



**IN THE EAST AFRICAN COURT OF JUSTICE AT
ARUSHA FIRST INSTANCE DIVISION**

(Coram: Mary Stella Arach-Amoko, DPJ; John Mkwawa, J, Faustin Ntezilyayo J.)



REFERENCE NO. 3 OF 2012

HILAIRE NDAYIZAMBA.....APPLICANT

VERSUS

**1. THE ATTORNEY GENERAL OF
THE REPUBLIC OF BURUND.....1ST RESPONDENT**

**2. THE SECRETARY GENERAL OF THE
EAST AFRICAN COMMUNITY.....2ND RESPONDENT**

28th February 2014

JUDGMENT OF THE COURT

INTRODUCTION

1. This is a Reference by one HILAIRE NDAYIZAMBA, a resident of the Republic of Burundi, (hereinafter referred to as the “Applicant”). His address for the purpose of this Reference is indicated as C/O Mr Isidore RUFYIKIRI, Avenue Nicholas MAYUGI-‘KU MUGUMYA’, P.O. Box 1745 Bujumbura, Burundi.
2. The Reference was filed on 23rd February 2012 under Article 30 of the Treaty Establishing the East African Community and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (hereinafter referred to as the “**Treaty**” and the “**Rules**”, respectively). It is also premised on Articles 3(3) (b), 6(d), 7(2), 8(4), 27(1) and 30(1) and (2) of the Treaty.
3. The Respondents are the Attorney General of the Republic of Burundi and the Secretary General of the East African Community who are sued on behalf of the Government of the Republic of Burundi and of the East African Community in their respective capacities as the Principal Legal Adviser of the Republic of Burundi and the Principal Executive Officer of the Community.

REPRESENTATION

4. The Applicant was represented by Mr. Isidore Ruffyikiri. Mr. Nestor Kayobera appeared for the 1st Respondent, while Mr. Wilbert Kaahwa, Learned Counsel to the Community appeared for the 2nd Respondent.

BACKGROUND

5. The undisputed background to this Reference is as follows:

On 15th October 2009, Mr. Hilaire Ndayizamba, a businessman, was arrested by the Public Prosecutor of Burundi on suspicion of assassination of one Ernest Manirumva, then Vice President of OLUCOME (a Burundian anti-corruption Non-Governmental Organization), who was assassinated in the night of 8th-9th April 2009.

On 22nd February 2012, the First Instance Tribunal of Bujumbura condemned Mr. Hilaire Ndayizamba to life imprisonment for the murder of Ernest Manirumva. An appeal against the life sentence was immediately made to the Court of Appeal of Bujumbura.

On 25th January 2013, the Court of Appeal of Bujumbura quashed the appeal and confirmed the life sentence. The Applicant through his Counsel applied for review of the judgment in the Review Chamber of the Supreme Court of Burundi and the matter was still pending at the time of the Reference.

THE APPLICANT'S CASE

6. The Applicant's case is contained in the Reference, an affidavit in support sworn on 22nd February 2012 by one Deo Nzeyimana, the Applicant's reply to the amended 1st Respondent's Response to the Reference filed on 26th March 2013, as well as his Counsel's oral submissions made on 8th November 2013.

7. Briefly, the Applicant avers that on 15th October 2009, he was arrested on suspicion that he had committed murder of one Ernest Manirumva. He alleges that following his arrest, he was not charged within the time prescribed by the Burundi Code of Penal Procedure and has since then been subjected to arbitrary and unlawful detention by agents of the Government of Burundi.
8. He claims that the acts/omissions of the Government of Burundi was an infringement of Article 6(d) of the Treaty since they violate the fundamental principles of the East African Community. He further claims that the matter gained so much notoriety that the 2nd Respondent is bound to have known and ought to have taken action pursuant to Articles 29(1) and 71(1) (d) of the Treaty.
9. The Applicant therefore seeks declarations from the Court that:
 - a) Keeping him in detention is an infringement of Article 6(d) of the Treaty;***
 - b) The Secretary General failed to fulfil his obligations under Articles 29 and 71(1)(d) of the Treaty;***
 - c) He has a full right to enjoy his freedom without any prior condition;***
 - d) An order that he be immediately released;***
 - e) The costs of the reference.***

FIRST RESPONDENT'S CASE

10. The 1st Respondent's case is set out in his response and amended response to the Reference filed on 26th March 2012 and 22nd February 2013 respectively.

11. In a nutshell, his response is as follows:-
- a) That the Court has no jurisdiction in the matter of this Reference;
 - b) That no violation of the Treaty occurred by the arrest and detention of the Applicant since this was done in accordance with the law of the Republic of Burundi;
 - c) He therefore prays that the Court should dismiss the Reference with costs.

