

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي African Commission on Human & Peoples' Rights		UNIÃO AFRICANA Comissão Africana dos Direitos Humanos e dos Povos
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Communication 778/22

**Kamilya Mohammedi Tuweni and 4
others (Represented by REDRESS)**

V.

The Republic of Kenya

Adopted by the
African Commission on Human and Peoples' Rights
During the 75th Ordinary Session held in Banjul, The Gambia from the 3rd to the 23rd
of May 2023.


.....
Commissioner Remy Ngoy Lumbi
Chairperson of the African Commission
On Human and Peoples' Rights


.....
Ms. Lindiwe Khumalo
Ag. Executive Secretary to the African
Commission on Human & Peoples' Rights

DECISION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS ON ADMISSIBILITY

Communication 778/22- Kamilya Mohammedi Tuweni and 4 others (Represented by REDRESS) V. The Republic of Kenya

SUMMARY OF THE COMPLAINT

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received the Complaint on the 25th of January 2022 from Kamilya Mohammedi Tuweni, Badriyah Badr Hassan Abdalla, Bardees Badr Hassan and Hayatti Hafidh Salem Hassan (The Complainants) through their representative REDRESS against the Republic of Kenya¹ (The Respondent State).
2. The Complainants submit that the First Complainant, Kamilya Mohammedi Tuweni was born in Zanzibar, Tanzania on the 7th of August 1965 and later moved to the United Arab Emirates (UAE) in 1979 where she now holds citizenship. The Complainants submit that on the 9th of January 2007, the First Complainant, together with two Omani nationals travelled from the UAE to Tanzania. She avers that she was engaged as an interpreter for the men as they sought to do business in Tanzania but did not speak fluent English. Upon arrival in Tanzania, the first victim obtained a visa valid for 3 months.
3. The Complainants allege that on 9 January 2007, the First Complainant travelled to Kenya with the Omani men and upon arrival she was given a visa to lawfully remain in the country. The Complainants submit that the First Complainant and her associates then met with their host, one Kenyan national named Mellie Mary Gakuo and proceeded to Eden Rock Hotel in Malindi. The Complainants allege that later that same day, 4 policemen burst into the First Complainant's room, searched her luggage and checked her documents without producing a warrant or an explanation for their suspicion. After failing to uncover anything incriminating, the policemen left.

¹ The Republic of Kenya ratified the African Charter on 23 January 1992

4. The Complainants submits that soon afterwards, the First Complainant and her associates were arbitrarily and with no explanation, arrested by 15 armed members of the Kenyan Anti-Terror Police Unit (ATPU) and they were not provided with an opportunity to call her embassy, family or lawyer.
5. The Complainants allege that the first victim and her companions were taken to a police station in Malindi, then later to another police station in Mombasa, where they stayed overnight. She alleges that on 10 January 2007 the next day, they were taken to Kileleshwa Police Station in Nairobi, where a police officer said “Welcome, Al Qaeda” to her. Again, the First Complainant claims she was denied consular assistance, legal advice, and contact to her family. She states that she bribed a guard who afterwards let her telephone brother after being held incommunicado for 3 days. The Complainants aver that the First Complainant was detained in an overcrowded and unsanitary cell; slept on the floor without bedding; denied medical attention after falling ill and on one occasion forcibly stripped naked. She contends that she feared for her life throughout. The First Complainant alleges that on 27 January 2007 in the middle of the night, the police transported her to the Tanzanian border, upon arrival and after being questioned, the Tanzanian authorities surrendered her back to the Kenyan police because she was lawfully in the country. The Complainants submit that the First Complainant was then taken to a police in Namanga to a small, overcrowded cell underground. The First Complainant further alleges that the prison guards accepted hashish as bribe from the male prisoners in the neighboring cell to let them rape her, the prison guards ultimately had a change of heart.
6. The Complainants submit that on 27 January 2007 the First Complainant was assaulted and violently forced into an aircraft which took her to Somalia where she was detained and interrogated for ten days. The Complainants further submit that while in Mogadishu, the First Complainant was terrorized by her proximity to ongoing hostilities of the Somalian Civil war; the bullet and bomb holes on the wall from previous attacks and the sound other detainees being beaten and abused. The complainant submits that the first victim was denied food and water, she also fell ill and was deprived of medical care.
7. The Complainants submit that after 10 days, the First Complainant was rendered without any due process to Ethiopia where she had to sleep outside on a mattress

fashioned out of boxes under harshly low temperatures and go to the toilet in a nearby bush under the watch of guards. The Complainants further submit that the First Complainant went on a hunger strike until she was taken for questioning by an American man, presumed to be from the CIA who concluded that there was no basis her detention. The Complainants submit that the First Complainant was detained for another month, released on 23 March 2007 and forced to make her own way back to the United Arab Emirates on the 25th of March the same year.

