



**IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION
AT ARUSHA**

APPEAL NO. 1 OF 2012

**(Coram: H.R. Nsekela P; P.K. Tunoi VP; E.R. Kayitesi, L. Nzosaba and
J.M. Ogoola, JJA)**

BETWEEN

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF RWANDA.....APPELLANT**

AND

PLAXEDA RUGUMBA.....RESPONDENT

**(Appeal from the Ruling of the First Instance Division at Arusha by M.S. Arach
Amoko, DPJ; J.J. Mkwawa, and Isaac Lenaola, JJ dated 1st December 2011)**

JUDGMENT OF THE COURT

Introduction

1 By a reference dated 8th November 2010 lodged in the First Instance Division on the same date, **PLAXEDA RUGUMBA**, the Respondent herein, and who

described herself as the natural elder sister of one, Seveline Rugigana Ngabo; ("the subject"); a Lieutenant Colonel in the Defence Force of the Republic of Rwanda, a member of the East African Community sought, *inter alia*, the following declarations:-

- (a) The arrest and detention by the 2nd Respondent's agents without trial of Lieutenant Colonel Seveline Rugigana Ngabo is a breach of the fundamental principles of the Community, to wit; Articles 6(d) and 7(2) which demand that Partner States shall be bound to govern their populace on the principles of good governance and universally accepted standards of human rights.
- (b) The failure by the 1st Respondent to investigate the failure of the Partner State Rwanda to fulfill obligations of the Treaty enunciated in Articles 6(d) and 7(2) and submit its findings as required under Articles 29(1), is wrongful.

- 2 The Respondent deponed, in her affidavit in support of the Reference, that she was informed by her sister-in law that on 20th August, 2010, her brother Lieutenant Colonel Ngabo was called from his home at Kabeza, Kanombe, Kicukiro Commune to his office; where he was immediately placed under arrest and, thereafter, detained by the agents of the Rwanda Government.
- 3 His next of kin, including his wife and children, have not been informed of where he is detained and Lt. Col. Ngabo has not been visited by his family doctor, nor a member of the Red Cross and is held incommunicado.
- 4 Up to the time the Reference was filed, Lt. Col. Ngabo had not been formally charged before any Court of Law in Rwanda, nor had it been disclosed what offence he is alleged to have committed.

- 5 The Respondent averred in the Reference that Lt. Col. Ngabo's wife was not in a position to commence habeas corpus application to cause the release of her husband within Rwanda as the Government was hostile to such process and her attempts to follow up the detention of her husband had led to her being harassed into hiding.
- 6 The Respondent is an adult Ugandan of Rwandan extraction, and stated that she filed the Reference to protect the fundamental human rights of her brother.
- 7 It was the Respondent's case that the Appellant was in breach of Articles 6(d) and 7(2) of the Treaty when it unlawfully detained the subject. Moreover, since the Appellant had specifically subscribed to the African Charter on Human and Peoples Rights as one of the sources of the fundamental principles governing the achievement of the objectives of the EAC, (in Article 6(d) of the Treaty), the Respondent averred that, the detention of the subject should be held to be in breach of the Treaty.
- 8 The Respondent further contended that Article 6(d) of the Treaty enjoins a Partner State to govern its people in accordance with the principles of good governance including strict adherence to the Principles of Democracy, Rule of Law, and the protection of human and peoples' rights as enshrined in the African Charter on Human and Peoples Rights. It was her submission that she had placed sufficient evidence by way of affidavits, that the subject was arrested and detained without being charged before a competent Court and he was therefore not afforded the opportunity to appear and defend himself; and that those actions were against the Rule of Law, and clearly a breach of Articles 6(d) and 7(2) of the Treaty (let alone of the Laws of Rwanda).

- 9 As to jurisdiction, she averred that the Court has the jurisdiction to make a declaration under Article 27(1) of the Treaty that the act of arresting and detaining the subject without due process, was in breach of the Treaty and the Government of Rwanda should bear culpability in that regard.
- 10 The Respondent submitted that she had no legal obligation to exhaust local remedies in Rwanda before filing the present Reference. She stated that the special jurisdiction conferred on this Court to interpret the Treaty cannot be assumed by any local Court in a Partner State and in the instant case, the remedy sought can only be granted by this Court and not by any Local Court in Rwanda.
- 11 The Respondent asserted that the Reference was filed within time because whereas Article 30(2) of the Treaty limits the time for filing proceedings to two (2) months after the cause of action has arisen, in the instant case, the subject was arrested on or about 20th August 2010 while the Reference was filed on 8th November 2010 the “ ***detention whose legality is the subject of this Reference continued up to 28th January 2011, when the subject was put in preventive detention by an order of Court as provided by the Laws of Rwanda.***” She submitted therefore that by the time the Reference was filed, the cause of action was still subsisting and Article 30(2) cannot apply to bar the present proceedings.

