

243/01 Women's Legal Aid Center (on behalf of Sophia Moto) / Tanzania

Summary of Facts

1. The complaint is filed by Women's Legal Centre, Tanzania on behalf of Sophia Moto, an unemployed Tanzanian woman of 40 years of age.
2. The Complainant alleges that she petitioned to the Magistrate [sic] of Dar es Salaam in 1995 and appealed to the High Court of Tanzania in 1997 for the dissolution of her marriage to one Anthony Lazima, division of matrimonial assets, and damages from an illicit cohabitation of the latter with one Bertha Athanas. She claims that the High Court, which is part of the Tanzanian Judiciary, dismissed her appeal on the grounds of her non-appearance on the date set for the hearing.
3. The Complainant states that she had applied to the same High Court for a review of the said decision, but the High Court overruled the application. And under the laws of Tanzania, such an exercise of applying for review before the same High Court bars one from appealing against the decision of the same to the Court of Appeal of Tanzania, the Complainant alleges that she could not thus seize the highest court in the country.
4. She, therefore, alleges that the High Court, in so dismissing her appeal without having issued summons or notice to her notifying her of the date for the hearing of the appeal, violated her rights to fair trial and hearing. The same decision also resulted in the wrongful denial of her right to the matrimonial property.
5. The Complainant claims that she has exhausted all the national remedies available to pursue her rights and that the present claim has not been or is not being considered by any other human rights treaty monitoring body.
6. The Complainant alleges violation of Articles 7 and 14 of the African Charter on Human and Peoples' Rights.

Complaint

7. The Complainant prays for a declaration that the Respondent State provides her with appropriate remedies in accordance with the Laws of Tanzania, and for any other relief the Commission deems just and fit.

Procedure

8. The complaint was dated 10th October 2001 and received at the Secretariat on 7th December 2001.
9. On 24th January 2002, the Secretariat wrote to the Complainant acknowledging receipt of the complaint, informing her of the entering of the same in the Commission's register, its number in the latter, and its having been scheduled for consideration by the Commission at its 31st Ordinary Session taking place from 2nd to 16th May 2002.
10. At its 31st Ordinary Session held from 2nd to 16th May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.
11. On 28th May 2002, the Secretariat wrote to the Complainant and the Respondent State of this decision and requested them to forward their submissions on admissibility before the 32nd Ordinary Session of the Commission.
12. On 9th September 2002, the Complainant requested further time for submission of further information on the issue.
13. At its 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the African Commission examined the complaint and decided to defer its consideration on admissibility to the 33rd Ordinary Session.
14. On 7th November 2002, the Secretariat wrote to the Complainant and Respondent State to inform them of this decision and further remind them to forward their submissions on admissibility of the same before the 33rd Ordinary Session of the Commission.
15. On 3rd April 2003, the Secretariat of the African Commission wrote to the parties informing them that it still awaited their submissions on the admissibility of the complaint and further reminded them to forward

the same before the 33rd Ordinary Session of the Commission.

16. At its 33rd Ordinary Session held in Niamey, Niger from 15th to 29th May 2003, the African Commission considered the communication and declared it admissible.

17. On 12th June 2003, the Secretariat wrote to the Complainant and Respondent State informing them of this decision and further reminding them to forward their written submissions on merits of the same before the 34th Ordinary Session of the Commission.

18. A similar reminder was re-sent to the Respondent State on 3rd July 2003 and to both parties on 6th August 2003.

19. On 3rd October 2003, the Secretariat received the Respondent State's written submissions to the communication, which was forwarded to the Complainant on 6th October 2003, which was received, per DHL's online Global Tracking facility, on 13th October 2003.

20. At its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003, the African Commission examined the complaint and decided to defer its consideration on merits to the 35th Ordinary Session.

21. On 8th and 9th December 2003, the Secretariat wrote to the Complainant and the Respondent State respectively informing them of this decision and further requesting the latter to forward to the African Commission a copy of the country's Civil Procedure Code and the former its response to the written submissions of the Respondent State before the 35th Ordinary Session.

22. On 13th January 2004, the Complainant sent its written submissions accordingly, which were forwarded to the Respondent State on 11th February 2004.

23. On 17th February 2004, the Respondent State forwarded a copy of the country's Civil Procedure Code through the African Union's office in Addis Ababa.

24. At its 35th Ordinary Session held in Banjul, The Gambia from 21st May to 4th June 2004, the African Commission examined the complaint and decided to defer its decision on the merits to the 36th Ordinary Session.

25. On 17th June 2004, the Secretariat informed both parties of this decision.

26. At its 36th Ordinary Session held from 23rd November to 7th December 2004, in Dakar, Senegal, the African Commission considered the communication and took a decision on the merits.

Law

Admissibility

27. Article 56.5 of the African Charter governs admissibility of communications brought before the African Commission. In this regard, the African Commission notes that the Respondent State's only challenge on the admissibility of this communication concerned itself with Article 56.5 under which it claimed that the dismissal of the application for review was done by a Court of competent jurisdiction and in accordance with its laws. For the purposes of the said sub-article, however, this claim does not refute the Complainant's claim that she could not seize the highest Court in Tanzania for the reason that she opted to apply for a review of the decision of the High Court that dismissed her application.

