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

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ & Fakihi A. Jundu, J)

REFERENCE NO.6 OF 2015

MALCOM LUKWIYA ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA.....1ST RESPONDENT

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....2ND RESPONDENT

27TH NOVEMBER 2018

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This is a Reference filed on 27th October 2015 by Mr. Malcom Lukwiya (hereinafter referred to as "the Applicant"), a male minor Ugandan[1] at the time, who, initially filed the Reference in his own names. Later, the Court ordered that the Reference be amended to provide that the same was filed through the Applicant's father and next friend and the amendment was duly filed on 15th November 2016. On 10th February 2017, the Applicant filed an Affidavit in which he stated that as he had attained majority, he was seeking the leave of the Court to proceed on his own and therefore to discharge the next friend. The Reference is premised on Articles 6(d), 7(2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty") and Rules 24(1) of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as "the Rules").The Applicant's address of service is C/O Rwakafuuzi & Co. Advocates, Plot 8-10 Kampala Road, Apartment 14 Uganda House, P.O. Box 26003, Kampala, Tel.: +256-414-258136/+256-772-706906, E-mail: keyzarat50@gmail.com,kalr@utlonline.co.ug.

2. The 1st Respondent is the Attorney General of the Republic of Uganda who is sued in his capacity as the Principal Legal Advisor of the Republic of Uganda. His address of service for the purposes

[1] The Applicant stated that his natural mother is Kenyan by birth and his natural father is Ugandan by birth and he resided in Kazo-Angola in Kampala at his father's home while in Uganda and while in Kenya he resided at Lower Kabete, a suburb of Nairobi at his mother's home.

of this Reference is given as Attorney General's Chambers, Baumann House, Plot 7, Parliament Avenue, P.O. Box 7183 Kampala, Uganda.

3. The 2nd Respondent is the Attorney General of the Republic of Kenya who is sued in his capacity as the Principal Legal Advisor of the Republic of Kenya. His address of service for the purposes of this Reference is Office of the Attorney General and Department of Justice, Sheria House, Harambee Avenue, P.O. Box 40112 – 00100 Nairobi, Telephone: +254 020 2227461/2251355; Mobile: +254 700072929/+254 732529995; Fax: +254 020 213956; Email: info@ag.go.ke.

4. The Applicant alleged that, while in Nairobi residing at his mother's home, he was arrested on 1st July 2015 and on 2nd July 2015, he was charged with terrorism and the murder of one Sheikh Hassan Kiirya on 30th June 2015. The Applicant was eventually unconditionally released on 11th September 2015.

5. He contended that his arrest and detention under painful and inhuman conditions violated his rights enshrined in the Constitutions of the Respondents' countries and breached the fundamental principles of the Community stipulated in Articles 6(d) and 7(2) of the Treaty.

B. REPRESENTATION

6. At the hearing of the Reference, the Applicant was represented by Mr. Ladislaus Rwakafuuzi; Mr. Oburu Adoi, Moreen Ijang and Ms.

Jackie Amsugut appeared for the 1st Respondent, while Mr. Thande Kuria represented the 2nd Respondent.

C. THE APPLICANT'S CASE

7. The Applicant's case is set out in his Statement of Reference filed on 27th October 2015, an Affidavit in support of the Reference sworn on even date by the Applicant, an Amended Statement of Reference filed on 15th November 2016, an Affidavit in support of the Amended Reference sworn on even date by the Applicant, his testimony during the hearing of 6th March 2017, written submissions filed on 15th May 2017 and submission highlights made on 12th June 2018.

8. The Applicant averred that about September 2014, while he was in Betsurfers Internet Café at Wandegeya, in Kampala, Uganda, he was accosted by one Mr. Ssenabulya Sadat who requested him for guidance on how to find gold buyers online.