Response to the Reference

- 12 It is noteworthy that the Reference had enjoined the Secretary General of the EAC as a party for alleged failure to investigate the State of Rwanda for not fulfilling its obligations under the Treaty; and to submit his finding as mandated

by Article 29(1) of the Treaty. However, the case against him was dismissed by the Court below and hence his absence in this appeal.

13 The response by the Appellant was terse. It opposed the Reference and sought the Court of the First Instance Division to dismiss the Reference on the following grounds:-

- (i) The reference was filed in breach of Article 30(2) of the Treaty and it was accordingly time-barred;*
- (ii) The Court has no jurisdiction to determine the issues raised since the Court has not been clothed with jurisdiction over abuse of human rights;*
- (iii) The reference cannot be entertained by the Court since local remedies have not been exhausted;*
- (iv) The Government of Rwanda has at all times acted by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and maintenance of accepted standards of human rights and so the Reference is without merit."*

Decision of the First Instance Division

14 In a well-reasoned judgment the Court below concluded: firstly, that the Court had jurisdiction to hear and determine the Reference; secondly, that the Reference was filed within the time prescribed by the Treaty; thirdly, that the Reference was not barred by the rule of exhaustion of local remedies; and finally that the Appellant/Respondent, the Republic of Rwanda, had breached the aforesaid Articles of the Treaty. The Court then proceeded to grant the declaration as sought by the Applicant/Respondent.

15 Aggrieved by the said decision, the Appellant on 6th February 2012 lodged this appeal based on five grounds of appeal which were listed in the Memorandum of Appeal as follows:-

"1 The East African Court of justice (EACJ) had no jurisdiction to entertain the reference;

2 It was not permissible to file the application out of time;

3 The applicant should have exhausted local remedies before filing the reference, a requirement of Customary international Law;

4 The declaration issued by the First Instance Division that 2nd Respondent's arrest and detention of Lieutenant Colonel Ngabo was in violation of the law of Rwanda had no basis in law, because the Rwanda courts had issued a similar declaration;

5 In rendering justice on Rugigana's irregular detention, Rwanda was fulfilling its obligations under national laws and international instruments ratified by Rwanda, including Articles 6(d) and 7(2) of the EAC Treaty. Consequently, there is no legal or factual basis for this Honorable Court to declare that Rwanda is in breach of the fundamental principles of the Community provided for in Articles 6(d) and 7(2) of the EAC Treaty."

16 The Appellate Division of the Court is mandated to hear and dispose of this appeal under Article 23(3) and 35A of the Treaty establishing the East African Community (the "Treaty") and Rule 77 of the EACJ Court Rules of Procedure.

Scheduling Conference

17 During the Scheduling Conference the Appellant's Counsel stated that he would not argue all the grounds listed in the memorandum of appeal.

18 It was also noted that the judgment of the Court below did not address, discuss nor make findings on each of the grounds of appeal *seriatim*.

Jurisdiction

- 19 The Appellant, through his learned Counsel Mr. Havugiyaremye submitted that the Court below had no jurisdiction to entertain the matter which concerns the arrest and detention of Lt. Col. Ngabo. The learned Counsel averred, further, that the said Court in considering the issue had gone beyond its interpretative mandate and did not respect the provisions of the Vienna Convention on the Law of Treaties in that it had not interpreted the Treaty "*in good faith and in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its objects and purposes.*"
- 20 Though Mr. Havugiyaremye admitted before us that the Court below had jurisdiction to interpret the Treaty, he however contended that in doing so the Court went beyond its interpretative mandate which event clouded and erased its jurisdiction over the matter.
- 21 Mr Rwakafuuzi, learned counsel for the Respondent, had vigorously argued in reply that by dint of Article 30(1) of the Treaty, legal and natural persons resident in the Partner States are granted the right to refer an action or decision of any Partner State, for the Court's interpretation under Article 27(1) of the Treaty; and for the Court to determine whether or not that act or decision infringes on any provision of the Treaty.
- 22 The crux of the Appellant's case is simple: namely, that since the matter in issue relates to human rights, the Reference was ill-conceived and it ought not to have been entertained by the court, as Article 27(1) of the Treaty specifically limits the jurisdiction of the Court only to the interpretation and application of the provisions of the Treaty.