SECOND RESPONDENT'S CASE

12. The 2nd Respondent filed his Response on 5th April 2012.
13. Affidavits in support of the response sworn by Dr. Julius Tanguus Rotich and Mr. Jean Claude Nsengiyumva were filed on 13th March 2013 and 5th April 2013 respectively. The 2nd Respondent also relies on his written submissions filed on 22nd May 2013. His case is as follows:-
- a) The 2nd Respondent has denied all responsibility in the matter before the Court as he was at all material times not aware of the alleged arrest and detention of the Applicant to prompt him to undertake any such investigations as he would in the discharge of his duties deem apt.
 - b) That as soon as he learnt of the Applicant's case, he took action with the Government of the Republic of Burundi;
 - c) In the premises, he pleads that the granting of the Declaratory Order and other Reliefs sought by the Applicant against him does not arise.

SCHEDULING CONFERENCE

14. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 25th January 2013 at which the following were framed as points of agreement and disagreement respectively:

Points of Agreement

Both parties agreed that the Reference raises triable issues based on the provisions of Articles 6, 27, 29, 30 and 71(1) (d) of the Treaty meriting adjudication and pronouncement by this Court.

Points of disagreement/Issues for determination by the Court

The parties framed the following issues for adjudication by the Court:

- a) Whether the Court is vested with the jurisdiction to entertain this Reference;
 - b) Whether the Applicant's detention is an infringement of Article 6(d) of the Treaty by the 1st Respondent;
 - c) Whether the 2nd Respondent has failed to fulfil his obligations under Articles 29 and 71(1)(d) of the Treaty;
 - d) Whether the Applicant is entitled to the Declaratory Orders he seeks.
15. In his written submissions, Counsel for the 2nd Respondent

raised yet another preliminary point that the Reference is time-barred.

16. It was agreed at the aforesaid Conference that evidence would be by way of affidavits.
17. The parties also agreed to file written submissions in respect of which they would make oral highlights at the hearing.
18. The parties noted that the case presented no possibility of mediation, conciliation or settlement.

DETERMINATION OF THE ISSUES BY THE COURT

19. Applicable Rules and Principles for Interpretation:

The Court has constantly stated that the Treaty, being an international treaty, is subject to International Law of Treaties, specifically Article 31(1) of the Vienna Convention on the Law of Treaties which has set out the general rule in the interpretation of treaties, that a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to the terms of the Treaty in their context, and in the light of the object and purpose.

We shall apply the above principles in deciding the case before the Court and in addition, we shall be guided by relevant provisions of the Treaty governing the Court's jurisdiction.

Issue No.1: Whether the Court is vested with the jurisdiction to entertain this Reference

SUBMISSIONS

20. In his oral submissions, Counsel for the Applicant argued that,

according to Article 75 of the Burundi Code of Penal Procedure (Act No.1/015 of 20th July 1999), as long as a detainee has not been produced before a criminal court for trial, it is mandatory for the Public Prosecutor to present him before the competent judge for verification of the detention every 30 days, otherwise he has to release him automatically since he would have no more legal power to keep him in detention. He then submitted that from 17th March 2010 when the Applicant appeared before the judge of detention until 14th July 2010 when he appeared before the High Court of Bujumbura, more than thirty days had passed, and hence, his detention was illegal and unlawful because it violated the abovementioned provisions.

21. Further, Counsel maintained that despite the fact that the Applicant had been subsequently condemned to life imprisonment by the Tribunal of First Instance of Bujumbura and that sentence was confirmed by the Court of Appeal of Bujumbura, his client continued to endure an arbitrary detention in light of the aforesaid provisions of Article 75 of the Burundi Code of Penal Procedure.
22. Given the foregoing, Counsel contended that the said detention constituted an infringement of the fundamental principles of good governance and rule of law enshrined in Article 6(d) of the Treaty by the Government of the Republic of Burundi. It is, therefore, his submission that the Court has the jurisdiction to interpret and apply the Treaty as it was decided in **Attorney General of the Republic of Rwanda Vs. Plaxeda Rugumba, EACJ Appeal No.1 of 2012 and James Katabazi & 21 others Vs. Secretary General of the EAC & Attorney General of**

Uganda, EACJ Ref. No.1 of 2007. In addition, Counsel argued that under Article 23(1) of the Treaty, the primary role of the Court as per the Treaty is to ensure adherence to the law in interpretation and application of compliance with the Treaty. Therefore, Counsel submitted that the Court has jurisdiction to entertain this Reference.

