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Communication 668/17

Peter Odiwuor Ngoge

v

The Republic of Kenya

Adopted by the:

African Commission on Human and Peoples' Rights

During the 80th Ordinary Session held virtually from 24 July to 2 August 2024.



Hon. Commissioner Rémy Ngoy Lumbu
Chairperson to the African Commission
on Human and Peoples' Rights



Ms. Abiola Idowu-Ojo
Executive Secretary to the African
Commission on Human and Peoples'
Rights



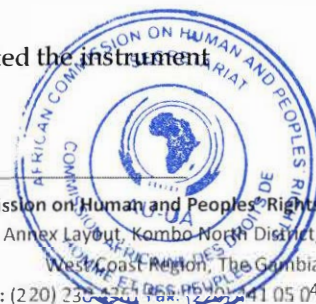
DECISION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS ON ADMISSIBILITY

Communication 668/17 – Peter Odiwuor Ngoge v. the Republic of Kenya

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a complaint on **23 October 2017** from Peter Odiwuor Ngoge, trading as O.P Ngoge & Associates Advocates (the Complainant).
2. The Complaint is submitted against the Republic of Kenya (Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹
3. The Complainant, an Advocate of the High Court of Kenya, asserts that in 2006, Mr. Wilson Mwangi Muiruri, the Senior Deputy Registrar of the High Court of Nairobi and Chief Magistrate, intentionally declined to assess the itemized Bill of Costs for the legal services provided to his clients. This refusal resulted in the Complainant's inability to recover his legal fees, thereby infringing upon his socio-economic, civil, and political rights.
4. Additionally, the Complainant alleges that the Senior Deputy Registrar deliberately refused to assess his Bill of Costs as a means to subject him to psychological and mental torment. This alleged mistreatment stems from the Complainant's previous exposure to official misconduct by the Respondent State, as outlined in Communications 432 and 437 of 2012.
5. The Complainant asserts that he took formal steps to address the issue by filing a complaint with the Chairman of the Judicial Service Commission (JSC) and urging intervention. However, he claims that instead of addressing his concerns, Hon. Muiruri, in his capacity as Senior Deputy Registrar of the High Court of Nairobi and Chief Magistrate, instructed a law firm to initiate a defamation lawsuit against him, known as Civil Suit No. 813 of 2007. The

¹ The Republic of Kenya ratified the African Charter on 23 January 1992 and deposited the instrument of ratification on 10 February 1992.





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Complainant alleges that this lawsuit was a strategic move to divert his attention from the ongoing complaint before the JSC. Furthermore, he contends that Hon. Muiruri, who was in a position to interfere with the court file,

6. intended to manipulate the judgment against him. By doing so, the Complainant argues that Hon. Muiruri deliberately undermined the administrative independence of the JSC and deprived him of a fair trial.
7. The Complainant states that the law firm representing Hon. Muiruri sought an *ex parte* judgment against him, even though the Deputy Registrar, Hon. Mr. Muya, who worked under Hon. Muiruri's supervision, lacked the jurisdiction to do so and was acting under his boss's instructions.
8. The Complainant submits that on May 2, 2008, he filed an application with the High Court to have the *ex parte* judgment set aside. On September 26, 2008, the application was successful, and he was granted permission to file his statement of defense against Hon. Muiruri. However, he was required to pay Hon. Muiruri's costs, which prompted him to file a Notice of Appeal against the ruling. Simultaneously, he requested the Deputy Registrar to provide him with certified copies of the proceedings and the verdict to facilitate the compilation of the Record of Appeal. The Complainant alleges that while handling his own file, Hon. Muiruri provided him with incomplete and falsified certified copies, including tampering with the date of delivery of the ruling.
9. The Complainant asserts that after an investigation by the JSC, Hon. Muiruri was terminated from judicial service via letters dated October 26, 2009, and March 22, 2010. Consequently, Hon. Muiruri lacks legal justification to maintain the defamation lawsuit filed a decade ago, which tarnishes the Complainant's professional reputation. However, on September 2, 2012, the Complainant's application to dismiss the defamation suit based on Hon. Muiruri's compulsory retirement was rejected.
10. The Complainant states that on October 1, 2012, he filed a Notice of Appeal in the High Court and simultaneously requested the Deputy Registrar to provide him with certified copies of the proceedings and the ruling. He alleges that the Deputy Registrar caused inexplicable and excessive delays, spanning approximately five years from October 1, 2012, to July 17, 2017, to supply the requested copies. The Court has acknowledged its responsibility for these prolonged delays and issued a Certificate of Delay on July 26, 2017.