The EAC Treaty and Human Rights

23 It is trite that the jurisdiction of the Court to entertain human rights disputes still awaits the operationalisation of a Protocol under Article 27 (2). It must follow therefore that the Court may not, as of now, adjudicate disputes concerning violations of human rights *per se*: see James Katabazi & 21 Others v EAC secretary General and the Attorney-General of Uganda (Reference No 1 of 2007).

However, of relevance to this appeal is Article 6 (d) of the Treaty which unambiguously states that one of the fundamental objectives of the Treaty is:-

“good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equity, as well as the recognition, promotion of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples Rights;” (emphasis ours)

24 The commitment by the Partner States to the above-quoted objective is reiterated in Article 7(2), which emphasizes thus:

‘(2) The Partner States undertake to abide by the principles of good governance, including adherence to the principle of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.’

Though the EAC Treaty is bereft of a chapter on Human Rights, nonetheless, it contains the hint of such rights in a number of its provisions. The Hon Mr Justice James Ogoola, Judge of Appeal, EACJ and Lord Justice Comesa Court of Justice, in his

Keynote Speech: "WHERE **TREATY LAW MEETS CONSTITUTIONAL LAW**", presented at the University of Dar es Salaam on 18th May 2012, observed as follows:

*"The EAC Treaty is emphatic in its intention under Article 27(2) to extend human rights jurisdiction to the EACJ, at a suitable subsequent date. One possible interpretation of this is to say that the Treaty's "hints" on human rights are ineffectual. Another, and more plausible view, is to hold that there is a layer of inchoate human rights in the Treaty, waiting for practical implementation and operationalisation via the channel envisaged in article 27(2). In the case of **James Katabazi & 21 Others v EAC Secretary General and the Attorney General of Uganda (Reference No. 1 of 2007: Judgment of 1st November, 2007)**, the EACJ gravitated toward the second view. The Court held that:*

'While the Court will not assume jurisdiction to adjudicate human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of Human rights violations'.

*In all its subsequent cases on this matter of human rights jurisdiction, the Court has consistently upheld the same view, which is articulated in the **Katabazi** case above-see, for instance, the recent case of **Attorney General of Kenya v Independent Medical Legal Unit (Appeal No. 1 of 2011: Judgment of 15 March 2012)**, in which the Appellate Division held that:*

'In these circumstances, we are of the view that the decision taken by the First Instance Division that it would not abdicate its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violations' was sound, because the

EACJ is the Institution mandated to determine whether a Partner State has or has not breached, infringed, violated or otherwise offended the provisions of the Treaty.”

We find, as indeed this Court did hold in the above case of **Independent Medical Legal Unit**, that there is in this instant Reference:

“a cause of action flowing from the Treaty (that is different and distinct from violations of human rights) on which to peg the Court’s jurisdiction.... [and which provides] the legal linkage and basis for this Court’s jurisdiction... separate and distinct from human right’s violations.”

In this regard, this Court reflecting on the **Katabazi case** – observed that:

“In [Katabazi], this Court had occasion to apply elements of the doctrine of a special cause of action under the EAC Treaty. In that case the cause of action in the matter before Ugandan courts was contravention of the provisions of the Constitution of Uganda (regarding prevention by the Army of decisions of the High Court and the Constitutional Court). Before the EACJ, however, the cause of action was totally different – namely: violation (by the Partner State) of the principles of the Rule of Law and of Good Governance enshrined in, inter alia, Articles 5, 6, 7 and 8 of the EAC Treaty; and, therefore, an infringement of the Treaty.”

The Republic of Rwanda and EAC Treaty and other International Covenants

25 The Republic of Rwanda is a Community member and a signatory to the EAC Treaty. It is also a signatory to the African Charter on Human and People’s

Rights. On 9th July 2010 it ratified the African Charter on Democracy, Elections and Governance and deposited the Instrument of Ratification on 14th July 2010. By the latter Charter State Parties who subscribe to it are obligated by Article 3 as follows:-

“State Parties shall implement this Charter in accordance with the following principle:-

1 Respect for human rights and democratic principles”.

Similarly, Article 4 of Chapter 4 of that Charter states as follows:-

“Democracy, Rule of Law and Human Rights

1 State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights.”

26 It is manifestly plain from a reading of Article 6 (d) that the EAC Treaty was promulgated with a specific aim, namely, to foster the Rule of Law. Also, the EAC Treaty clearly enjoins a Partner State to govern its people in accordance with the principles of good governance, including adherence to the principles of democracy, the rule of law, protection of human and people’s rights in accordance with the African Charter on Human and People’s Rights. Article 6 of that Treaty, mandates each State Party to guarantee individual’s liberty; and not to deprive its subjects of their freedom except for reasons laid down by law. In particular, none may be arrested or detained arbitrarily.