9. On 10th May 2015, he allegedly travelled to Nairobi via Malaba from Uganda and was residing at his mother's home in Lower Kabete, Nairobi. While in Nairobi at the aforesaid residence, on 1st July 2015, he was called by the said Ssenabulya Sadat and they agreed to meet at Wangigi taxi stand. It is the Applicant's contention that upon meeting his counterpart, he was arrested by a contingent of 8 security officers who grabbed him, fell him to the ground, cuffed him and threw him into a vehicle without being told the reasons for his arrest.

10. The Applicant further alleged that the armed men escorted him to his mother's house where, without presenting a search warrant, they searched the house taking with them his lap top, mobile phone and birth certificates. He also contended that thereafter the search, he and his brother were driven to the Anti-Terrorism Police Unit at Muthaiga Police Station in Nairobi.

11. The Applicant further contended that on 2nd July 2015, he was taken to Milimani Law Court where the Prosecution read charges to the effect that the Applicant and his brother were members of terrorist groups, namely ISIS, Allied Democratic Forces, Al-Shabaab); were recruiting Kenyans into terrorism; were involved in the killing of Sheikh Hassan Kirya on 30th June 2015 in Kampala; they had been in constant communication with a known terrorist recruiter called Ssenabulya Rajab; that the Applicant entered Kenya illegally and he and his brother were a security threat to Kenya.

12. The Applicant also alleged that on 3rd July 2015, he was hooded by the officers of the Kenya Anti-Terrorist Police, cast into the boot of a motor vehicle, handcuffed and tied with a rope and renditioned to Nalufenya Police Station, Jinja, Uganda in very painful conditions.

13. The Applicant further contended that while he was in detention at Nalufenya Police Station under very inhuman conditions, he was interrogated as to whether he had connections with terrorists operating in South Sudan, Somalia, and Northern Tanzania, which he denied. He added that he remained in the said detention until

19th July 2015, when he was again cast into the boot of a motor vehicle, handcuffed and tied with a rope; and renditioned back to Kenya. He asserted that his application to be released that was filed on 20th July 2015 was denied by a court in Kenya, which ordered that he remained in detention until 3rd August 2015 to enable the Police conclude their investigations, but that he was eventually released unconditionally on 11th September 2015.

14. The Applicant thus contended that his arrest and detention without affording him an opportunity to explain himself, the failure of the Respondents' agents to allow him to inform his next of kin of his arrest and detention, his detention in police cells without any bedding, his feeding on very little and poorly cooked food, his detention in police cells 24 hours daily without allowing him to see the sun, his transportation in distressful conditions from Nairobi to Jinja and back, his assault in police custody, were:

    (i) A violation of his liberty guaranteed in the Constitutions of the Respondents' countries;

    (ii) A violation of his freedom from torture guaranteed in the Constitutions of the Respondents' countries;

    (iii) A breach of the fundamental principles of the Treaty in Articles 6(d) and 7(2) that bind Partner States to govern their populace on the principles of good governance, rule of law, democracy and universally accepted human rights standards.

15. He also contended that his "stealthy removal" from Kenya to Uganda and back amounted to extra judicial rendition, a breach of

the cited laws of the Partner States, and a violation of the fundamental principles of the Community stipulated in Articles 6(d) and 7(2) that bind the Partner States to abide by the principles of good governance, rule of law, democracy and universally accepted human rights standards.

16. The Applicant therefore prayed for the following declarations and orders:

(i) That the actions of the agents of the Respondents were highhanded, illegal and unconstitutional and were in violation of the fundamental principles of the Community stipulated in Articles 6(d) and 7(2) of the Treaty for the establishment of the East African Community that bind the Partner States to abide by the principles of good governance, rule of law, democracy and universally acceptable standards of human rights.

(ii) That the Respondents pay the costs of this Reference.