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11. The Complainant asserts that upon receiving the certified copies, he promptly lodged Volume One and Two of Civil Appeal No. 261 of 2017 with the Court of Appeal in Nairobi on July 31, 2017, and served Hon. Muiruri's Advocates on August 1, 2017. However, when this petition was being drafted by the
12. Commission, the Court of Appeal had not yet scheduled the appeal for a substantive hearing.
13. The Complainant alleges that by allowing Hon. Muiruri, who was forcibly dismissed from judicial service, to harass and silence him through a malicious defamation suit, Kenya has permitted its judiciary to violate his human rights. These violations include selective application of the law, mental and psychological torture, unlawful treatment contrary to Articles 2, 3, and 5 of the African Charter, as well as retribution contrary to Articles 5 and 9 of the African Charter.
14. The Complainant further asserts that Kenya's refusal to dismiss the malicious defamation suit unlawfully allowed the High Court to encroach upon the jurisdiction of the JSC. This situation exposed him to retaliation from disgruntled judicial officers and curtailed his freedom of expression and peaceful protest, thereby violating Article 9(2) of the African Charter.
15. The Complainant alleges that, until today, Kenya continues to enable the judiciary to undermine his legal practice by keeping him entangled in a frivolous, malicious, vexatious, costly, and time-consuming defamation suit for an entire decade. This prolonged ordeal is a punitive measure for his prior exposure to the State's misconduct, implying a bias within the Kenyan judiciary that jeopardizes his chances of receiving a fair trial.
16. Additionally, the Complainant submits that his legal practice has become ineffective and subject to ridicule. He submits that the Respondent State persistently sabotages and suppresses almost all the cases he files within the local judiciary.

Articles alleged to have been violated:

17. The Complainant alleges violation of Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, and 24 of the African Charter.

Prayers:





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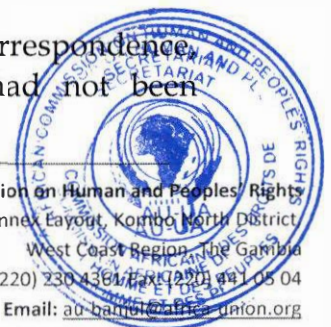
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18. The Complainant requests the African Commission on Human and Peoples' Rights (the Commission) to:
- Grant interim orders to suspend or halt Case No. 813 of 2007 proceedings at the High Court of Kenya, preventing the Respondent
 - State from issuing retaliatory orders against the Complainant following the confiscation of this Communication.
 - Issue temporary orders to suspend or halt the proceedings in Civil Appeal No. 261 of 2017 at the Court of Appeal, preventing the Respondent State from issuing any retaliatory orders against the Complainant following the seizure of this Communication.
 - Dismiss and declare the defamation suit filed in Case No. 813 of 2007 null and void.
 - Evaluate and award the Complainant general damages amounting to 50 billion US Dollars as compensation for enduring a vexatious, frivolous, baseless, and malicious decade-long defamation suit, as well as for the violation of the Complainant's fundamental human rights, which the Kenyan government permitted and sponsored.

Procedure

19. The Secretariat received Communication 668/17 on 23 October 2017.
20. During its 61st Ordinary Session, held from 1 to 15 November 2017, the Commission decided to be seized of the Communication.
21. In a letter and Note Verbale dated November 21, 2017, the Parties were officially notified of the Commission's decision on the seizure of the Communication.
22. In a Note Verbale dated February 16, 2018, the Respondent State informed the Secretariat that the Communication had been forwarded to the relevant authorities for their review and necessary action.
23. On February 21, 2018, the Secretariat notified the Complainant that the deadline for submitting Admissibility arguments had passed.
24. On February 9, 2024, the Secretariat retracted its previous correspondence, stating that the Complainant's Admissibility submissions had not been





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received. The Secretariat informed the Complainant that the submissions had been located in their records and would be transmitted to the Respondent State.

