still pending before the courts of the Republic of Ghana. The Commission further notes that should the on-going trial end against the Complainant's favour, he has further rights of appeal to the Court of Appeal and Supreme Court of Ghana, in accordance with Articles 137 & 131 respectively of the Constitution of Ghana. In this regard, the Commission draws the attention of the parties to the similar case of Kenya Human Rights Commission vs. Kenya [Comm. 135/94], where it had held that "...the facts supplied by the Complainants themselves stated that the Communication was pending before the Courts of Kenya,... [and] that the Complainants had therefore not exhausted all available local remedies."

36. Therefore, although the Communication presents a prima facie case of a series of violations of the African Charter, a close look at the file and the submissions indicate that the Complainant is yet to exhaust all the local remedies available to him.

37. With regard to Article 56(6) of the Charter which provides that Communications shall be considered if "... they are submitted within a reasonable period of time from the time local remedies are exhausted, or from the date the Commission is seized of the matter", the Commission holds that this is quite related to the principle of the exhaustion of local remedies in accordance with article 56(5). This means that the Commission estimates the timeliness of a Communication from the date that the last available local remedy is exhausted by the Complainant. In the case of unavailability or prolongation of local remedies, it will be from the date of the Complainant's notice thereof.

38. Unlike its Inter-American [FN2] contemporary, the Commission does not specify a time-period within which Communications must be submitted. However, it advised on the early submission of Communications in the case of John K. Modise vs. Botswana [Comm. 97/93].

[FN2] Art 32 of the Rules of Procedure of the Inter-American Commission; www.cidh.org.

39. However, having found that the Complainant has not exhausted local remedies the Commission concurs with the Respondent State's argument that the Complainant had acted impetuously in bringing this Communication. This is because the matter has not been concluded, for which reason time has not begun to run such as to afford the complainant the opportunity to bring this complaint.

FOR THESE REASONS, THE AFRICAN COMMISSION declares the communication inadmissible for non-exhaustion of local remedies.

Done at the 40th Ordinary Session held from in Banjul, The Gambia, 15 - 29 November 2006.