8. On the 10th of June 2009, it is averred that the First Complainant filed a civil case before the Kenyan High Court against the Commissioner of Police and the Attorney General and alleged various breaches of the Constitution of Kenya 1969. It is alleged that on 26 August 2014, a representative of Kenya's ATPU filed a responsive affidavit in which it was denied that the First Applicant was ever in the custody or detention of the Kenya Police or the ATPU as the Kenyan Police had no written record of her arrest or detention. The First Complainant states that on 17 September 2018, the Commission of Police and the Attorney General filed their written submissions in which they continued to deny that she was ever in police custody and submitted that she had "not proved her case". She further contends that on 1 July 2021, due to COVID-19 restrictions, Judge A. C. Mrima remotely delivered his verdict without reasons. A certified copy of the written judgment with reasons was provided to the First Applicant's legal team on 23 July 2021. The Complainants submit that the Kenyan High Court dismissed the petition on the basis that the First Applicant had failed to satisfy her burden of proof.
9. The Complainants aver that Pursuant to Kenyan procedural law, the First Complainant had 14 days from the date the judgment was handed down remotely (i.e., until 15 July 2021) to file a notice of appeal. The Complainants state that although the verdict had been announced, the written reasons for the Judge's decision had still yet to be published and therefore, on 12 July 2021, in order to preserve her rights, the First Complainant, filed a notice of appeal. The authors aver that when the written judgment was certified and transmitted on 23 July 2021, the First Complainant did not proceed to go ahead with the appeal. The Complainants argue that this is because the First Complainant had sought legal advice from several Kenyan lawyers on the merits of an appeal and was advised in the strongest possible terms not to pursue an appeal.

10. On the 21st of January 2022, the Complainant's representative filed a complaint with the Secretariat.

ARTICLES ALLEGED TO HAVE BEEN VIOLATED

11. The Complainants submit that the Respondent State has violated Articles 1; 2; 5; 6; 7; 12 and 18 of the African Charter on Human and Peoples' Rights.

PRAYERS

12. The Complainants seeks the following:

- I. That the Commission finds that the Republic of Kenya has breached Articles 1, 2, 3, 5, 6, 7, 12 and 18 of the African Charter.
- II. Rehabilitation,
The Complainants request compensation for rehabilitation in the form of medical and psychosocial treatment in the UAE, which they ask the Commission to award on an equitable basis at an estimated costs of \$USD20 884.
- III. Compensation,
The Complainants claim an amount of USD 60,885 to be awarded by the Commission in respect of material damages suffered. The Complainants also claim USD 60,000 in moral damages for the pain and suffering of the First Complainant and USD 15,000 for each of the Second, Third and Fourth Complainants.
- IV. Prompt and impartial investigation,
- V. A public apology
- VI. Non-repetition measures.

PROCEDURE

13. The Complaint was received by the Secretariat on the 21st of January 2022.

14. On the 22nd of February in 2022, the Secretariat wrote to the Complainants in terms of Rule 115(4) of the 2020 Rules of Procedure requesting for further particulars on the authority of the representatives to act for the complaints per Rule 115(2)(e).
15. The Complainants' representative wrote back on the 1st of March 2022 re-transmitting the initial document that the secretariat took issue with which the complainants had sent at the time of filing the complaint.
16. On the 28th of March 2022, the Secretariat wrote back the Complainants' representative noting the insufficiency of the document sent in respect of their authority to act and requested that they send a document that complies with Rule 115(2)(e).
17. The Complainants wrote back on the 31st of March 2022 once again re-transmitting the same proof of authority which had been previously rejected by the Secretariat and requesting guidance on why the Secretariat took issue with the submitted document .
18. On the 06th of May 2022, the Secretariat wrote the Complainants highlighting the lack of credible authentication in the document submitted by the representative and requesting that remedy it within 7 days.
19. The Complainants' representative wrote back on the 16th of May 2022 requesting an extension of 7 more days to submit sufficient proof of authority to act.
20. On the 1st of June 2022, the Secretariat duly granted the request of an extension of 7 days.
21. The Complainants' representatives submitted the sufficient proof of authority to act on the 7th of June 2022.
22. The Commission considered the complaint and decided to be seized of it at the 72nd Ordinary Session which took place from 19 July to 2 August 2022.
23. By letter dated 10 August 2022, the Complainants where requested to submit their arguments and evidence on admissibility and merits of the communication within 60 days per Rule 116(1) of the 2020 Rules of Procedure. By Note verbal dated the