25. On February 9, 2024, a Note Verbale was sent to the Respondent State, which specified a 60-day timeline for the Respondent State to submit its observations.
26. The consideration of the Admissibility of the Communication was deferred from the 61st to the 79th Ordinary Sessions of the Commission.
27. The Commission adopted a decision on Admissibility during its 80th Ordinary Session, which took place virtually from 24 July to 2 August 2024.

Admissibility of the Communication

The Complainants' Submissions on Admissibility

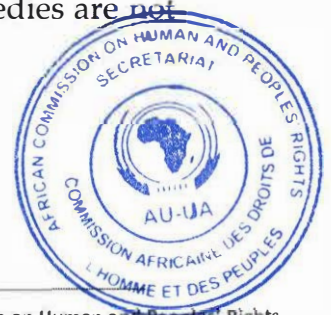
Absence of any insulting or derogatory terms

28. The Complainant asserts that the language used in this Communication is devoid of any abusive or derogatory terms towards the Respondent State. It is employed in good faith to accurately depict the manner, pattern, depth, and style of the violations.

Prior exhaustion of domestic remedies

29. The Complainant submits that the public ruling issued by the Judges and Magistrates Vetting Board of Kenya on April 25, 2012, clearly demonstrates the lack of effective access to local remedies. Consequently, he contends that fulfilling his responsibilities as a practicing attorney to his clients and effectively accessing local remedies becomes practically impossible. Referring to the statement provided by the Judges and Magistrates Vetting Board of Kenya on April 25, 2012, the Complainant argues that local remedies are not effectively accessible.

30. The statement reads as follows:





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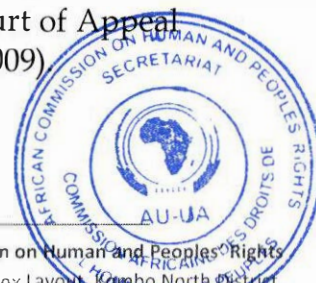
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"Advocate O.P Ngoge made another complaint against the Judge. The board notes that Mr. Ngoge has made complaints against every judge in the Court of Appeal, all to the effect that they are unfairly hostile to him and discriminate against him and, therefore, against his clients. Some of these complaints have been sent to the United Nations, the International Criminal Court, and other bodies. Clearly, there has been a complete breakdown of trust and professional respect between Mr. Ngoge and the Judiciary, with

negative consequences all around. The situation seems to call for the intervention of the Law Society of Kenya (LSK) to achieve an appropriate remedy. The Board will contact the LSK regarding this. It is not in a position to make a finding against the Judge with respect to these complaints."

31. The Complainant alleges that the Respondent State, either knowingly or unlawfully, has endorsed the obstruction of his access to effective local remedies by its judiciary. He further asserts that this obstruction is a punitive retaliation for his previous exposure of official misconduct by the Respondent State, particularly concerning the 2003 Speaker of the National Assembly elections.
32. The Complainant asserts that the Respondent State, with deliberate intention, has allowed its judiciary to impede his effective access to local remedies. As evidence, he cites the disqualification of Honorable Mr. Onyango Otieno and Honorable Mr. Justice Alnashir Visram, Judges of the Court of Appeal, from hearing and deciding his Court of Appeal Civil Application No. NAI 265 of 2009 (UR 184/2009) on October 16, 2012. Additionally, he submits that on May 22, 2012, Honorable Mr. Justice M.A WARSAME, an appeal judge and a Commissioner with the JSC of Kenya, also disqualified himself from hearing and deciding his Nairobi Court of Appeal Civil Application No. NAI 265 OF 2009 (UR 184/2009).
33. Furthermore, the Complainant highlights that on October 13, 2009, Honorable Mr. Justice E.M Githinji, a Judge of the Court of Appeal, disqualified himself from hearing and deciding the Complainant's Court of Appeal Civil Application No. NAI 265 OF 2009 (UR 184/2009). In contrast, he submits that Honorable Mr. Justice Visram, who had previously disqualified himself on October 16, 2012, did not find it necessary to disqualify himself this time.
34. The Complainant states that on December 18, 2009, Honorable Mr. Justice P.K Tunoi, Honorable Mr. Justice Alnasir Visram, and Honorable Mr. Justice E.O O'kubasu collectively prevented him from being heard in the Court of Appeal regarding his Civil Application No. NAI 265 OF 2009 (UR. 184/2009).