23. In his response, Counsel for the 1st Respondent argued that the murder case having been presented before competent judicial bodies of the country, the Court ought not to interfere in criminal matters undergoing national legal and judicial processes.
24. He asserted that the preventive detention of the Applicant was lawful on the grounds that it was done pursuant to the Burundian law, namely Articles 71, 72 and 75 of the Burundi Code of Penal Procedure and Article 205 of the Constitution.
25. Counsel further submitted that although, under Article 23(1) and Article 27(1) of the Treaty, the Court has jurisdiction over the interpretation and application of the Treaty, it does not, however, under Article 27(2) and 30(3) of the Treaty have jurisdiction to entertain prayers (a), (c) and (d) sought by the Applicant.
26. In support of his contention, he relied on **Attorney General of Kenya Vs. Omar Awadh and 6 others, EACJ Appeal No. 2 of 2012** and contended that the Court does not have jurisdiction to entertain the prayer asking the Court to declare null and void the decision of keeping the Applicant in detention [part of prayer (a)], the prayer asking the Court to declare that the Applicant

has a full right to enjoy his freedom without any prior conditions [prayer c] and the prayer seeking an order that the Applicant be immediately released [prayer (d)].

27. On his part, Counsel for the 2nd Respondent joined issue with Counsel for the 1st Respondent and submitted that the Court has jurisdiction to interpret and apply the provisions of the Treaty, including Articles 6(d), 7(2) of the Treaty as was decided in **Plaxeda Rugumba's case** (supra) and **James Katabazi's case** (supra).
28. He then argued that in respect of some of the prayers sought by the Applicant, namely part of prayer (a), and prayers (b) and (e), the Court in exercise of its interpretative jurisdiction under Article 27(1) of the Treaty may grant relief if on the evidence by the Applicant that relief arises.
29. Counsel hastened to add, however, that in respect of remedies under paragraphs (c) and (d) of the Reference which are matters of human rights and matters of municipal jurisdiction, and as was stated by this Court in the **Plaxeda Rugumba's case** (supra), the Court will not exercise jurisdiction.

DECISION OF THE COURT ON ISSUE NO.1

30. Given the factual background of the Reference, the Court has to examine whether it has the requisite jurisdiction to determine the Applicant's allegations against the Respondents. In that regard, the starting point is Article 23(1) of the Treaty as read together with Article 27 from which the Court derives its mandate. Article 23 provides that:

“The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty.”

Article 27 states that:

“1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty; Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States;

2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalize the extended jurisdiction.”

31. At the Scheduling Conference, parties agreed that the Reference raised triable issues meriting adjudication and pronouncement by this Court. However, Counsel for the Respondents have contended that the Court is only competent to entertain the Applicant’s prayers pertaining to the interpretation and application of the Treaty. Counsel for the 2nd Respondent further argued that the Court cannot determine issues raising human rights matters since such a jurisdiction still awaits the operationalization of a Protocol under Article 27(2) of the Treaty.
32. It is common knowledge that the extended jurisdiction as envisaged by Article 27(2) of the Treaty has not been conferred on this Court as decided especially in **James Katabazi’s case**

(supra) and **Plaxeda Rugumba & Attorney General of Rwanda, EACJ Ref. No. 8 of 2010**. We need not elaborate on this matter since it has been extensively debated in the said cases. It is, however, worth mentioning that the Reference before the Court invokes the Court's jurisdiction to interpret and apply the provisions of the Treaty. The Applicant seeks, among others, to invoke the Court's jurisdiction to hear and determine whether the 1st Respondent has breached the fundamental principles of the Treaty set out in Article 6(d) by keeping him in detention and whether the 2nd Respondent has violated Articles 29 and 71 (1) of the Treaty.

33. We wish to point out that Article 6(d) of the Treaty states that one of the fundamental Principles that shall govern the achievement of the objectives of the Community by the Partner States is:

“good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunity, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter of Human and Peoples’ Rights.”

34. Given the foregoing and guided by the Court's previous decisions on similar matters [see for example - **Plaxeda Rugumba's case** (supra), **Professor Peter Anyang' Nyong'o & 10 others Vs. Attorney General of Kenya & 3 others, EACJ Ref. No.1 of 2006; James Katabazi's case** (supra)], we are of the decided opinion, and in agreement with the Respondents,

that the Court has jurisdiction to entertain prayers (a), (b) and (e) of the Reference, and that it is not clothed with the jurisdiction to grant prayers (c) and (d), since the latter clearly falls outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.