same, the respondent state was served with the complaint and informed of the Commission's decision to be seized of it.

24. On the 7th of October, the Complainants filed their observations on admissibility;
25. By Note Verbale dated 14 October 2022, the Complainants' observations were transmitted to the Respondent State and an invitation made for them to transmit the same with 60 days of that notification.
26. On the 11th of November 2022, the Secretariat once again wrote to the Government of the Republic of Kenya to reiterate that their observations were due for submission in under a month and highlighting that in the absence of the former, the Commission would have to adopt a default decision.
27. The Secretariat has since not received any response from the Respondent State.

THE SUBMISSIONS FROM THE COMPLAINANT ON ADMISSIBILITY

28. The Complainants submits that in accordance with Article 56(1) of the African Charter, the Communication identifies the Complainants as Kamilya Mohammedi Tuweni, Badriyah Badr Hassan Abdalla, Bardees Badr Hassan and Hayatti Hafidh Salem Hassan who are represented by REDRESS. The Complainants argue that the communication is compatible with Article 56(2) as it alleges violations of the Charter which Kenya ratified on the 23rd of January in 1992. Regarding Article 56(3), the Complainants propound that the Communication is written in respectful language which is neither disparaging nor insulting to the Respondent State or the AU. The Complainants submit that they comply with Article 56(4) on account of their communication not being based on news media but rather on a range of sources including witness statements and various contemporaneous documents.
29. The Complainants submit that they exhausted local remedies in accordance with Article 56(5) in that the First Complainant commenced the Kenyan Civil Claim against the Kenyan Attorney General and Commissioner of Police in 2009 which, ultimately, was dismissed by the Kenyan High Court in 2021. The Complainants aver that the judge found the vast majority of their evidence inadmissible. The Complainants further propound that letters referring to Miss Kamyla's detention, the flight manifest bearing her name and the copies of pages from her passport

were found inadmissible because she had not adopted them as exhibits in her affidavit. It is further that the written statement of Mr Mucheke was not admitted by the court because he was not formally called as a witness and the expert evidence of Dr. Brock Chisholm, the Psychiatrist who assessed the First Complainant was ruled inadmissible as the witness' expertise was put to question despite his qualifications having been established in his testimony. The Complainants aver that the court thus dismissed the petition on the basis that they had failed to prove their burden and ordered them to bear the costs of the government.

30. The Complainants contend that the First Complainant did not pursue an appeal of the High Court decision due to the lack of a realistic prospect of success. It is submitted that this decision was motivated by three reasons, firstly, that the Court of Appeal would have been limited to a review of whether the trial judge erred in either procedure or law, and the Judge's formalistic approach in considering the evidence was still justifiable under Kenyan, thus limiting the appeal's prospects. Secondly, it is averred that the Court of Appeal would have been bound by the evidence presented in the trial court and with the First Complainant's evidence being excluded, it would have been impossible for the Appeals Court to reach a different substantive conclusion. The Complainants argue thirdly that, the appeal would have taken long to conclude and exposed the First Complainant to financial burden and costs in the event of the appeal's failure. The Complainants aver that the 12 year duration of the First Complainant's civil claim before the High Court and her limited financial means made the prolongation of the appeal a plausible conclusion to make. It is thus submitted by the Complainants that the First Complainant exhausted local remedies.

31. The Complainants also contend that the Respondent State forfeited the right to deal with the matter domestically by taking no steps to investigate it. The Complainants' authority for this contention is the case of *Abdel Hadi, Ali Radi & Others v. Sudan*² in which the Commission held that "By failing to initiate an investigation into the complaints, the Respondent State thereby made any local remedies that theoretically existed, ineffective ... It follows that the Respondent State has forfeited its prerogative to deal with the matter domestically and the Commission consequently considers that the requirement to exhaust local remedies must be dispensed with".