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35. The Complainant argues that these actions led to a complete denial of his inherent right to access justice in the Court of Appeal, and they served to protect the Senior Deputy Registrar of the High Court, who was included as a respondent in the application, from being held accountable, thus detrimentally affecting him. He further contends that due to the unprofessional conduct of the Court of Appeal judges, which clearly aimed to frustrate him and unlawfully hinder his access to local remedies as a form of retribution, any submissions made by him are merely formal exercises without any potential for remedy in the Court of Appeal.
36. The Complainant additionally contends that this Communication meets the admissibility criteria due to the unjustifiable prolongation of local remedies by the Judiciary of the Respondent State. He avers that the significant and unexplained delays in providing him with certified copies of proceedings and a ruling by Hon. Mr. Justice G.P Odunga in September 2012 have impeded his capacity to initiate Nairobi Court of Appeal Civil Appeal No. 261 of 2017, thereby prolonging the local remedies to his disadvantage. The Complainant submits that the Judiciary has acknowledged its responsibility by issuing a self-explanatory Certificate of Delay dated July 26, 2017.

Submission of the Communication within a reasonable time

37. The Complainant submits that upon receipt of the Certificate of Delay, the High Court proceedings, and the certified copies of the ruling issued by Hon. Mr. Justice G.V Odunga, he expeditiously compiled all pertinent documents and promptly lodged the complaint with the Commission. He emphasizes that there was no delay on his part, particularly in light of the General Elections held on August 8, 2017, and the subsequent repeat presidential elections on October 26, 2017.

Exclusion of cases settled in accordance with other principles.

38. The Complainant asserts that this Communication has not been previously submitted to any treaty monitoring body other than the Commission.

Respondent State's Submission on Admissibility

39. Despite the Commission's request for the Respondent State to present its arguments and evidence on admissibility, as per Rule 105(2) of the 2010 Rules of Procedure governing this Communication, no response has been received.





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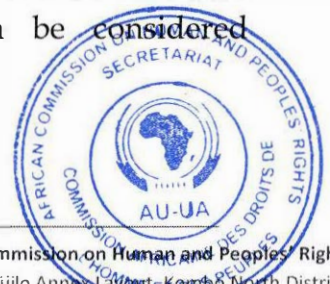
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40. In such instances, the Commission has consistently held that when a substantive response from the Respondent State is absent, it must make a determination based on the facts presented by the Complainant. This approach aligns with the Commission's established practice, as exemplified in cases such as *the Institute for Human Rights and Development in Africa v. Republic of Angola*, *the Social and Economic Rights Action Center for Economic and Social Rights v. Federal Republic of Nigeria*, and numerous other communications. In these cases, the Commission reaffirmed its position by stating that "... it would proceed to consider Communications based on the submission of the Complainants and information at its disposal, even if the Respondent State fails to submit." Consequently, the Commission shall conduct the following analysis on admissibility, relying on the available arguments and facts presented in the Complainant's submission on admissibility.

Analysis of the Commission on Admissibility

41. The Commission reiterates that Article 56 of the African Charter governs the admissibility of Communications and outlines seven (7) requirements that collectively determine the admissibility of Communications submitted to the Commission. A Communication must fulfill all seven (7) requirements to be considered admissible.
42. Regarding the requirement stated in Article 56(1) of the African Charter, which stipulates that "*Communications should indicate their authors even if the latter requests anonymity*," the Commission acknowledges that the Communication in question identifies the author and address of the Complainant. Therefore, the Commission concludes that the Communication satisfies the provisions of Article 56(1) of the African Charter.
43. Pursuant to Article 56(2) of the African Charter, a Communication must align with either the Charter of the Organization of African Unity or the African Charter. Regarding the compatibility of the Communication with the Constitutive Act of the African Union, the Commission acknowledges that the Complainant has claimed violations of human rights guaranteed by the African Charter, which explicitly includes the protection of these rights as one of its objectives under Article 3 (h) of the Act. Furthermore, the Commission concludes that no aspect of the Communication can be considered contradictory to the objectives or principles of the Act.





