



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

(Coram: Mary Stella Arach-Amoko, DPJ(Rtd), Isaac Lenaola, DPJ, John Mkwawa, J,

REFERENCE NO. 8 OF 2011

PROFESSOR NYAMOYA FRANCOIS APPLICANT

VERSUS

1. ATTORNEY GENERAL

OF THE REPUBLIC OF BURUNDI1ST RESPONDENT

2. THE SECRETARY GENERAL

OF THE EAST AFRICAN COMMUNITY ...2ND RESPONDENT

JUDGMENT OF THE COURT

Introduction

1.This Reference was lodged in this Court on 14th October 2011. Before the Reference could be heard, the Applicant filed an amended Reference which was lodged on 31st October 2012. The said Reference is premised on Articles 3 (3) (b), 6 (d), 7 (2), 8 (4), 27 (1) and 30 (1) and (2) of the Treaty for the Establishment of the East African Community and Rules 1(2) and 24 of East African Community Rules of Procedure (hereinafter referred to as the “Treaty” and the ”Rules”, respectively).

2.Professor Nyamoya Francois (hereinafter referred to as the “Applicant”) is a resident of Bujumbura in the Republic of Burundi. He is an advocate and a spokesperson of one of the Opposition Political Parties in Burundi and his address for the purposes of this Reference is indicated as care of Mr. Isidoire Rufyikiri, Batonnier of Burundi Bar Association, Rue du Muscee, No. 3, B.P. 1745, Bujumbura,Burundi.

3.The 1st Respondent is the Attorney General of the Republic of Burundi and he is sued in his capacity as the Principal Legal Adviser of the Government of the Republic of Burundi . His address is given as care of

the Minister of Justice and Keeper of the Seal, Republic of Burundi, P. O. Box 1870, Bujumbura, Burundi.

4.The 2nd Respondent is the Secretary General of the East African Community (hereinafter referred to as the “Community”). He is sued in his capacity as the Principal Executive Officer of the Community pursuant to his mandate under Articles 4(3), 29 and 71 of the Treaty. His address is EAC Headquarters, Barabara ya Afrika Mashariki, P. O. Box 1096, Arusha, Tanzania.

Representation

5.The Applicant was represented by Mr. Richard Onsongo. Mr. Nester Kayobera appeared for the First Respondent whereas Mr. Wilbert Kaahwa appeared for the Second Respondent.

The Applicant’s Case

6.The Applicant’s case can be deduced from his pleadings, the accompanying affidavit of one Onesime Kabayabayo sworn on 30th August 2012, the affidavit of one James Aggrey Mwamu sworn on 22nd February 2013 as well as his submissions filed on 10th Mary 2013.

7.In a nutshell, his case is as follows:

On 28th July 2011, he was arrested on the orders of the Public Prosecutor of Burundi for alleged subornation of witnesses in a criminal matter which involved the murder of one, Dr. Kassim Allan, in a case that was instituted sometime in 2003. On 19th August 2011, the Public Prosecutor took the Applicant to the court -in - charge of confirmation of detention in the Tribunal of First Instance of Bujumbura.

8.The said Tribunal, after deliberation, provisionally released him and further ordered that its decision was to be executed immediately pursuant to the provision of Article 84 of the Penal Procedure, Laws of Burundi. The foregoing notwithstanding, the Public Prosecutor allegedly arbitrarily refused to deliver the necessary documents for his release and as a result, the Applicant remained in jail in the absence of any supporting documents for his further incarceration.

9.It is his contention therefore, that the harassment, arbitral and unlawful detention that he was subjected to by agents of the Government of Burundi contravened internationally recognized tenets and principles of good governance and specifically Article 6(d) of the Treaty.

10.It is also the Applicant's case that the matter in question was widely reported in the print and electronic media both locally in Burundi and

internationally but the 2nd Respondent failed to fulfill his obligations under Articles 29 and 71(1)(d) of the Treaty and failed to intervene in the matter.

11.For the reasons above, the Applicant prays for the following declarations and orders from this Court:

(a)That keeping him in detention is an infringement of Article 6(d) and 71 (1) (d) of the Treaty and that the said action is null and void.