² Communication 368/09 4 June 2014, Para 47

32. It is also submitted by the Complainants that they are not bound to exhaust local remedies as they were unduly prolonged by the Respondent State. They aver that the Respondent State delayed their access to justice by 16 years with the civil case alone taking 12 years and also took no steps to investigate, prosecute or punish anyone for the alleged violations. The Complainants cite *Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon*³ and *Enga Mekongo Louis v. Cameroon*⁴ where the Commission found that delays of 4 and 5 years respectively were undue prolongation.
33. Regarding Article 56(6), the Complainants relied on *Luke Munyandu Tembani v. Angola*⁵ to submit that the Commission has previously suggested the commencing of proceedings within six months to be a reasonable period. They argue that they exhausted local remedies on 23 July 2021 when the Kenyan High Court issued its written judgment in the Kenyan Civil Claim (or, alternatively, on 10 September 2021 when the deadline for filing grounds of appeal elapsed) and filed this Communication on 21 January 2022 which was within 6 months.
34. Finally, in accordance with Article 56(7) of the African Charter, the Complainants contend that the subject matter of the present Communication has not been submitted to, or settled by, any other regional or international court or tribunal.

THE SUBMISSIONS OF THE RESPONDENT ON ADMISSIBILITY

35. The Respondent State did not submit observations on admissibility or merits of the Communication. The Secretariat notified the Respondent State of the need to submit observations on admissibility within 60 days of receiving those of the complainant on the 14th of October 2022. On the 11th of November 2022, the Secretariat once again wrote to the Government of the Republic of Kenya to reiterate that their observations were due for submission in under a month and highlighting that in the absence of the former, the Commission would have to adopt a default decision. It should be noted that the Respondent State did not respond to both of those *Note Verbales*. As highlighted in the aforementioned *Note*

³ Communication 272/03, 25 November 2009, para. 68.

⁴ Communication 59/91, 22 March 1995, para. 67

⁵ Communication 409/1230 April 2014, para. 106

Verbal to the Respondent State and in accordance with established practice,⁶ the Commission is compelled to make its analysis without the submissions from the Government of the Republic of Kenya.

THE COMMISSION'S ANALYSIS ON ADMISSIBILITY

36. A Communication submitted in terms of Article 55 must satisfy the seven requirements in Article 56 in order to be declared admissible.
37. The Commission recalls that the conditions outlined in Article 56 are cumulative and should all be adequately fulfilled for a communication submitted in conformity with the terms of Article 55 to be admissible. Consequently, non-respect of any one of these conditions is liable to render a communication inadmissible.⁷ The Commission now considers the submissions of the parties in light of these requirements in series.

Article 56(1)

38. Article 56(1) of the Charter states that "Communication relating to Human and Peoples' Rights... received by the Commission shall be considered if they indicate their authors even if the latter request anonymity..." The requirement here is that complainants or authors of complaints proffer their identity⁸ and contact details⁹ to enable the Commission to adequately process the communication through assurances of continued interest in the matter.¹⁰ In the present case, the Communication is brought by Kamilya Mohammedi Tuweni, Badriyah Badr Hassan Abdalla, Bardees Badr Hassan and Hayatti Hafidh Salem Hassan. The Complainants are legally represented by REDRESS. The Communication duly complies with Article 56 (1).

Article 56 (2)

⁶ Communication 292/04 - Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh and 13 others) v Angola (2008) para 34; Communication 155/96 (2001); Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria; Communication 325/06 (2006) World Organisation Against Torture and anor v Democratic Republic of Congo para 30

⁷ Communication 304/2005 - FIDH & Others v Senegal (2006) ACHPR para 38

⁸ Communication 308/05 : Michael Majuru v Zimbabwe, 24 November 2008, para 71.

⁹ Communication 70/92_9: Ibrahima Dioumessi, Sekou Kande, Ousmane Kaba v Guinea, 7 October 1995, para 11.

¹⁰ Communication 277/2003-Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v Botswana, 12 October 2013, para 97.