D. 1ST RESPONDENT'S CASE

17. The 1st Respondent's case is set out in his Response to the Reference filed on 21st December 2015, an Affidavit in support of the Response to the Reference sworn by Mr. Richard Adrole on even date, an amended response to the Reference filed on 13th July 2016, together with an Affidavit in support of the amended response to the Reference sworn by Mr. Omoding Wilson Otuna, a supplementary Affidavit sworn by Mrs. Adongo Emelda sworn on

12th February 2018, written submissions filed on 4th April 2018 and submission highlights made on 12th June 2018.

18. The 1st Respondent averred that following a joint investigation into terrorism related activities in East Africa by the Anti-Terrorism Police Unit (ATPU) of the Republic of Kenya, the Applicant was arrested for suspected links to terrorism related activities.

19. He contended that the Applicant was brought to Uganda by the Kenya ATPU on 4th July 2015 and detained at Nalufenya Police Station in Jinja pursuant to a court order which was issued by a Kenyan Court the effect of which was to allow the Kenyan Police ATPU to detain the Applicant for 30 days for the purpose of furthering the said investigations.

20. The 1st Respondent also averred that the Applicant was kept in "safe custody" in Uganda in order to ensure that he did not interfere with the Police investigations.

21. In support of the 1st Respondent's case, Mr. Omoding Otuna also stated that the Applicant was not interrogated and neither did he record any statement at Nalufenya Police Station as he was not charged with any offence under the laws of Uganda. It was the 1st Respondent's contention that the Applicant was never tortured by its agents as stated in paragraph 4(m) of the Reference and refuted the Applicant's allegations that he was denied the opportunity to explain himself as he was produced before a competent court of law in Kenya and added that there was no torture and assault to the Applicant by the 1st Respondent's agents.

22. The 1st Respondent also contended that there was no violation of the Applicant's freedom from torture under the Constitution of the Republic of Uganda and denied that there was a breach of the fundamental principles of the Treaty as enshrined in Articles 6(d) and 7(2) of the Treaty as alleged.

23. Furthermore, in her supplementary Affidavit, Mrs. Adongo Emelda averred that the Applicant had filed **Civil Suit No. 302 of 2015** in the High Court of Uganda on 3rd December 2015, which sought declarations in regard to violation of fundamental principles of the Treaty, extra judicial rendition being in violation of the 1995 Uganda Constitution and general, punitive damages and costs. She also stated that the said suit sought the same declarations being sought in **Reference No.6 of 2015** before this Court and that the Applicant had not exhausted the local remedies in the High Court of Uganda having filed the present Reference in the same year.

24. Finally, the 1st Respondent denied that the removal of the Applicant from Kenya to Uganda and back amounted to extra judicial rendition, breach of the Treaty, rule of law or democracy.

25. The 1st Respondent, therefore, prayed that the Reference be dismissed with costs.

E. THE 2ND RESPONDENT'S CASE

26. The 2nd Respondent's case is set out in his Response to the Reference filed together with a Replying Affidavit in opposition of the Statement of Reference sworn on 10th June 2016 by Sergeant

Ezekiel Luley, a Police Officer attached to the Kenya's Anti-Terrorism Police Unit, both filed on 13th June 2016, written submissions filed on 20th June 2017 and submission highlights made on 12th June 2018.

27. The 2nd Respondent denied the allegations set out in the Applicant's Reference and averred that following the terror attacks in the East Africa region, the Anti-Terrorism Police Unit of the Kenyan Criminal Investigation Department had commenced joint operations together with Criminal Investigation Departments of Uganda and South Sudan, to tackle terror-related activities.

28. He also asserted that following investigations, a suspect called Ssenabulya Rajab aka David, aka Sadat, 20 years of age and a Ugandan national, was found to be involved in the recruitment of youth to join Al Shabaab and ISIS terror groups and had admitted to having recruited 20 youth who were already in Somalia. He added that on or about 30th June 2015, the said Ssenabulya Rajab was arrested while attempting to cross the Ugandan border to Kenya to meet with one, Malcon Lukwiya Okempee (the Applicant).