(b)That the Secretary General failed to fulfill his obligations under Article 29 and 71 (1)(d) of the Treaty; and

(c)He has a full right to enjoy his freedom; and

(d) An order should be issued that he, be immediately released unconditionally.

(e)Costs of the Reference .

1st Respondent's case

12.In his Response to the Amended Reference, filed on 22nd February 2013 and in his written submissions filed on 6th November 2013, the 1st Respondent admits that the Applicant was arrested and detained as alleged but avers that the said acts were done in accordance with the laws of the Republic of Burundi, specifically Article 265 of the 1981 Burundi Penal Code (repealed in April 2013). He further avers that although the

First Instance Tribunal at Bujumbura ordered provisional release of the Applicant, the Public Prosecutor, in accordance with Article 84 (2) of the Burundi Criminal Procedure Code ,re-arrested him and retained him in lawful preventive detention. He also states that subsequently ,the said Public Prosecutor, immediately the Applicant's release order was issued, appealed to the Court of Appeal of Bujumbura against the said order and on 5th September 2013, the Court of Appeal quashed the judgment of the First Instance Tribunal and in effect confirmed the Applicant's preventive detention order.

13.It is on the basis of the foregoing that the 1st Respondent finally avers that the arrest and detention of the Applicant was lawful and that the Applicant cannot now be heard to say that the provisions of Article 6 (d) of the Treaty were violated by agents of the Government of Burundi.

14.Further, it is also the 1st Respondent's contention that the matter complained of is one that relates to human rights and is vested in the National Courts of Burundi pursuant to Article 27(2) and 30 (3) of the Treaty and therefore no jurisdiction is thereby conferred on this Court. In any event, that the Applicant was granted provisional release on 17th February 2012 and since then he is no longer in detention and his complaints are therefore baseless.

15.The 1st Respondent finally contends that the Applicant is not entitled to the remedies sought and the Amended Reference should be dismissed with costs.

The case for the 2nd Respondent

16.The 2nd Respondent's case rests on his response filed on 9th November 2012 which is supported by the affidavit of Dr. Julius Tangus Rotich, the then Deputy Secretary General of the Community, filed on 9th November 2012 and another by Ms. Jesca Eriyo, Deputy Secretary General, filed on 27th February 2013 as well as his written submissions filed on 14th June 2013. Mr. Kaahwa, learned Counsel for the Community, later highlighted those submissions when the matter came up for hearing on 6th November 2013.

17.It is the 2nd Respondent's case that firstly, the instant Reference is time-barred because while the Applicant was arrested on 28th July 2011, the Reference was filed on 14th October 2011 in breach of Article 30 (2) of the Treaty which obligates any party claiming a violation of the Treaty to institute any proceedings in this Court within two months of the Act, regulation, directive, decision or action complained of.

18.Secondly, that he was irregularly impleaded without leave of Court and contrary to the requirement of pleadings that amendments must be highlighted in distinct colour appended to the original pleading.

19.Thirdly, the 2nd Respondent also firmly maintains that his conduct has been consistent with the requirements of his office and that he has discharged his obligations in accordance with the Treaty and, therefore, there are no grounds for the grant of the reliefs sought by the Applicant against him and consequently prays that the Reference be dismissed with costs.

Scheduling Conference

20.At a Scheduling Conference held on 23rd January 2013, all the Parties were in agreement that there are triable issues based on the provisions of Articles 6, 27, 29 and 30 of the Treaty.

21.The issues that were framed and agreed for adjudication are therefore as follows:-

- i) Whether the East African Court of Justice has jurisdiction to entertain the Reference.

ii) Whether the actions, omissions and commissions of the 1st Respondent infringe on the Treaty for the Establishment of the East African Community.

iii) Whether the 2nd Respondent has failed to fulfill his obligations under Articles 29 and 71 (1) (d) of the Treaty and ;

iv) Whether the Applicant is entitled to the declaratory Orders he seeks.

22.We also deem it important to note at this stage that the issues raised by the 2nd Respondent by way of Preliminary Objection and which were argued at the hearing, will require our determination for reasons to be seen shortly.