28. For this reason, the African Commission decided to declare this communication admissible at its 33rd Ordinary Session held in Niamey, Niger from 15th to 29th May 2003.

Merits

29. As can be seen in paragraph 2 above, the complaint arose out of the Tanzanian High Court's decision to dismiss the Complainant's civil case appeal for the dissolution of marriage on the ground that she failed to appear on the date set for the hearing irrespective of the fact that she was not served with summons or notice notifying her of the date for the same. In seizing the African Commission, the Complainant alleged that the Court's decision, an institution of the Respondent State, denied her right to fair trial, and (as the original case before the lower magistrate court related to dissolution of property as well) her right to the matrimonial property.

30. The Complainant further alleges, in her memorial to the African Commission of 9th September 2004, that it was her counsel and not her who was reportedly present and aware of the date on which her case was slated before the High Court which dismissed it altogether for non-appearance. She further alleged that there was no evidence presented showing that her counsel (on whose expertise she, as a lay person,

relied on) communicated the information about the date for the hearing of her appeal. By dismissing her appeal, the High Court improperly punished her while the proper person to be punished for â negligence or recklessnessâ if any, was her counsel.

31. In requesting that the African Commission dismiss the complaint in its entirety, the Respondent State submitted, on 21st August 2003, its response to the same. In its response, the Respondent State disputed the allegation that it violated Article 7 of the African Charter in that the Complainant was indeed granted an opportunity to be heard but chose not to exercise it by failing to appear on the hearing date. The Respondent State annexed a copy of the proceedings of the High Court in question and further argued that although the judiciary is an institution of the Respondent State, the latter could not be at fault for the courtâ s dismissing the appeal as the Complainantâ s advocate was present on the first date for the hearing and was aware of the date when the hearing was adjourned to, and that despite this knowledge, both the Complainant and her counsel failed to appear on the scheduled date.

32. The Respondent State further argued that there was no violation of Article 14 of the African Charter as the decision to dismiss by the High Court in question was in accordance with Order IX Rule 8

× Where the defendant appears and the plaintiff does not appear where defendant when the suit is called on for hearing, the court shall make an order only appears that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

of the countryâ s Civil Procedure Code of 1966. The Complainant failed to adduce evidence to prove her right to property, which right was recognised by the Government. It argued that the matter had been completely dealt with by the Respondent Stateâ s Courts of Law and hence the complaint before the Commission was an abuse of process of law. The Respondent State concluded that the appeal was dismissed by the High Court because of the gross misconduct of the Complainantâ s advocate and hence she should proceed against her counsel for professional misconduct.

33. By a rejoinder of 23rd October 2003, the Complainant maintained that there was no evidence whatsoever to show that she was duly served or notified of the date set for the hearing by the High Court that dismissed the appeal, and hence the dismissal was contrary to the cardinal principle of natural justice, the right to be heard. She insisted that she did not have knowledge of the hearing date as the records show that she was absent when the matter was adjourned.

34. She further averred that her main prayers as laid before the magistrateâ s court, dissolution of marriage and division of matrimonial property, remained undecided to date as the High Courtâ s dismissal order erroneously based itself on the Law of Limitations Act of 1971. She claimed that even if she were absent on the date the matter was called for hearing, which fact she denied, the High Court was wrong to dismiss her appeal as it was not mandatory under the law (Order XXXIX Rule 11 (1)

× The Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his advocate and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the court from whose decree the appeal is preferred and without serving notice on the respondent or his advocate.

of the Civil Procedure Code of 1966) that non-appearance of the appellant shall result in dismissal of the appeal.

35. The Complainant followed this by a further submission dated 13th January 2004 addressing the contents of the copy of the proceedings before the High Court that dismissed her appeal for non-appearance. In that, she alleged that the matter concerned matrimonial issue, which required determination for purposes of giving rights to each party, exacting special care due to its nature relating to divorce, custody of children, and division of property. The Counsel for the appellant that appeared before the High Court was a human being and anything might have happened to her and as such her non-appearance on the hearing date ought to have been given excuse. Besides, the Complainant further alleged, the non-appearance was a first default and the trial judge should have adjourned the matter and order for the parties to be notified to appear on another date. She maintained that the dismissals failed to consider the interest of both parties as far as married life was concerned, which, together with the rights of each party, had to be determined.

36. A look at both partiesâ submissions and documentary evidence adduced before the African Commission showed that an important fact, that neither the Complainant nor her counsel appeared before the High Court on the date her appeal was slated to be heard, was correct. As summarised above, however, the Complainant held that the dismissal that ensued was not justified as she had not been notified

of the date for the hearing, and that, among others, the dismissal was contrary to natural justice denying her right to equitable share of the matrimonial property. She maintained that it was her counsel's fault that resulted in her present situation and that should anyone be punished, it should have been her counsel not her. She further advocated that the decision by the High Court did not determine her marital status or the partition of matrimonial property, including child custodial issues. It merely disposed of the matter on the superficial reason that procedure had not been complied with.