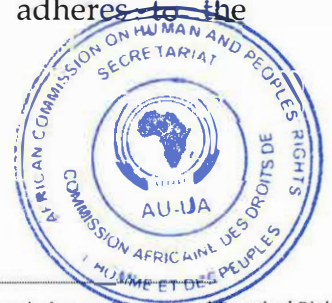
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44. In relation to the criterion of compatibility with the African Charter, the Commission has determined that a Communication submitted to the Commission will be considered if certain conditions are met. These conditions include the State being a party to the African Charter, the alleged violations of rights falling within the scope of rights protected by the African Charter, and the alleged violations occurring within the territory or jurisdiction of the concerned State after the African Charter enters into force for that specific State.
45. In the present case, the Communication is submitted against the Respondent State, a state party to the African Charter. The alleged violations occurred within the territory of the Respondent State and after the ratification of the African Charter, as the alleged violations are indicated to have occurred from 2017, while the Respondent State ratified the African Charter on 10 February 1992. The Communication alleges the violation of rights guaranteed in Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, and 24 of the African Charter. In view of the above, the Commission considers that the admissibility requirement of Article 56(2) of the African Charter is satisfied.
46. Pursuant to Article 56(3) of the African Charter, which 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 Organisation of African Unity now African Union (AU),*" the Commission acknowledges the subjective nature of determining what qualifies as disparaging or insulting language.² Statements that may be considered disparaging or insulting to one person may not be perceived similarly by another. After evaluating the submissions of the Complainant, the Commission determines that the language used does not fall under the category of insulting or disparaging within the context of Article 56(3) of the African Charter. Therefore, the Commission concludes that the Communication complies with Article 56(3) of the African Charter.
47. According to Article 56(4) of the African Charter, Communications should not solely rely on news disseminated through the mass media. After careful examination, the Commission has determined that the Communication in question does not exclusively rely on news from mass media sources. Instead, it is supported by factual evidence presented by the Complainant based on his personal experience. Consequently, the Communication adheres to the provisions of Article 56(4) of the African Charter.

² Communication 266/03- Kevin Ngumne v Cameroon, para 75





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48. Article 56(5) of the African Charter stipulates that '*Communications should be sent after exhausting local remedies, if any unless it is evident that this procedure is unduly prolonged.*' This requirement ensures that States are given the initial opportunity to address any human rights violations. Additionally, it prevents the Commission from functioning as a primary judicial body or a means to bypass local institutions, which not only have a duty to address human rights violations but are also better equipped to do so. In the case of *Association Mauritanienne des droits de l'Homme v Mauritania*,³ the Commission emphasized that local remedies refer to the ordinary legal remedies accessible within jurisdictions for individuals seeking justice. Similarly, in *Cudjoe v Ghana*,⁴ the Commission clarified that local remedies, in principle, encompass courts of a judicial nature.
49. In the case of *Jawara v Gambia*,⁵ the Commission acknowledged flexibility in applying the exhaustion of local remedies rule. It stated that Complainants are expected to exhaust local remedies only to the extent that these remedies are available, effective, and adequate. Furthermore, the Commission elaborated on this principle by affirming that a remedy is considered available if the petitioner can pursue it without hindrance; it is deemed effective if it holds the possibility of success. It is considered sufficient if it is capable of addressing the complaint satisfactorily.
50. In light of the submissions, the Complainant's claims for non-exhaustion of local remedies are centered around obstruction of justice from the judiciary, which hampers his practice as an Attorney, and unduly prolonged remedies. According to the Complainant, the Respondent State utilizes the judiciary to discriminate against him. The Complainant also asserts that the statement of the Vetting Board substantiates this allegation. In particular, the Complainant argues that the April 25, 2012, public ruling by the Judges and Magistrates Vetting Board of Kenya highlights the lack of effective access to local remedies.
51. The Complainant also asserts that he lodged a Notice of Appeal in the High Court on October 1, 2012, and formally requested the Deputy Registrar for certified copies of the proceedings and the ruling. The Complainant alleges that the Deputy Registrar caused unexplained and excessive delays in providing the requested copies, resulting in approximately five years, spanning from October 1, 2012, to July 17, 2017. The Complainant states that the Court acknowledged its responsibility for these protracted delays and issued a