23.We also propose to determine the issue of Jurisdiction first because without it there is nothing ; and if we find that we have no jurisdiction then we must down our judicial tools and take no further step(see **Re Owners of Motor Vessel ‘Lilian S’ vs Caltex Oil(K) Ltd [1989]KLR 1**)

Consideration and determination of Issue No(1)-

Whether the East African Court of Justice has jurisdiction to entertain the Reference

Submissions

24.The question as to whether this Court has jurisdiction to entertain the Reference was raised by the 1st Respondent in his response to the Amended Reference filed on 22nd February 2013.

The Applicant's Submissions

25.Mr. Onsongo ,who argued the case for the Applicant ,was emphatic that this Court has jurisdiction to entertain the Reference and that Article 30 of the Treaty confers jurisdiction on any litigant resident in a Partner State of the East African Community to institute proceedings alleging that there is a violation of the Treaty. It is also his submission that any such litigant has direct access to the Court for the determination of any issue relating to infringement of the Treaty without the requirement for the exhaustion of local remedies.

26.He further contends that by dint of the provisions of Article 30 (1) of the Treaty, the instant Reference is properly before the Court and that pursuant to the aforesaid provisions of the Treaty, not unlike each of the Partner States, the Republic of Burundi has undertaken to honour its commitments in respect of other multinational and international organizations of which it is a member.

27.He further submits that in determining a matter in question under the above Article, the Court is required to review the lawfulness of that matter and whether it amounts to an infringement of the Treaty.

28.In response to the 1st Respondent's assertion that the cause of action in this Reference relates to alleged violations of human rights and therefore outside the jurisdiction of the Court, Counsel argued that the 1st Respondent's contention is erroneous and that on the contrary, while agreeing that the jurisdiction of this Court is subject to the proviso contained in Article 27 of the Treaty, the crux of the Applicant's plea, as exhibited in the Reference, is that the actions complained of are breaches of Burundi's obligations not only under international law generally e.g. under the Bangalore Principles of Judicial conduct, 2002 but also under Article 6 (d) of the Treaty.

29.It is on this basis of the foregoing, that the Applicant is asking the Court to pronounce itself on the alleged breaches of the said Treaty obligations by Burundi in light of his grievances, namely that the three arms of government have come together and have acted to deny him his freedom.

30. Finally, relying on the authority of **James Katabazi & 21 Others Vs. Secretary General of the East African Community – Reference No. 1 of 2007**, Counsel submitted that this Court’s jurisdiction is not ousted merely because the acts complained of are based on allegations of human rights violation and that following the **Katabazi** case (supra), this Court should not abdicate from its duty to interpret the Treaty even if the issues raised in the Reference may touch on human rights.

1st Respondent’s Submissions

31. Mr. Nestor Kayobera, for the 1st Respondent, in a nutshell submitted that while this Court has jurisdiction to hear and determine the Reference in respect of prayers (a), (b) and (c) of the said Reference, it lacks jurisdiction in respect of other prayers basically for the following reasons:

- (a) That the Court’s jurisdiction ought to be in accordance with Articles 27(1), (2) and 30 (3) of the Treaty and that under Article 27(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’.**

(b) That because the instant Reference is premised on allegations of human rights violations, this Court lacks jurisdiction to try such violations unless the jurisdiction of this Court is extended or a protocol to do so, is concluded. Counsel stressed that the jurisdiction of the Court to entertain human rights disputes still awaits the operationalisation of a Protocol under Article 27 (2) of the Treaty and without it there cannot be jurisdiction to address such issues .

Counsel concluded his submission in respect of this issue by contending that the instant case is different from and can be distinguished from the case of **Attorney General of the Republic of Rwanda Vs. Plaxeda Rugumba – EACJ Appeal No. 1 of 2012** because the Applicant in the instant matter ,unlike the subject of the **Rugumba case**, had not at any material time been detained in violation of Burundi national laws, a fact that was admitted by the Attorney General of Rwanda in **Rugumba**, nor has the Applicant been held incommunicado and in ignorance of his charges.

