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PRESS RELEASE
JUDGMENT SUMMARY

JEBRA KAMBOLE V. UNITED REPUBLIC OF TANZANIA
APPLICATION NO. 018/2018
JUDGMENT ON MERITS AND REPARATIONS
15 JULY 2020

A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Date of Press Release: 15 July 2020.

Arusha, 15 July 2020: The African Court delivered judgment in the case of *Jebra Kambole v United Republic of Tanzania*.

Jebra Kambole (the Applicant) is a national of the United Republic of Tanzania (the Respondent State) and an advocate by profession. He is also a member of the Tanganyika Law Society. The Applicant filed this Application contesting the provisions of article 41(7) of the Respondent State's Constitution.

The Applicant alleged that the Respondent State had violated his rights under the African Charter on Human and Peoples' Rights (the Charter) by maintaining article 41(7) in its Constitution, which provision bars any court from inquiring into the election of a presidential candidate after the Electoral Commission has declared a winner. Specifically, the Applicant alleged that article 41(7) of the Respondent State's Constitution violated his right to non-discrimination, his right to equal protection of the law and the right to have his cause heard, especially the right to appeal to competent national organs against acts violating his fundamental rights as provided for under Articles 2, 3(2) and 7(1)(a) of the Charter, respectively. The Applicant also alleged that the Respondent State had failed to honour its obligation to recognise the rights, duties and freedoms enshrined in the Charter and to take legislative and other measures to give effect to the Charter as stipulated under Article 1 of the Charter.

The Court observed that, as per Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the

Protocol), it had to determine whether it has jurisdiction over the Application. In this case, the Court, while noting that none of the Parties had raised any objection to its jurisdiction, nevertheless conducted an analysis which proved that its material, personal, temporal and territorial jurisdiction were established.

In terms of the admissibility of the Application, the Court, as empowered by Article 6 of the Protocol and Rule 39 of the Rules of Court (the Rules), had to determine whether the requirements of admissibility, as provided under Article 56 of the Charter and Rule 40 of the Rules, had been met. In this connection, the Court considered the two (2) objections raised by the Respondent State, relating, first, to the requirement of exhaustion of local remedies, and, second, to the filing of the Application within a reasonable time.

In connection to the objection that the Applicant had failed to exhaust local remedies, the Respondent State argued that the Applicant had not made any attempt to exhaust domestic remedies thereby depriving it of an opportunity to redress the alleged violations. The Applicant, for his part, argued that there were no domestic judicial remedies available to redress the allegations that he was raising.

In resolving this objection, the Court reiterated the fact that for purposes of exhausting local remedies an Applicant is only required to exhaust judicial remedies that are available, effective and sufficient. The Court further emphasised that a domestic remedy that has no prospects of success does not constitute an effective remedy within the context of Article 56(5) of the Charter. Given that the provision of the Respondent State's Constitution which was being challenged by the Applicant ousts the jurisdiction of domestic courts, the Court held that the Applicant did not have a remedy that was available for him to exhaust before filing his Application. The Respondent State's objection to the admissibility of the Application, on the ground that domestic remedies were not exhausted, was thus dismissed.

In relation to the objection that the Application was not filed within a reasonable time after the exhaustion of domestic remedies, the Respondent State argued that it had taken over eight (8) years, after the Respondent State had deposited its Declaration under Article 34(6) of the Protocol, for the Applicant to file the case with the Court. The Respondent State submitted that this period was not reasonable. In response, the Applicant contended that there is no time frame stipulated under Article 56(6) of the Charter within which an Application must be filed and that the Court is empowered to conduct a case by case analysis of the reasonableness of time. The Applicant also argued that while Article 56(6) of the Charter requires cases to be filed promptly,

in appropriate cases, where there are good and compelling reasons, fairness and justice require the consideration of applications that have not been filed promptly. Specifically, the Applicant submitted that due to the continuing character of the violations that he was alleging his Application should be deemed to have been filed within the time limit provided by law.