29. The 2nd Respondent further averred that following continued investigations by the Kenyan and Ugandan teams conducted in Nairobi, the Applicant and his brother Emmanuel Oneka were apprehended by the Anti-Terrorism Police Unit and detained for a period of 30 days after obtaining a court order in **Miscellaneous Criminal Application No.1169 of 2015 Anti-Terrorism Police**

Unit Vs. Lukwiya Malcom & Emmanuel Oneka made before the Milimani Law Courts.

30. He also stated that the police continued investigations by crossing to Uganda's Nalufenya Police Station in Jinja, where they were received by some of the police officers who had participated in the Applicant's arrest and proceeded with the investigations and thereafter, they returned to Nairobi. The 2nd Respondent added that during that time, contrary to the Applicant's allegations, the Applicant was treated in a humane manner and was held in comfortable conditions by transporting him in a comfortable police vehicle and provision of basic meals. Sergeant Ezekiel Luley also deponed that the Police through the collaboration of Kenya, Uganda and South Sudan were able to establish a network of key suspects in the human trafficking business and terrorism related recruitment for both Al Shabaab and ISIS, but the Applicant was unconditionally released after completion of investigations on 11th September 2015.

31. Finally, the 2nd Respondent contended that during the time that the Applicant was in police custody, the fundamental principles stipulated in Articles 6 and 7 of the Treaty, and more particularly the provisions of the Kenya's Constitution and laws, were adhered to at all times in that the removal of the Applicant from Kenya to Uganda and back was not an exercise amounting to extra judicial rendition but rather adherence to the Community's principle of mutual legal assistance in combating terrorism and fighting all crimes.

F. ISSUES FOR DETERMINATION

32. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 6th June 2017 at which the following were framed as issues for determination:

(a) ***Whether the East African Court of Justice has jurisdiction to determine this matter before the exhaustion of remedies in the municipal courts;***

(b) ***Whether the arrest and detention of the Applicant was justified, legal and regular under the applicable Kenyan and Ugandan laws and/or the fundamental principles of the Community stipulated under Articles 6(d) and 7(2) of the East African Community Treaty;***

(c) ***Whether the act of arresting and moving the Applicant across Kenyan and Ugandan borders amounted to extra judicial rendition;***

(d) ***What remedies are available to the parties?***

Issue No.1: Whether the East African Court of Justice has jurisdiction to determine this matter before the exhaustion of remedies in the municipal courts:

33. The jurisdiction of the Court to determine this matter was challenged by both Respondents.

34. The 1st Respondent started his submissions by recalling the provisions of Article 27(1) of the Treaty which provides that this Court has jurisdiction over the interpretation and application of the Treaty, where such jurisdiction is not conferred by the Treaty on

organs of Partner States. Then referring to the case of **Samuel Mukira Mohochi vs. The Attorney General of the Republic of Uganda, EACJ Ref.No.15 of 2011** where this Court held that "this Court does have jurisdiction to interpret and apply any and all provisions of the Treaty save those excepted by the proviso to Article 27," he contended that domestic courts in the two Partner States were the right forum to determine the Applicant's case. In support of his contention, he cited the case of **Makaruduze & anor Vs. Bungu & Ors HH-8-15 Zimbabwe Court (Mafusire, J.)** where it was held that a litigant should be discouraged from rushing to courts before he had exhausted such domestic procedures or remedies as may be available to his situation in any given case; that he is expected to obtain relief through the available domestic channels unless there are good reasons for not doing so; and the domestic remedies must however be able to provide effective redress to the complaint, and the unlawfulness complained of must not be such as would have undermined the domestic remedies themselves.

35. In this regard, the Respondent averred that the Applicant had filed a case in Uganda on 3rd December 2015 under **Civil Suit No. 302 of 2015**, which suit sought the same declarations as those sought in **Reference No. 6 of 2015** instituted while that claim was still on-going. He opined that Article 50 of Uganda's Constitution allows anyone who feels their right under the Constitution had been violated to move the High Court for the enforcement of such right. It was the 1st Respondent's submission therefore that the Applicant ought to have exhausted the available domestic remedies before

seizing this Court, and that the alleged violation of Articles 6 and 7(2) of the Treaty did not arise.