Counsel went on to say that it has in fact been shown that the legality of the Applicant’s detention was affirmed by the Court of Appeal of Burundi after determining the Appeal by the Public Prosecutor in that regard.

32. In view of the foregoing, Counsel for the 1st Respondent urges this Court to declare itself incompetent to hear and determine the instant Reference.

2nd Respondent's submission

33. Mr. Wilbert Kaahwa, Counsel to the Community, advocating the case for the 2nd Respondent had the following to say in answer to the issue of want of jurisdiction:

(a) That this Court derives its mandate from Articles 23 (1), 27 (1) and 30 (1) of the Treaty. In Article 23 (1) the Treaty provides that:

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

The Treaty then provides in Article 27 (1) that :

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty.”

34. It is Counsel's argument that the Treaty makes provision, for reference by natural or legal persons on any matter that infringes the Treaty or

whose legality is disputable, to the Court under Article 30 of the said Treaty for determination and contended that the issue of jurisdiction of this Court was settled in;

i) EACJ Reference No. 1 of 2006: Prof. Peter Anyang' Nyong'o and 10 Others Vs. Attorney General of Kenya & 3 Others

ii) EACJ Reference No. 3 of 2010; Independent Medico Legal Unit Vs. Attorney General of the Republic of Kenya (commonly known as the **IMLU case**) and;

iii) EACJ Reference No. 9 of 2012 – The East African Centre for Trade Policy and Law Vs. The Secretary General of the East African Community.

35. His further argument was that in all the above cases, this Court found and held that it has jurisdiction to determine matters under the Treaty notwithstanding the fact that some of the claims had the inclusion of allegations of violations of human rights.

36. Counsel observed and noted in that regard that in the instant matter, the Applicant seeks five remedies, some of which fall outside the jurisdiction of this Court and further argued that only the remedies sought under paragraphs (a), (b) and (e) of the Reference may be granted by the

Court in exercise of its interpretive jurisdiction under Article 27(1) of the Treaty if proved by the Applicant and referred us to the decisions in the **Rugumba case** (supra) and **the Katabazi case** (supra) in support of that submission.

37. Counsel concluded by submitting that this Court has jurisdiction to entertain only some parts of the Reference and not the whole of it contrary to submissions on behalf of the Applicant.

Decision of the Court on Issue No(i)

38.We have examined at substantial length the submissions of all the learned Counsel in respect of the issue now in question. It is plainly clear from their submissions that they are generally in agreement that the remedies sought under paragraphs (a), (b) and (e) of the instant Reference may be granted by this Court in exercise of its interpretative jurisdiction subject to the usual standard of proof by the Applicant.

39.In view of the foregoing, we have found it necessary, for ease of reference, to reproduce the prayers in question. They are as follows:

“ (a) A declaration that the decision of keeping Professor Francois Nyamoya in detention as mentioned above is an infringement of

Article 6 of the Treaty for the Establishment of the East African Community and that it is null and void;

(b) A declaration that the 2nd Respondent failed to fulfill his obligations under Articles 29 and 71 of the Treaty establishing the East African Community;

(c) Declare that the Applicant has a full right to enjoy his freedom according to the judgment of Tribunal of First Instance of Bujumbura

(d) Order that Professor Nyamoya Francois be immediately released without any conditions.

(e) Costs of this Reference”

40. We are persuaded by the reasoning of learned Counsel for the 2nd Respondent and we fully associate ourselves with his submission that this Court has jurisdiction to entertain prayers (a), (b) and (e) of the Reference now before us.

41. Further to the foregoing, we wish to reiterate what this Court has consistently maintained/ held that the mere inclusion of allegations of human rights violations in a Reference will not deter this Court from exercising its interpretative jurisdiction under Article 27 (1) of the Treaty.

(See for example the **Katabazi** case (supra), the **Rugumba** case(supra), the case of **Omar Awadh & 6 Others vs Attorney General of Kenya, EACJ Appeal No. 2 of 2012** and **EACJ Ref. No. 5 of 2011 – Samuel Mukira Mohochi Vs. The Attorney General of the Republic of Uganda**)

42. Without belabouring the point, we find and hold that this Court has jurisdiction to entertain the Reference in so far as prayers (a), (b) and (e) of the Reference are concerned.