27 To this end this Court definitively affirmed in the **Independent Medical Legal Unit** case (*supra*) that:

“The respective Partner States’ responsibilities to their citizens and residents have, through those States’ voluntary entry into the EAC Treaty, been scripted,

transformed and fossilized into the several objectives, principles and obligations now stipulated in, among others, Articles 5, 6 and 7 of the Treaty, the breach of which by any Partner State, gives rise to infringement of the Treaty. It is that alleged infringement of the Treaty which, through interpretation of the Treaty under Article 27(1), constitutes the cause of action in a Reference such as the instant Reference. It is not the violation of human rights under the Constitutions and other Laws of [the Partner State] or of the international Community, that is the cause of action in the Reference at hand."

Evaluation of the Evidence

- 28 It is not in dispute that the subject was held in custody without lawful authority from 20th August 2010 until 28th January, 2011. In his affidavit sworn on 16th June 2011, the Attorney General of the Republic of Rwanda deponed, *inter alia*:-

"that on 28th January 2011, the Military High Court ruled that the detention of Lieutenant Colonel Ngabo from the date he was arrested until the date his case was brought before the court was irregular and contravened the provisions of articles 90 to 100 of the Rwandan Code of Criminal Procedure. However, basing on strong reasons to suspect him and the gravity of the crime against him, the Military High Court ruled on his preventive detention, applying article 89 of the Rwandan Code of Criminal Procedure, which provides that " when a person is detained unlawfully, A judge or magistrate then makes an order arresting or releasing the person on bail..."

That in effect the mischief in relation to the irregular detention was cured by the decision of the Military High Court when it regularised the pre-trial detention.

Consequently, the detention of Lieutenant Colonel Rugigana Ngabo is regular and in accordance with the Laws of Rwanda.

That for the purposes of investigation and the gravity of the charges against Lieutenant Colonel Rugigana Ngabo, which require enough time and security precautions, the military prosecution complied with Article 100 of the Rwandan Code of Criminal Procedure, which provides that 'An order authorizing for preventive detention remains in force for 30 days including the day on which it was delivered. After the expiry of that time, it can be renewed for one month and shall continue in that manner.' The same article provides that the time cannot be extended after one year for felonies. The crime against Lieutenant Colonel Rugigana Ngabo is qualified as a felony under article 20 of Rwanda Criminal Code."

- 29 To hold a citizen in preventive detention without lawful authority and in breach of the laws of the State of Rwanda; to deprive him of his liberty for a period of about five (5) months; not to inform him or his family of the reason(s) for detention, obviously breach the principles set out in the EAC Treaty to which the Republic of Rwanda is a signatory.
- 30 We are satisfied that the Appellant gave no information at all about why, where and how it was detaining the subject. Of particular importance in this appeal is the fact that there was no evidence at all that the subject was informed of the reason for his detention, neither was the family informed. The Appellant, furthermore, did not even issue a Gazette notice, nor any official communication regarding the detention.
- 31 Though the arrest of the subject on suspicion of having committed a crime known to the Laws of the Republic of Rwanda would not, by itself, breach the EAC Treaty or other international human rights covenants and instruments,

however, the detention beyond the time permitted by law, does amount to a breach.

- 32 Moreover, the action taken against the subject by the Appellant in holding him incommunicado and in ignorance of the charges was, in all respects, not transparent; and offends the Principles of Articles 6 (d) and 7 (2) of the EAC Treaty.

Exhaustion of Local Remedies

- 33 It was vigorously argued by the Appellant before us that the subject should have exhausted local remedies before filing the reference in this Court and that this was a requirement of customary international law. This submission in our view is now moot since it was agreed by both parties before the Court below that upon the Reference being filed; the Republic of Rwanda produced the subject before the Military High Court of that country.

- 34 Furthermore, the Respondent did not challenge the rule which requires that international judicial proceedings may only be instituted following the exhaustion of local remedies. Rather, she contended that the present case is one in which an exception to the rule may be invoked due to the peculiar facts of the case; and again, the case being one in which an exception to the rule is authorized by the rule itself, since the First Instance Division found it as a fact that it was not possible, in the circumstances, to tell the subject to go back to Rwanda and exhaust whatever remedies, if any, were available there.