36. In the same vein, the 2nd Respondent submitted that the Applicant should have approached the municipal courts in Kenya as opposed to this Court. In this regard, he contended that Article 23 of the Constitution of Kenya grants the High Court of Kenya exclusive jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights.

37. The 2nd Respondent also relied on the **Inter-handle Case 1959 ICJ report p.27** to submit that the Reference was not admissible before this Court on account of the rule of exhaustion of local remedies since, under international law, a State Party must be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility is called into question at the level of regional and international organs. Further, it was the 2nd Respondent's submission in this respect that the Applicant had not presented any reason as to why he did not pursue his claim before the High Court of Kenya as provided for under Articles 22 and 23 of the Constitution of Kenya. He reiterated his submission that the Applicant should not be allowed to institute a case before this Court which, according to him, is a court of last resort, before exhausting local remedies. For that reason, he argued that the Reference was premature before this Court.

38. Conversely, it was submitted for the Applicant that this Court had held in several cases including the one of **Plaxeda Rugumba Vs. The Secretary General of the EAC and the Attorney General of the Republic of Rwanda** that the Treaty does not have express provisions requiring the exhaustion of domestic remedies prior to filing a case before it. The Applicant also argued that his case was different from the situation presented by the Respondents since the case instituted before the High Court of Uganda sought to obtain damages for violation of his constitutional rights, whereas the case before this Court requested it to interpret the Treaty so as to issue a declaration that his arrest and detention under painful and inhuman conditions constituted a violation of the Respondents' obligations under Articles 6 (d) and 7 (2) of the Treaty. Thus, he submitted that this Court is competent to interpret the Treaty and declare that indeed the Treaty was violated or not. It was his final submission that municipal courts have jurisdiction to apply the provisions of the Treaty in determining disputes within Partner States but this does not oust the original jurisdiction of this Court in interpreting the Treaty.

Court's Determination of Issue No.1

39. Having carefully considered the pleadings and the submissions of both Parties on this issue, in our understanding, the contention between the Parties is straightforward. In a nutshell, the Respondents contend that this Court is not clothed with the jurisdiction to entertain the Reference because the Applicant did not exhaust domestic remedies which is, in their view, a condition

of admissibility of the said Reference. On his part, the Applicant argues that he has direct access to this Court because the Treaty does not provide any requirement for the exhaustion of domestic remedies.

40. The jurisdiction of this Court is set out in Articles 23(1) and 27(1) of the Treaty. Article 23(1) 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 this Treaty."*** As for Article 27(1), it states that **"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."***

41. Also relevant for this case is Article 30(1) of the Treaty which provides that ***"subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."***

42. Before considering how the afore-cited Treaty provisions apply to the present case, we find it apposite to shed some light on what the exhaustion of domestic remedies rule entails. It can be

garnered from the provisions of treaties and decisions of international courts and tribunals that the exhaustion of domestic remedies requires that before an individual's claim alleging a violation of his rights is heard by an international court, the court must be satisfied that domestic remedies provided by the municipal law of the Respondent State have been attempted and exhausted. It is admitted that local remedies are only national domestic judicial or legal mechanisms that ensure the settlement of disputes and protection of rights. Domestic remedies refer to remedies sought from judicial courts and they are considered exhausted if all levels of national courts have been petitioned and non-judicial remedies are not considered an exhaustion of domestic remedies. [2]

43. The exhaustion of domestic remedies rule is widely upheld by international courts having direct jurisdiction over individuals as a treaty requirement and as a rule of customary international law. In that regard, the exhaustion of local remedies rule is considered as a condition precedent for the assumption of jurisdiction over suits brought in an international court against a State by an individual from a Member State. [3]