43. As regards prayers (c) and (d), we have no jurisdiction to make such orders and we decline the invitation to perform the duties properly conferred on the National Courts of Burundi.

Preliminary Objection

44. Although a preliminary objection should ordinarily be raised at the earliest stage of any legal proceeding, we deem the one raised by the 2nd Respondent sufficiently important to address in this Judgment.

On amendment of the Reference

45. In **Modern Holdings Limited vs Attorney General of Kenya, EACJ Ref.1 of 2008**, this Court upheld an objection on the basis that a proper

preliminary objection must be a pure point of law whose determination would bring the dispute to a quick resolution. In that regard and noting the twin objections by Mr. Kaahwa, the one that the Reference was unprocedurally amended and that the 2nd Respondent was improperly impleaded, portends no difficulty at all.

46. We say so, with respect, because a clear reading of the record in this matter would show that when Counsel for the Applicant appeared before us on 13th July 2012, an adjournment was granted for him to do certain things including amending the Reference. By that time, pleadings had not closed under Rule 45 of this Court's Rules of Procedure and therefore under Rule 48(a) of the said Rules, he did not require any leave to amend the Reference and introduce the 2nd Respondent as a party to the proceedings. He therefore properly amended the Reference and our finding is that this limb of the objection is not supported by the law and the record and is consequently overruled.

47. Regarding the physical and visual manner of effecting an amendment, Rule 49 of the Rules merely requires a party after amending a pleading to deposit the amended version in the Registry and that is what the Applicant did on 31st August 2012 and after service thereof, the 2nd Respondent became a party to the proceedings and duly responded to the Amended

Reference. There is no express provision in the Rules similar to that found for example in the Civil Procedure Rules of Kenya, Uganda and Tanzania that red, blue and green colours be used in showing the effected amendments against the original pleading. The Amended Reference in any event indicates the amended portions of the original Reference and we are satisfied that it meets all the requirements of an amended pleading. That limb of the objection is therefore similarly misguided and is overruled.

On whether the Reference is time-barred

48.Turning to the question whether the Reference as amended is time-barred, from the submissions made, the following facts clearly emerge;

From the Applicant's own pleadings and from the supporting Affidavit of one Onesime Kabayabaya, the Applicant was arrested on 28th July 2011 while the Reference was lodged on 14th October 2011 and amended on 31st August 2012.

49.It is Mr. Kaahwa's argument that in view of the limitation period set out by Article 30(2) of the Treaty the Reference was filed out of time and is therefore time – barred. The said Article states 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.”

50.It has been further argued by Mr. Kaahwa that the starting date of an act complained of under the provision of Article 30 (2) of the Treaty is not the day the act ends, but the day when it is first effected and contends that both justice and equity abhor a claimant’s indolence or sloth which is the case in the present Reference.

51.In support of his stance, he referred us to the decisions of this Court in **Omar Awadh** and **IMLU** (supra) and submitted that on the basis of those decisions , the Applicant in the present Reference cannot argue that computation of time can only commence after the cessation of his detention as any argument premised on continued breach militates against the very spirit and grain of the principle of legal certainty.

52.It is therefore his case that since the Reference was filed outside the time limit prescribed by Article 30(2) aforesaid, the same should be struck off with costs.

53.As can be gleaned from the record, specifically the proceedings of 6th November 2013, Mr. Onsongo, learned Counsel for the Applicant, was very brief in his rebuttal on this point. It was his main argument that the complaint does not relate to the exact date and point of arrest and detention. That the Applicant is basically arguing against an unlawful set of activities and that the process which led to his incarceration and denial of freedom of movement was unprocedural; and so the issue of limitation of time cannot arise in the circumstances; and the objection should therefore be overruled.

54.The 1st Respondent made no submissions on the preliminary objections raised by Mr. Kaahwa.

Decision of the Court

55.We have carefully considered the rival submissions of the Parties in support of their respective positions regarding the above issues. It is common ground, as is evident from the affidavits in support of their respective pleadings, that the acts complained of (the arrest, detention and alleged denial of freedom of movement of the Applicant) happened between 28th July 2011 and 17th February, 2012 when he was released (see paragraph 2 of Onesime Kabayabaya's affidavit sworn on 30th August

2012 in support of the Reference). It is further common ground that the instant Reference was lodged in this court on 14th October 2011 and amended on 31st August 2012.