³ Communication 242/01 – Interights, Institute for Human Rights and Development in Africa and Association mauritanienne des droits de l'Homme v Mauritania (2004) ACHPR para 27

⁴ Communication 221/98 - Alfred B. Cudjoe v Ghana (1999) ACHPR, para 14

⁵ Communications 147/95_149/96- Jawara v Gambia





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Certificate of Delay on July 26, 2017. Upon receipt of the certified copies, the Complainant states that he expeditiously lodged Volume One and Two of Civil Appeal No. 261 of 2017 with the Court of Appeal in Nairobi on July 31, 2017, and served the Respondent's Advocates on August 1, 2017. The Complainant highlights that, as of the drafting of this Communication for submission to the Commission, the Court of Appeal had not yet scheduled the appeal for a substantive hearing.

52. In **Amnesty International v. Sudan**, the Commission highlighted the importance of exhausting local remedies before resorting to international mechanisms.⁶ The Commission emphasized that the exhaustion requirement is based on the principle of subsidiarity, which promotes the primary responsibility of domestic authorities in protecting and enforcing human rights. Only when local remedies have been exhausted or proven ineffective are recourse to international mechanisms appropriate.
53. The alleged obstruction of justice raises significant apprehensions regarding the Complainant's professional association with the judiciary. However, this Commission believes that the allegation of a lack of trust in the judiciary does not automatically render all local remedies unavailable or ineffective. In assessing the functionality of local remedies, factors such as legal provisions, procedural guarantees, and past precedents should be considered. While the allegation of a lack of trust holds significance, it does not exempt individuals from the requirement to exhaust local remedies.
54. The exhaustion requirement is a fundamental principle of international law, ensuring the proper functioning of domestic legal systems and granting national authorities the opportunity to address alleged violations before international intervention. Upholding the obligation to exhaust local remedies, even in cases where a lack of trust is alleged, strikes a balance between local accountability and the protection of human rights. It recognizes that local remedies can provide redress in certain instances, and bypassing them without sufficient justification may undermine the integrity of the domestic legal system.
55. Within the context of this Communication, the Commission acknowledges the Complainant's assertion regarding the ruling of the Vetting Board as interference with the judiciary; however, this does not absolve the Complainant from the obligation to exhaust available local remedies. Nevertheless, the Complainant has not presented substantiated evidence to support his

⁶ Communications 48/90, 50/91, 52/91, 89/93-Amnesty International and Others v. Sudan, para 32





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obstruction claim and how it hindered him from pursuing the available local remedies.

56. In reference to the ruling of the Vetting Board, the Commission recalls its previous decision in the cases of *Peter Odiwuor Ngoge v Republic of Kenya and Peter Odiwuor Ngoge and Joseph Njau v Republic of Kenya*.⁷ In these Communications, the Commission determined that the Supreme Court's decision concerning the Vetting Board does not preclude the Complainant from pursuing domestic cases in local courts. The Commission emphasized that the findings of the Vetting Board and the Complainant's domestic cases are distinct from each other.
57. Hence, consistent with its established jurisprudence, the Commission affirms that the contention regarding the obstruction of justice and the decision of the Vetting Board does not exempt the Complainant from the requirement to exhaust domestic remedies.
58. The Complainant also asserts that the local remedies were unreasonably prolonged, as supported by the High Court's Certificate of Delay, which hindered the exhaustion of domestic remedies.
59. According to Article 56(5) of the African Charter, while there are exceptions to the exhaustion requirement, such as when domestic remedies are inaccessible, ineffective, or unduly prolonged, the general rule remains that complainants should make a genuine effort to exhaust local remedies before seeking international recourse. This approach encourages individuals to engage with domestic mechanisms, fostering dialogue and facilitating the resolution of human rights issues within their countries.
60. Although the Commission lacks standardized criteria for determining undue prolongation, it evaluates each case individually. The Commission has also relied on the common law principle of "reasonable person's standard," which serves as a benchmark to assess whether the duration of a delay in resolving a legal matter is reasonable from an objective standpoint. It considers various factors and circumstances surrounding the delay, including the complexity of

⁷ Communications 485/14 -Peter Odiwuor Ngoge v Republic of Kenya and 535/15 - Peter Odiwuor Ngoge and Joseph Njau v Republic of Kenya, paras 67 and 68



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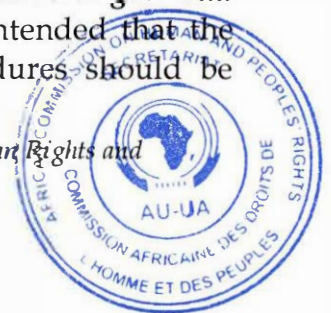
the case, the nature of the legal proceedings, the availability of resources, the conduct of the parties involved, and any other relevant considerations⁸.