In dealing with this objection, the Court confirmed that the Charter does not set a specific time frame within which an application must be filed and that reasonableness of time before seizure will always be assessed on a case-by-case basis. Specifically, in relation to the Respondent State's objection, the Court found that there were no domestic judicial remedies available for the Applicant to exhaust and as such the question of a reasonable time, after the exhaustion of domestic remedies, within which the Applicant ought to have filed his Application with the Court did not arise. The Court also found that given the continuing character of the violations it was not necessary to set a time limit within which the Application should have been filed because, in principle, an application against the Respondent State could have been commenced at any time as long as the law creating the alleged violation remained in force. The Court thus dismissed the second objection by the Respondent State.

The Court also satisfied itself that the Application had complied with all the other conditions of admissibility set out under Article 56 of the Charter and Rule 40 of the Rules and declared the Application admissible.

On the merits of the Application, the Court first considered whether article 41(7) of the Respondent State's constitution violated the Applicant's right to non-discrimination under Article 2 of the Charter. The Court found that article 41(7) of the Respondent State's Constitution creates a differentiation between litigants in that while the Respondent State's courts are permitted to look into any allegation by any litigant, they are not allowed to do so when a litigant seeks to inquire into the election of a president. The result is that those seeking to inquire into the election of a president are, practically, treated differently from other litigants, especially by being denied access to judicial remedies, while litigants with other claims are not similarly barred. The Court held, with Six (6) for and Four (4) against, that in the absence of clear justification as to how the differentiation and distinction in article 41(7) is necessary and reasonable in a democratic society, article 41(7) of the Respondent State's Constitution effects a distinction between litigants and that this distinction has no justification under the Charter. The Court held that this amounted to a violation of Article 2 of the Charter.

As to whether the Respondent State had violated Article 3(2) of the Charter, the Court noted that the principle of equal protection of the law does not necessarily require equal treatment in all instances and can permit differentiated treatment of individuals who are differently placed. In the circumstances of the present case, the Court found that the Applicant was guaranteed the same range of rights as any other citizen within the Respondent State. The Court thus held, by the President's casting vote, the votes having being tied with Five (5) for and Five (5) against, that the Respondent State had not violated Article 3(2) of the Charter.

In relation to the alleged violation of Article 7(1)(a) of the Charter, the Court noted that among the key elements of the right to a fair hearing, as guaranteed under Article 7 of the Charter, is the right of access to a court for adjudication of one's grievances and the right to appeal against any decision rendered in the process. As against this, the Court noted that article 41(7) of the Respondent State's Constitution ousts the jurisdiction of courts to consider any complaint in relation to the election of a presidential candidate after the Electoral Commission has declared a winner. This, the Court reasoned, entails that irrespective of the nature of the grievance or the merits thereof, as long as the same pertains to the declaration by the Electoral Commission of the winner of a presidential election, no remedy by way of a judicial challenge exists to any aggrieved person within the Respondent State. The Court also noted that there was nothing in the submissions of the Respondent State which established any of the conditions in Article 27(2) of the Charter to justify a limitation of the right to have one's cause heard. In the circumstances, the Court held, with Nine (9) for and One (1) against, that article 41(7) of the Respondent State's Constitution violated the Applicant's rights under Article 7(1)(a) of the Charter.

The Court having found, with Nine (9) for and One (1) against, that the Respondent State had violated Articles 2 and 7(1) (a) of the Charter also found, that the Respondent State had also violated Article 1 of the Charter.

Having found the violations of these rights, the Court then considered the issue of reparations.

The Court noted that the only prayer for reparations the Applicant required was the adoption of constitutional and legislative measures to remedy the violations. Against the background of the violations found, the Court ordered the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter so as to eliminate, among others, any violation of Articles 2 and 7(1) (a) of the Charter. The Court also ordered the Respondent State to submit a report within twelve (12) months of the judgment, on the measures taken to implement

the terms of the judgment and to submit further reports every six (6) months thereafter until the Court is satisfied that there has been full implementation.

Given the fact that the terms of its judgment are likely to affect a significant section of the Respondent State's population, the Court, *suo moto*, also ordered the Respondent State to publish the Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

The Court ordered that each Party should bear its costs.

Further Information

Further information about this case, including the full text of the decision of the African Court, may be found on the website at: <https://en.african-court.org/index.php/56-pending-cases-details/1185-app-no-018-2018-jebra-kambole-v-the-united-republic-of-tanzania-details>

For any other queries, please contact the Registry by email registrar@african-court.org

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