39. Article 56(2) of the African Charter states that “Communications...received by the Commission shall be considered if they are compatible with the Charter of the Organization of African Unity or with the present Charter.” The Commission in *Kevin Mgwanga Gunme et al v Cameroon* previously interpreted this provision to require that the Communication: be brought against a State party to the African Charter; allege prima facie violations of rights protected by the African Charter; be brought in respect of violations that occurred after [the] State’s ratification of the African Charter, or where violations began before the State Party ratified the African Charter, have continued even after such ratification.¹¹In the present case, the communication is against the Republic of Kenya which is a State Party to the Charter;¹² alleges violation of Articles 1, 2, 5, 6, 7, 12 and 18 of the Charter, which allegations occurred after 1992 when Kenya ratified the Charter. It follows that the Complainants have satisfied Article 56(2) of the Charter.

Article 56 (3)

40. Article 56(3) of the African Charter states that “Communications ...received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity (AU)”. In *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe*, the Commission held that “in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice.”¹³ Having analyzed the submissions of the Complainants, the Commission has not come across any language that appears to be aimed at unduly impairing the esteem of either the Respondent State or the African Union. In light of the foregoing the Commission finds that Article 56(3) has been complied with.

Article 56 (4)

¹¹ Communication 266/03, 27 May 2009, para 71

¹² The Republic of Kenya ratified the African Charter on 23 January 1992

¹³ Communication 284/03, 3 April 2009, para 91.

41. Article 56(4) of the African Charter states that “Communications relating to human and Peoples’ Rights... shall be considered if they are not based exclusively on news disseminated through the mass media”. In shedding more light to this provision, the Commission averred that “the issue therefore should not be whether the information was gotten from the media, but whether the information is correct’ and whether the complainant tried to verify the truth”¹⁴ This interpretation from *Jawara* was adopted with approval in *Ahmed Ismael and 528 Others v. the Arab Republic of Egypt*.¹⁵ In the present Communication, the Complainants have presented substantial volumes of evidence in the form of witness statements and various contemporaneous documents. The Commission is of the opinion that the Complainant has not relied exclusively on news disseminated through the mass media and thus adheres to Article 56(4) of the Charter.

Article 56[5]

42. Article 56(5) of the African Charter states that “Communications relating to human and Peoples’ Rights... shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.” The Commission requires exhaustion of local remedies where they are ‘available, effective and sufficient to redress the alleged violation.’¹⁶ An available remedy is one where ‘the petitioner can pursue it without impediment’.¹⁷ An effective remedy will be one that ‘offers a prospect of success.’¹⁸ A remedy will be sufficient ‘if it is capable of redressing the complaint.’¹⁹

43. The Complainants argue that they exhausted local remedies by their civil claim to the High Court in Kenya for which they received judgement in 2020 despite not pursuing an appeal as allowed by Kenyan Law. The Complainants contend that “there was no realistic prospect of having access to an effective remedy by appealing the judgment in the Kenyan Civil Claim and the deadline for filing grounds of appeal elapsed on 10 September 2021. As a matter of Kenyan law, the Kenyan Civil Claim is now closed, and it is not possible to appeal that judgment.”

¹⁴ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 25 and 26.

¹⁵ Communication 467/14, 27 May 2016.

¹⁶ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 31.

¹⁷ Communication 317 / 2006 – The Nubian Community in Kenya vs The Republic of Kenya, 30 May 2016, para 55.

¹⁸ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 31.

¹⁹ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 31.

44. The Commission recalls that an effective remedy will be one that ‘offers a prospect of success’,²⁰ and ‘upon success, the appropriate relief is one that is capable of adequately and timely redressing the specific violation suffered’.²¹ It should also be noted that a prospect of success of a remedy need not be ‘certainty or guarantee of a favourable outcome for the complainant’ but simply an assurance of full and fair examination of the legal issues and arguments.²² In determining the propensity of a remedy to offer real prospects of success the Commission will assess the nature of the complaint, the ‘general legal and political context’ of the remedies, and the complainant’s personal circumstances.²³
45. In the present case, the Complainant had the option to pursue an appeal but decided not to do so on the strength of the legal advice she sought as averred. The Commission notes that the First Complainant appears to have dispensed with her right of appeal because she assumed or was led to believe that the outcome would not be the one she favored. Furthermore, it is clear to the Commission that the First Complainant through the information received from her legal advisors predicted the likely outcomes, costs and duration of the Appeal without placing the issues before the Appeals Court. It must be recalled that the First Complainant was required to make use of all the local remedies, provided that they were effective and sufficient to address the allegations of violations. The Commission refers to the decision of the Human Rights Committee in *Patino v Panama*²⁴ in which this principle was reaffirmed. Reference is also made to the judgment of the African Court on Human and Peoples’ Rights (The Court) in *Nobert Zongo and Others v Burkina Faso* in which it was held that “the effectiveness of a remedy is measured in terms of its ability to solve the problem raised by the Applicant”²⁵
46. To determine whether the First Complainant was within her right to abandon the appeal, the Commission must examine whether the appeal in the Respondent State was an effective remedy offering a useful resolution of the First Complainant’s complaint. The Commission recalls the long-observed principle re-affirmed in *Ahmed Ismael and 528 Others v. the Arab Republic of Egypt*, that an effective appeal procedure is one that ‘subsequent to the hearing by the competent tribunal