- 35 The obligation to exhaust domestic remedies forms part of customary international law, recognized as such in the case law of the International Court of Justice. See **The International Case (Switzerland v United States)** judgment of 21st March 1959. It is also to be found in other international

human rights treaties, for example, the International Covenant on Civil and Political Rights (Article 4 9(1) (c) and the Optional Protocol (Articles 2 and 5 thereto and the African Charter on Human and Peoples' Rights (Article 46). However, the EAC Treaty does not have any express provisions requiring exhaustion of local remedies. In our view, therefore, though the Court could be flexible and purposeful in the interpretation of the principle of the local remedy rule, it must be careful not to distort the express intent of the EAC Treaty. In the instant case, in any event, given the peculiar circumstances of this particular case it is difficult if, not impossible, to see what local remedies remained to be exhausted – in view of the State's own express admission and concession to the effect that the five-month detention in question:

"was irregular and contravened the provisions of Articles 90 to 100 of the Rwanda Code of Civil Procedure...

That in effect, the mischief in relation to the irregular detention was [only] regularized by the decision of the Military High Court when it regularized the pre-trial detention".

-See the above - quoted affidavit of the Hon. The Attorney General of the Republic of Rwanda, dated 16th June, 2011.

When did time begin to run?

- 36 It was further averred by the Appellant that the Reference was filed out of time and ought not to have been entertained by the Court below. In our view, it was not possible with any degree of certainty to determine when time begun to run. The pleadings do not tell us. Furthermore, the affidavits of the subject's sister and wife are merely hearsay in that they only depone that "they were told" of the detention. We think that the sister and wife should not be penalised for not knowing when the subject was detained. After all, there is sufficient evidence

on record to sustain the contention that the Government of Rwanda was largely to blame for withholding information on the detention of the subject.

37 It is obvious that the Respondent could not file any Reference in this Court concerning the arrest of her brother, unless and until she had knowledge of the detention --- namely: when, where, why, and by whom the brother had been detained. The Respondent averred knowledge only of her brother having gone missing. She did not know if he had been arrested – if so, by whom, and for what reason, purpose of offence; *nor, indeed, where he was being kept*, and by whom. The Appellant, on the other hand, contended that the Respondent knew all these; and that she did so right from the day of the arrest of her brother (i.e. 20 August 2010). It is our view that, in these circumstances, it is the Appellant who had the burden to show when the sister and the wife of the subject knew the date the subject was detained. To contend that they should have known of the detention through such foreign media as the BBC is, with great respect, untenable since these are not State or Official organs for informing the citizens of Rwanda about the official affairs of the State – and, particularly so, regarding information touching the security affairs of the State.

38 We are satisfied that the Appellant failed to discharge the burden of showing the Respondent's knowledge of the critical date; and as the principle – *"he who alleges must prove"* – not having been satisfied, the benefit of the doubt must go to the Respondent.

Conclusion

39 In light of the above considerations and findings, the appeal fails on all five grounds. Accordingly, the Court holds as follows:

- (1) The judgment of the First Instance Division is upheld, but for the different reasons discussed above.

- (2) The Court has jurisdiction to interpret and apply the provisions of the EAC Treaty, including Articles 6 (d), 7 (2) and 8 (1) (c) of that Treaty.
- (3) The failure by the appropriate Authorities of the Republic of Rwanda:
 - (a) To produce Lt. Col. Seveline Rugigana Ngabo before a competent Court of law beyond the forty eight (48) hours prescribed under Rwandan Laws; and
 - (b) To charge him with specific offences for his arrest and detention, as well as to inform him, his family or his lawyers of the time of his arrest/detention--for a period of five (5) months, during which time he was held incommunicado-- was fundamentally inconsistent with Rwanda's express undertakings under Articles 6 (d), 7 (2) and 8 (1) of the Treaty: to observe the principles of Good Governance, including in particular, the principles of adherence to the Rule of Law, and the promotion and protection of human rights. These failures, singly and collectively, constituted an infringement of the said provisions of the Treaty.
- (4) Unlike other legal regimes in this field, the EAC Treaty provides no requirement for exhaustion of local remedies as a condition for accessing the East African Court of Justice.
- (5) In the circumstances of this particular case, the onus was on the Appellant to establish the time at which the detainee or his family members or his lawyers were told or otherwise made aware of the detention of Lt. Col. Ngabo. The Appellant failed to discharge that burden. He cannot now turn around to impeach the Respondent for any failure to file the Reference within the two (2) months prescribed under Article 30 (2) of the Treaty.
- (6) The Appellant shall bear the Respondent's costs of this appeal and of the Reference in the First Instance Division.

It is so ordered.

Dated, delivered and signed at ARUSHA thisday of June, 2012.

Harold R. Nsekela

PRESIDENT

Philip K. Tunoi

VICE PRESIDENT

Emily R. Kayitesi

JUSTICE OF APPEAL

Laurent Nzosaba

JUSTICE OF APPEAL

James Ogoola

JUSTICE OF APPEAL