WHETHER THE REFERENCE IS TIME-BARRED

35. As stated earlier, this issue was raised as a preliminary objection by Counsel for the 2nd Respondent. It is necessary to deal with it at this stage, since if it is answered in the affirmative, it would dispose of the whole Reference.
36. Counsel for the 2nd Respondent submitted that in light of the limitation period set to institute references of this nature pursuant to Article 30(2) of the Treaty, the matter was time-barred and the Reference should be dismissed with costs. Article 30(2) provides that:

“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.”

37. To buttress his assertion that the instant case was filed out of time, Counsel referred to Applicant's relevant averments contained in paragraphs 10 to 15 of the Reference, and paragraphs 12 to 17 of Deo Nzeyimana's affidavit in support of the Reference. It is his contention, therefore, that since the impugned detention commenced on 15th June 2011, which is the

date on which the Tribunal of First Instance made its decision and given that the Applicant was aware of the impugned infringement as of the abovementioned date, but chose to file his Reference only on 23rd February 2012, the said Reference was manifestly filed outside the two-month period prescribed by Article 30(2) of the Treaty.

38. Furthermore, relying on **Omar Awadh's case** (supra), learned Counsel asserted that the Appellate Division of this Court, while considering the scope of Article 30(2) of the Treaty, held that the starting date of an act complained of under the said article (including the detention of a complainant), is not the day the act ends, but the day when it is first effected. He also cited an extract of the decision in **Independent Medico Legal Unit's case** (supra) in which the Court stated that:

“The Treaty does not contain any provision enabling the Court to disregard the time limit of two months and that Article 30(2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant.”

39. Counsel also submitted that the ***“Applicant cannot afford himself the Argument to the effect that the detention arising out of the decision of the Tribunal of First Instance is equally unlawful and as such a continuing violation; and that, in this case, computation of the time can only commence after the cessation of the continuing detention. Continuing violation are not exempted from Article 30(2) of***

the Treaty because such an argument militates against the spirit and grain of the principle of legal certainty as was observed by the EACJ Appellate Division in Omar Awadh's case."

Counsel for the 1st Respondent did not make submissions on this issue.

DECISION OF THE COURT

40. As the case stands, the main thrust of the Applicant's Counsel's argument is that, firstly, the failure by the Respondent to present the Applicant before the competent court within the prescribed time is unlawful and thus, an infringement of Article 6(d) and 7(1) of the Treaty. Secondly, since the preventive detention has never been confirmed as required by the Burundian law, there is continuing illegal and unlawful detention notwithstanding subsequent condemnations of the Applicant to life imprisonment and therefore, Article 30(2) of the Treaty as regards the computation of the time to institute proceedings cannot apply.
41. In agreement with Counsel for the 2nd Respondent's position as supported by the authorities cited above, we are of the decided view that Counsel for the Applicant's argument revolving around the notion of a continuing violation of the Applicant's rights does not stand at all. Since the impugned irregularities surrounding the Applicant's detention triggering his claim were well known as by 15th June 2011, no reason was given why the time to file the Reference was not complied with as prescribed by Article 30(2) of the Treaty.

42. In a similar case, the Appellate Division of this Court has rejected the concept of legal continuing violations and opted instead for a strict interpretation of Article 30(2) of the Treaty in order to protect the principle of legal certainty. It has so decided that:

“The principle of legal certainty requires strict application of the time-limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend, to condone, to waive, or to modify the prescribed time limit for any reason (including for ‘continuing violations’). [See Omar Owadh’s case (supra), p. 21].

43. In view of all the foregoing, we conclude that the Applicant filed his Reference out of the prescribed time, and that, consequently, the Reference is time-barred for not complying with the provisions of Article 30(2) of the Treaty. **We answer this issue in the affirmative.**

44. Since the issue is answered in the affirmative, accordingly, we refrain from entertaining the remaining issues for the simple reason that the Reference is no longer alive.

45. Consequently, the Reference is dismissed.

46. As for costs, given the peculiar circumstances of this Reference, it would not serve the ends of justice to condemn the Applicant in costs. We accordingly deem it just that each party shall bear its/his own costs.

CONCLUSION

47. The Reference is dismissed.

48. Each party shall bear its/his own costs.

49. It is so ordered.

Dated, Delivered and Signed at Arusha this 28th day of February, 2014

.....
MARY STELLA ARACH-AMOKO¹
DEPUTY PRINCIPAL JUDGE

.....
JOHN MKWAWA
JUDGE

.....
FAUSTIN NTEZILYAYO
JUDGE

¹ Hon. Lady Justice Mary Stella Arach-Amoko participated in deliberations. She retired from the Court on 28th November, 2013.