56.It is glaringly clear from the foregoing that the Applicant lodged his Reference more than 16 days after the expiry of the two-months time-limit prescribed by Article 30 (2) of the Treaty.

57.It is now settled law as amply demonstrated in the decisions of this Court that Mr. Kaahwa has made reference to, that the computation of time starts on the date of the unlawful act act complained of, and not the day that the act ends –See **Omar Awadh’s case** [supra] and the **Independent Medico Legal Unit case** (supra).Time therefore started running on 28th July 2011 and stopped running on 28th September 2011.

58.Mr Onsongo, in rebuttal to Mr. Kaahwa’s arguments on this point, contends that his client’s main grievance is “***the process that led to the incarceration and the denial of freedom of movement*** “. He submits that the whole process was conducted unprocedurally. With due respect to him, we do not find merit in this argument. He cannot, in our candid view, afford himself the argument to the effect that Article 30(2) of the Treaty as regards the computation of time to institute proceeding does not apply to

the matter now before us. This is precisely what he is saying and is now inviting us to buy his novel argument. With unfeigned respect to him, we decline his invitation to do so.

59.On the contrary, we are in full agreement with Counsel for the 2nd Respondent on his objection and further add that the principle of legal certainty that was enunciated in the **Omar Awadh** case (supra) and the **Independent Medical Legal Unit case** (supra) requires strict application.

60.In view of all the foregoing, we hasten to conclude that the Applicant filed his Reference out of the prescribed time and that action consequently spells out the obvious ;that the instant Reference has not complied with the strict provisions of Article 30 (2) of the Treaty and having said so, we hereby emphatically hold that it is time-barred and we shall make the necessary orders at the end of this Judgment.

Issues Nos (ii), (iii) and (iv)

61.In light of the above, we refrain from entertaining the remaining issues for the one obvious and simple reason that the Reference is no longer alive and any attempt at determining those issues will be a mere academic exercise.

Conclusion

62. Before taking leave of the Reference we are constrained to reiterate the remarks of Lady Justice Arach Amoko(DPJ, as she then was) made on 6th November 2013 when the matter was before us for highlighting of the written submissions lodged by all the Parties in this Reference. The remarks were in respect of compliance with the Rules of Procedure of this Court. It behoves us at this juncture to remind all who are coming to this Court to observe the Rules of Procedure of this Court. In the Reference now before us ,all Parties have on several occasions fallen prey to the non-observance of the Rules of Procedure of this Court and specifically the Rule that requires filing of authorities. As a result, on more than two occasions, this Court was compelled to invoke its inherent powers under Rule 1 (2) of the Rules of Procedure, 2013 to admit documents that were filed outside the time stipulated by the Rules.

63. We think that it is high time that we reminded all persons (advocates in particular) who appear before this Court to comply with the said Court Rules and to strictly adhere to them.

Rules were made for a purpose and that purpose was for orderly

conduct of our business in this Court. We are alive to the fact that the Rules of Procedure are only hand maidens of justice and they should not be used to defeat substantive justice ,but it is our pious hope and prayer that our remarks will bear fruit and that we shall see no more of what transpired in the instant Reference.

Final Orders;

- (a) For the reasons we have given, the Reference is dismissed
- (b) As for costs, we endeavour to say that given the peculiar circumstances of this case, we deem it just that each Party shall bear its own costs.

It is so ordered.

Dated, Delivered and signed at Arusha this **28th** day of **February 2014**.

.....
MARY STELLA ARACH –AMOKO
DEPUTY PRINCIPAL JUDGE(RTD)

.....
ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

.....
JOHN MKWAWA
JUDGE

NB:

1. Hon. Lady Justice Mary Stella Arach-Amoko participated in this deliberation. She retired from the Court on 28th November, 2013.
2. Hon. Mr. Justice Isaac Lenaola is the Current Deputy Principal Judge.