61. In the present case, the Complainant emphasizes the delay in receiving the High Court's certified copies of proceedings and rulings. Specifically, the Complainant states that the High Court acknowledged the delay by issuing a Certificate of Delay on **July 26, 2017**. Subsequently, the Complainant filed his appeal with the Court of Appeal on **July 31, 2017**, and served the Respondent State on **August 1, 2017**. As of preparing this petition, the Complainant reports that the Court of Appeal had not yet scheduled a hearing. The Communication to the Commission was filed on **October 23, 2017**, approximately **three months** after filing with the Court of Appeal.
62. The central issue under consideration is whether the duration of the remedies sought from the Court of Appeal, specifically the three months, can be deemed excessive and whether this delay had an impact on the Complainant's ability to exhaust local remedies. The question is whether the delay was unreasonably long and justifiable and to what extent it affected the Complainant's situation.
63. The Commission notes that the Complainant has not provided a clear and reasonable explanation for why the three months should be deemed excessive. If such a justification had been provided, it would have shifted the burden of proof to the Respondent State, requiring them to explain the alleged delay in the Court of Appeal's consideration of the Complainant's case.
64. In order to address the matter at hand and evaluate the merits of the Complainant's allegation of delay in considering his claim by the Court of Appeal, the Commission will employ the common law "*reasonable person's standard*." This standard will objectively assess whether the Complainant made reasonable efforts to exhaust local remedies or failed to take any action. The Commission will consider the various factors and circumstances surrounding the Communication to determine the reasonableness of the Complainant's actions or inaction.
65. In *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe*,⁹ the Complainants contended that the exception to the rule regarding unduly prolonged procedures should be

⁸ Communication 293/04 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa /Zimbabwe*, available at:

http://www.achpr.org/fr/communications/decision/293.04/_paras_57_to_61

⁹ Ibid, para 57





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applied. They argued that the delays in finalizing the petitions by the Supreme and High Courts were unreasonable and, according to the Complainants, justified the invocation of the exclusionary rule for exhaustion of local remedies since they were non-existent. The Commission's ruling in that case stated that the exception under Article 56 (5) requires not only a prolonged process but one that is "unduly" prolonged. In that case, "unduly" was interpreted as "excessively" or "unjustifiably."¹⁰ Consequently, the Commission ruled that the Complainant must justify the excessive prolongation to qualify as unduly prolonged.

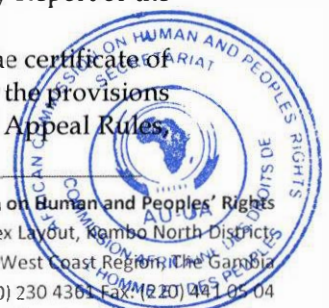
66. In the aforementioned case, the Commission deliberated upon the circumstances and applied the "reasonable person's test" doctrine. Employing this test, the Commission determined that a delay exceeding four years following the submission of the election petitions constituted an unreasonably prolonged process of exhausting local remedies.¹¹
67. Furthermore, in *Minority Rights Group International and Environnement Ressources Naturelles et Développement (on behalf of the Batwa of Kahuzi-Biega National Park, DRC) v. Democratic Republic of Congo (DRC)*,¹² after considering the circumstances of the case and the reasons presented by the Complainant, the Commission ruled that the procedure for domestic remedies was unduly prolonged, particularly in light of eight years of proceedings at the lower courts and an additional two years of pending action at the Supreme Court without a scheduled hearing date.
68. After carefully considering the circumstances presented in the current case and based on the Commission's previous jurisprudence, particularly the *Zimbabwe case*, this Commission concludes that three months cannot be deemed as constituting an 'excessive' delay. This determination is made by applying the "reasonable person's test" to assess the reasonableness of the timeframe in question.
69. Moreover, the Commission contends that the Complainant had the option to pursue an expedited appeal. Rule 47(1) of the 2010 Rules of Court of Appeal¹³