44. The EAC Treaty recognizes the capacity of individuals to seek redress for a breach of their rights enshrined therein against any Partner State or an institution of the Community. Article 30(1) of

[2] See Kenneth Lehtinen Vs. Finland, Application No. 39076/97, ECHR 1999-VII; Selmouni Vs. France, Application No. 25803/94 judgment of 28 July 1999, ECHR at para 74 cited in Amos O Enabulele, "Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice," *Journal of African Law*, Vol. 56, No. 2 (2012), p. 271. See also Hugh Thirlway, *The Law and the Procedure of the International Court of Justice. Fifty Years of Jurisprudence*, Vol. 1, Oxford University Press, 2013, pp. 611-621

[3] Hugh Thirlway, *Op. Cit.*, p. 612 citing *ICJ Reports* 1959, p. 46.

the Treaty reproduced herein above gives *locus standi* to any person to have direct access to the Court and the Treaty has not provided the exhaustion of domestic remedies as a condition for the admissibility of petitions brought by individuals before this Court. This is reflected in the decision of the Court in **Plaxeda Rugumba Vs. The Attorney General of Rwanda, EACJ Reference No.8 of 2010**, where one issue for determination was whether the Applicant should have exhausted local remedies before filing the Reference. The Court held that ***"it is not in doubt that there is no express provision barring this Court from determining any matter that is otherwise properly before it, merely because the Applicant has not exhausted local remedies."(***para 30). The Court went on to clarify its interpretative mandate of the Treaty pointing out that the EACJ is the only court mandated to determine whether the EAC Treaty has been breached or violated, that it has primacy in interpreting the Treaty and in the said case, it held that ***"the remedy the Applicant was seeking could not be granted by any court in Rwanda because the East African Court of Justice is the only Court with jurisdiction to hear a claim that alleges a violation of the EAC Treaty***."

45. That decision was appealed before the Appellate Division of this Court in **The Attorney General of the Republic of Rwanda Vs. Plaxeda Rugumba, EACJ Appeal No.1 of 2012,** where the Appellant also argued that the Applicant should have exhausted local remedies before filing the Reference in this Court and that that was a requirement of customary international law. The

Appellate Division opined ***that "the obligation to exhaust domestic remedies forms part of customary international law, recognized as such in the case law of the International Court of Justice.[4] It is also to be found in other international human rights treaties; for example the International Covenant on Civil and Political Rights (Article 41(1)(c) and the Optional Protocol (Articles 2 and 5) thereto and the African Charter on Human and Peoples' Rights (Article 50). However, the EAC Treaty does not have any provision requiring exhaustion of local remedies. In our view, though the Court could be flexible and purposeful in the interpretation of the principle of the local remedies rule, it must be careful not to distort the express intent of the EAC Treaty."*** [sic]

46. This position of the East African Court of Justice as regards the exhaustion of local remedies rule is similar to the one of the Economic Community of West African States (ECOWAS) Court of Justice. In at least two cases,[5] the exhaustion of domestic remedies has been raised as a bar to the jurisdiction of the ECOWAS Court of Justice. In both instances, the Court held that the rule of exhaustion of domestic remedies, as mentioned in Article 50 of the African Charter on Human and Peoples' Rights has no bearing with Article 10(d) of the Supplementary Protocol.

[4] See The International case (Switzerland v United States) judgment of 21st March 1959.
[5] See Etim Moses Essien v The Republic of the Gambia and the University of the Gambia (Unreported) suit No. FCN/CCJ/05/05 delivered on 14th March 2007, at par 27, cited by Amos O. Enabulele, *Op. Cit.*, p. 270

The absence of the rule from the court's Protocol means that the rule is not applicable before the court.[6]

47. Given the case law above and turning to the case at hand, we are mindful of the provisions of Article 30(1) of the Treaty that give the right to any person resident in any Partner State to bring a direct claim for the vindication of breaches committed by a Partner State. In this regard, the Applicant has approached the Court praying for a declaration that his arrest and detention under painful and inhuman conditions by the two Partner States (Respondents) violates their obligations under Articles 6(d) and 7(2) of the Treaty. He also stated that the suit filed before the High Court of Uganda is different from the present one since in the former, he is claiming damages against the 1st Respondent for violation of his constitutional rights. No such suit has been filed against the 2nd Respondent.