²⁰ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 31.

²¹ Communication 445/13- Human Rights Council and Others v. Ethiopia, 19 May 2016

²² Communication 445/13- Human Rights Council and Others v. Ethiopia, 19 May 2016

²³ Communication 445/13- Human Rights Council and Others v. Ethiopia, 19 May 2016

²⁴ Communication 473/1990, para 5.2 21 May 1994

²⁵ Application 013/2011

of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice'.²⁶ If the appeal procedure did not satisfy fair trial guarantees, or if it did not provide 'an effective, impartial adjudication of the matter',²⁷ then it may not need to be exhausted. There would, however, need to be evidence to support this.²⁸

47. In the present case, no evidence has been led by the First Complainant to undermine the fairness of the trial in the High Court. As a matter of fact the First Complainant takes issue not with the regularity of procedure but rather with the substance of the decision, which is the particularly formalistic approach of the trial judge in arriving at their ruling. It must further be noted that even by their own admission, the Complainants realise that whilst the decision of the High Court was not to their liking, it is justifiable under Kenyan Law. Furthermore, the Complainants have not tangibly demonstrated any potential for impartial adjudication or lack of capacity to grant good administration of justice on the part of the Appeals Court. Furthermore the potential of the Appeals Court to grant the remedy sought by the First Complainant as set out in her prayers before the High Court has not been contested. Based on this understanding, it is clear from the submission that at law there is no evidence to suggest that the appeal at the First Complainant carried no prospects of success. It must be recalled that as stated in *Sana Dumbuya v The Gambia*, the Complainant bears the burden of proof to present evidence of exhaustion of local remedies and failing which the communication will be declared inadmissible.²⁹ The Commission is convinced that it was concretely possible for the Appeals Court to determine whether her rights had been violated and to access a remedy as required by Commission standards. In this regard, the Commission takes the view that the First Complainant has not demonstrated why it was impossible to obtain remedy via appeal and that her fears on the usefulness of the remedy were insufficient to convince the Commission otherwise. The Commission notes that the African Court has previously established in *Mtikila* and subsequently in *Konate* that "there was no need to go through the same judicial process the outcome of which was known".³⁰ However the Court has qualified this position to only apply in instances where

²⁶ Communication 467/14 – Ahmed Ismael and 528 Others v. the Arab Republic of Egypt, 27 May 2016, para 163.

²⁷ Communication 467/14 – Ahmed Ismael and 528 Others v. the Arab Republic of Egypt, 27 May 2016, para 166.

²⁸ Communication 467/14 – Ahmed Ismael and 528 Others v. the Arab Republic of Egypt, 27 May 2016, para 164.

²⁹ Communication 127/94

³⁰ *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (2016) 1 AfCLR 668, para 103

there is incontrovertible evidence of ineffectiveness of remedies and therefore would not apply in the present case. Accordingly, the Commission is of the view that the First Complainant had an effective remedy at her disposal.