37. The Respondent State, on the other hand, insisted that it shall not be held responsible for the Complainant's failure to follow procedure in enforcing her rights. It even suggested that the Complainant rather proceed against her own counsel for failure to appear which resulted in the dismissal of the case by the High Court.

38. The African Commission notes that civil procedure concerns itself with enabling parties enforce their substantive rights before the courts as guaranteed by substantive laws. It is not disputed that the present Complainant failed to do so by failing to appear on the date for hearing of the matter. What is disputed is the fairness of the dismissal of the matter in its entirety, which the Respondent State claimed was proper.

39. The Respondent State claimed that the High Court's decision based itself on Order IX Rule 8 of the country's Civil Procedure Code of 1966, which read: "Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

40. The subsequent Rule 9 (1) under the same Order IX, however, introduced an important exception to Rule 8 above in providing the plaintiff an opportunity to have the dismissal set aside. It states that the plaintiff: "... may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal...", and shall appoint a day for proceeding the suit."

41. The African Commission does not wish to pre-empt the understanding and interpretation of these rules by Tanzanian courts. Yet, the combined reading of these two Rules clearly shows that the dismissal of the suit by the High Court is not unassailable and that as long as the plaintiff can show sufficient cause for her non-appearance, the court should allow the Complainant to proceed with the suit. The High Court may exercise discretion, on a case by case basis, in deciding whether the cause shown before it to have the dismissal set aside is sufficient or not.

42. The Courts are provided with further discretionary power under Order XXXIX Rule 11 (2) of the same procedure code when they decide upon the appeals before them. This Rule reads: "If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed."

43. The emphasis here is on "may make an order that the appeal be dismissed". This is a clear discretion left to the court to decide as it deemed fit. Again, the African Commission does not wish to delve into the interpretation of this or any other laws of Tanzania. Yet, the effect of their application, should it run contrary to the natural justice principle underlying Article 7.1.a of the African Charter, can be a proper subject before the African Commission.

44. The facts as presented by the parties and not contested indicate that there were no proceedings held justifying the closure of the Complainant's case without further hearings. In such circumstances, the African Commission cannot but agree with the Complainant's claim that the option the court followed in dismissing her appeal without giving her an opportunity to be heard and without considering the consequences that may have on her claims to property and child custody (which could have been taken care of by a favourable exercise of discretion by the courts) does not conform with the requirements of the African Charter and the principle of natural justice. The court's decision to simply dismiss the Complainant's petition ushered in uncertainty as to the status of the marriage itself, the partition of patrimonial property, and custodial issues.

45. The African Commission holds that substantive rights enshrined in the African Charter rely on procedural rules for their effective enjoyment. The application of these procedural rules giving effect to the enjoyment these rights should be checked since, like in the present case, their application may negate the very substantive rights, resulting in their curtailment or deprivation. Member States have committed themselves to give effect to rights contained in the African Charter. The African Commission holds that the application of these procedures domestically put in place with a view to implement the African Charter should not result in frustrating the very obligations the Member States undertook in committing themselves

under the African Charter.

46. The African Commission further notes that although the provisions of the Tanzanian Civil Procedure [Code] form part of the procedural laws giving effect to the substantive laws elsewhere in their laws, their application in cases such as the present could result in the curtailment of citizens' enjoyment of their basic rights. It is not being disputed that the substantive laws of Tanzania guarantee the right to property, family life and child custodian rights. Yet, the establishment of such rights must be followed by the diligence on the part of the State to ensure that everyone enjoys them, which means the just application of procedures meant to give effect to the rights. It is noted that it is not the place of the African Commission, nor does it fall under its mandate, to prescribe legislation for Member States with a view to give effect to the rights and duties enshrined in the African Charter domestically. However, it is the duty of the African Commission to check the application of domestic procedures enacted by Member States implementing the African Charter. Accordingly, Tanzanian authorities may enact the procedures governing the exercise of rights and duties, while the African Commission retains its supervisory role over the application of those procedures enabling the implementation of the African Charter, making sure that the application of procedures does not indeed deny the enjoyment of the rights themselves.

47. It is noted that the Complainant was given only one chance to appeal. She was faced with making a procedural choice to enforce her rights. Eventually, her case was dismissed on mere grounds of procedural rules, the application of which was at times discretionary (as shown in paragraphs 38-42 above). Even the review procedure allowing the same High Court judge to preside over appeals and their review thereof, the application of which led to the dismissal of the Complainant's claim, does not tone with the general requirements of fair trial.

Holding

For these reasons, the African Commission,

Finds the Republic of Tanzania in violation of Article 7.1.a;

Further, the African Commission urges the Government of the Republic of Tanzania to ensure that its Courts apply its rules of procedure without fear or favour;

Urges the Government of the Republic of Tanzania to allow the complainant to be heard on her appeal.

Adopted at the 36th Ordinary Session of the African Commission on Human and Peoples' Rights held from 23rd November to 7th December in Dakar, Senegal.