48. In the circumstances therefore, we find that the present case falls squarely within the jurisdiction of this Court as provided by Article 27(1) of the Treaty and that the Applicant need not exhaust local remedies before filing his Reference before this Court because Article 30(1) of the Treaty gives him direct access to the Court. Consequently, Issue No.1 is answered in the affirmative.

49. During his submissions on this issue, the 2nd Respondent did raise the issue that the Reference was time-barred. The Applicant pressed the point that the Court should not include that issue

[6] See Article 4 of the Supplementary Protocol amending the Protocol relating to the Community Court of Justice, http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf

among the ones retained for determination arguing that it should have been raised in the pleadings. We are however mindful that it is trite law that the allegation that a case is time-barred is a point of law that can be raised at any stage of the proceedings. We therefore deem it necessary to address it as an issue for determination. Indeed, the said issue was canvassed extensively in questions from the Bench during oral highlights of submissions.

Whether the Reference is Time-Barred

50. The act complained of by the Applicant is the alleged way he was arrested, held incommunicado, transported in inhuman manner when he was subjected to irregular rendition to Uganda and back to Kenya. It was argued on behalf of the Applicant that during that time when he was subjected to those illegal acts by the Respondents, he was unable to file his case against the Respondents. It was further contended that it was only after being released that he was able to institute his case.

51. It is an undisputed fact that on 4th August 2015, the Applicant was released and bonded to appear at the Anti-Terrorism Police Unit Kenya headquarters weekly and that on 11th September 2015, he was released unconditionally.

52. During the hearing of the Reference held on 12th June 2018, the Applicant's Counsel was asked to explain why the Applicant did not file the Reference after his conditional release on 4th August 2015, and the learned Counsel only reiterated the contention that the Applicant was under incapacity to do so without elaborating on

such incapacity. In any event, the same had not been pleaded by the Applicant.

53. In the premise therefore, we are not satisfied by the Applicant's contention that he was unable to file his Reference until the time he filed it on 27th October 2015. It is our considered view that even if we agree with the Applicant that during his detention and alleged irregular rendition to Uganda and back to Kenya up to his conditional release on 4th August 2015, he could not have filed his case, it was possible for him to file the same after the conditional release. It is worth recalling that the actions complained of occurred from the time the Applicant was arrested on 1st July 2015 up to when he was conditionally released on 4th August 2015. This means that the Applicant ought to have instituted his case not later than 4th October 2015, but his case was filed on 27th October 2015.

54. In light of the foregoing and guided by this Court's decision in the case of **The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No.1 of 2011,** where it held that ***the Treaty does not contain any provision enabling the Court to disregard the time limit of two (2) 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 complainant,*** we find that the Applicant's Reference filed on 27th October 2015 was time-barred.

55. Since the allegation of time-bar is a point of law if successfully pleaded disposes of the entire case, we find that it would be a

futile exercise to determine the Reference in its merits as the same is no longer live before the Court.

G. CONCLUSION

56. The Reference is dismissed for having been filed out of the two-month period prescribed by Article 30(2) of the Treaty.

57. Each Party to bear its costs.

It is so ordered.

Dated, Signed and Delivered at Arusha this 27th November 2018

.....
MONICA K. MUGENYI
PRINCIPAL JUDGE

.....
FAUSTIN NTEZILYAYO
DEPUTY PRINCIPAL JUDGE

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FAKIHI A. JUNDU
JUDGE