48. The Commission now proceeds to determine whether or not, in any event, the First Complainant was exempted from exhausting local remedies because they were unduly prolonged. As a matter of law, Article 56(5) does not require the exhaustion of local remedies where it is obvious that the procedures are unduly prolonged. 'Unduly' has been interpreted as meaning 'excessively' or 'unjustifiably', and therefore if there is a reason for the delay then the remedy may still require to be exhausted.³¹ There is no standard criteria to determine if a process has been unduly prolonged, the Commission will look at a number of factors including the 'political situation', the 'judicial history' and 'the nature of the complaint', as well as the 'reasonable man test'.³² A justifiable reason for prolonging a case will not be 'undue'.³³
49. In the present case, it has been submitted by the Complainants that the First Complainant's procedure was unduly prolonged in that she waited 12 years to receive judgment on her Civil case before the High Court. Whilst the Commission realises the lengthy duration of this process, it also notes the First Complainant waited for its completion regardless. It must be noted that by the very meaning of Article 56(5), the First Complainant was not expected to withstand that 12 year delay. The Commission has previously held that there is no requirement to wait for a pending case which does not offer a remedy which is neither available, sufficient or effective.³⁴ It follows that after waiting for 12 years for the domestic procedure to resolve the First Complainant forfeited her right to dispense with the remedies on the basis that they were unduly prolonged. The Commission is of the view that despite her wait, given that she had stood by those proceedings, the First Applicant, by her own choice, had to exhaust local remedies.
50. The Commission further takes note that whilst the issues regarding the First Complainant's case are trite, there has been no indication of the exhaustion of local

³¹ Wilfred Onyango Nganyi & 9 Others v. United Republic of Tanzania, App. No. 006/2013, Judgment of 18 March 2016, para 91.

³² Communication 293/04 : Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa / Zimbabwe, 22 May 2008, paras 58 and 60.

³³ Communication 293/04 : Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa / Zimbabwe, 22 May 2008, para 60.

³⁴ Communication 467/14 – Ahmed Ismael and 528 Others v. the Arab Republic of Egypt, 27 May 2016, para 158.

remedies in the claims of the 2nd to 4th Complainant. An examination of the Petition before the High Court in Kenya shows that the 2nd to 4th Complainants were not parties to those proceedings. Furthermore their claims could not have attached to that of the First Complainant because the issues they have raised before the Commission were not raised in that Civil Claim. Accordingly, the Respondent State has not had an opportunity to deal with the 2nd to the 4th Complainant's allegations and claims for moral damages. The Commission has previously noted that remedies need to be exhausted for each element of the claim and they will be considered separately.³⁵ The Commission is of the view that consideration of the claims of the 2nd to the 4th Complainant would render it a Court of First Instance as these elements of the Communication have not exhausted local remedies.

51. In view of all those considerations the Commission finds that the Complainants have not exhausted all local remedies and accordingly have not complied with Article 56 (5)

56(6)

52. Article 56(6) of the African Charter states that Communications relating to human and Peoples' Rights... shall be considered if they: are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter". The Commission has previously held in *Promoting Justice for Women and Children (PROJUST NGO) vs. Democratic Republic of Congo*,³⁶ that where Article 56(5) has not been complied with, there is no reason to proceed to consider Article 56(6) as it will be concluded that the latter has not been complied with. As such, the Commission concludes that this communication has failed to meet the requirements of Article 56(6).

56(7)

53. Article 56(7) of the African Charter states that "Communications relating to human and Peoples' Rights... shall be considered if they: do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter." The rule is based on the *non bis in idem* and *res judicata* rules.³⁷ The Commission has previously found in *Luke*

³⁵ Frank David Omary and Others v. United Republic of Tanzania, App. No. 001/2012, Ruling on Admissibility, 28 March 2014, paras 136-138.

³⁶ Communication 278/2003, 12 October 2013, para 75.

³⁷ Communication 260/02 : Bakweri Land Claims Committee v Cameroon, 4 December 2004, para 52.

Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others that the provision requires that a case “ no longer be under consideration under an international dispute-settlement procedure”³⁸ Further, that the other international body must have decided the case on the merits and there is a ‘final settlement’ by that body.³⁹ The settlement must, as the Commission has previously stated, a human-right adjudicatory body.⁴⁰ In the present case, there is no evidence to suggest that this matter was settled by another international adjudicatory body. It thus complies with sub-Article 7.

54. The Commission finds that the Complainants have failed to satisfy Article 56(5) and (6) of the Charter.

55. The Commission declares this Communication inadmissible.

**Done at the 75th Ordinary Session of the Commission held in Banjul, The Gambia
from the 3rd to the 23rd of May 2023.**

³⁸ Communication 409/12, 30 April 2014, para 112.

³⁹ Communication 260/02 : Bakweri Land Claims Committee v Cameroon, 4 December 2004, para 52 and 53.

⁴⁰ Communication 279/03-296/05 : Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 103.