¹⁰ Ibid, para 60

¹¹ Ibid, para 61

¹² Communication 588/15 *Minority Rights Group International and Environnement Ressources Naturelles et Développement (on behalf of the Batwa of Kahuzi-Biega National Park, DRC) v. Democratic Republic of Congo (DRC)* (published in the combined 54th and 55th Activity Report of the ACHPR) para 55

¹³ The Court of Appeal Rules, 2010 (which were in effect when the High Court issued the certificate of delay) have since been replaced by The Court of Appeal Rules, 2022. It is noteworthy that the provisions related to the issue being discussed remain the same in both sets of rules. The Court of Appeal Rules,





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explicitly provides for urgent hearings, requiring the applicant to submit a certificate of urgency signed by either the applicant or their legal representative. This certificate must be supported by an affidavit presenting the grounds upon which the applicant relies to establish the necessity for an expedited review. The Commission believes that the Certificate of Delay issued by the High Court could have served as a substantiating document to bolster the Complainant's case for urgency.

70. Additionally, it is noteworthy that even when the Court is on vacation when filing the appeal, Rule 47(4) of the same Rules permits urgent applications to be considered during both term and vacation periods.
71. Regrettably, it is evident that the Complainant did not seize the opportunity to make use of this provision and pursue an expedited appeal despite the availability of Rule 47(1) of the 2010 Rules of the Court of Appeal.
72. This Commission has established that merely asserting the unavailability of local remedies is insufficient; it must be demonstrated that genuine efforts were made to exhaust them before deeming them futile. This principle was exemplified in the case of *Ousman Manjang v The Gambia*,¹⁴ where the Complainant argued that local remedies were severely limited and unlikely to be effective. However, the Commission deemed the lack of effort inexcusable, making the Communication inadmissible. A similar principle was applied in *Ceesay v The Gambia*,¹⁵ where the absence of an attempt to exhaust local remedies led to the dismissal of the claim. Therefore, it is crucial to genuinely "attempt" to exhaust local remedies.
73. In light of the above observations and analysis, the Commission finds that the conditions of Article 56 (5) have not been satisfied.
74. Article 56(6) of the African Charter provides that Communications should be '*submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter.*'
75. As discussed in the paragraphs above, the Commission has determined that the Complainant failed to exhaust local remedies. When local remedies have not been exhausted, Complainants may submit to the Commission within a reasonable time from when they realized that local remedies were unavailable

2010 can be accessed
<http://kenyalaw.org/8181/exist/kenyalex/sublegview.xql?subleg=CAP.%209>.

¹⁴ Communication. No. 131/94- Ousman Manjang v The Gambia, para 1

¹⁵ Communication. No. 86/93 Ceesay v The Gambia





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or ineffective. In this particular instance, however, the Commission also held that the Complainant needed to demonstrate the unavailability or ineffectiveness of local remedies. As was the position of the Commission in *Givemore Chari (represented by Gabriel Shumba) v Zimbabwe*¹⁶ and other decisions, in situations where local remedies have not been fully exhausted, the admissibility of the Communication is deemed premature. Therefore, if a Complainant has not yet pursued all domestic remedies, it can be concluded that the Communication does not satisfy the conditions outlined in Article 56 (6) of the African Charter.

76. Regarding Article 56 (7) of the African Charter, the Commission has not seen any indication or evidence that the present Communication has been settled before any other international forum. Accordingly, the Commission finds that the requirement of Article 56 (7) of the African Charter has been satisfied.

The decision of the Commission on Admissibility

77. Given the above, the African Commission on Human and Peoples' Rights:

- i. Declares this Communication Inadmissible for failure to comply with Articles 56(5) and 56(6) of the African Charter;
- ii. Notifies its decision to the Parties in accordance with Rule 118 (4) of its Rules of Procedure 2020.

Done, this 80th Ordinary Session held virtually from 24 July to 2 August, 2024

¹⁶ Communication 351/07 - Givemore Chari (represented by Gabriel Shumba) v Republic of Zimbabwe (2013) ACHPR.

