
In the matter of

Atabong Denis Atemnkeng

vs.

The African Union

Application N°. 014/2011

Dissenting Opinion

Justice Sophia A.B. Akuffo – President

Justice Bernard M. Ngoepe

Justice Elsie N. Thompson

The facts of the case have been succinctly outlined in the majority judgment, we adopt them as ours.

We have read the reasoning in the majority judgment and unfortunately do not agree with it. In Application N°. 001/11 Femi Falana *vs* African Union we dissented - Akuffo, Ngoepe and Thompson JJ. We adopt the dissenting opinion in that case as if the reasoning is herein reproduced, and are indeed fortified all the more by the submissions made by the Applicant herein.

The Applicant contended that 'With respect to the promotion of human and peoples' rights *in accordance with the ACHPR* (African Charter on Human and Peoples' Rights) Article 34(6) particularly violates Articles 2, 3 and 7 of the ACHPR. ... In all these provisions, the Charter stresses the right of ***every individual*** to have access to justice; it stresses the equality of parties before the law. However, by operation of Article 34(6) of the Protocol, all victims of human and peoples' rights in countries which have not expressed their acceptance of the Court's competence for cases brought against them are without access to any justice whatever.'

He argued that, 'This restriction placed on the enforcement of human and people' rights by Article 34(6) should further be placed in the light that human rights are not rights granted by states, but rights that attach to each individual person by virtue only that he

or she is human. States may articulate them, but states are not their origin. Therefore not even states have the right to obstruct the enjoyment of those rights, and worse, to be given the right to do so under the instruments of a continental organization purporting to stand for justice. Given that human rights are not derived from states but from our status as human beings, every state that violates those rights ought to be held accountable.'

Further, that 'Anyone reading the Protocol would wonder how the true subjects of human and peoples' rights law could be so systematically excluded from access to a Court purportedly created to implement and enforce human and peoples' rights. '

The Applicant maintains that 'It is a gross violation of the basic principles of law for violators to decide whether their victims shall have access to the courts of law or not. Article 34(6) effectively grants State Parties the right to decide whether their victims shall have access to the African Court or not, contrary to the fundamental principles of Law. '

We agree with the Applicant in his argument that Article 34 (6) of the Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol) is incompatible with the Protocol

itself and inconsistent with the African Charter on Human and Peoples' Rights (the Charter). It also violates the fundamental right of the Peoples' of Africa to ventilate their grievances in a Court established for that purpose.

Member States must not only create institutions for the protection of human rights but they must ensure that the instruments used by the institutions meet international standards and do not derogate from the protective mandate, enshrined for the Peoples of Africa in the Charter. They cannot and should not be allowed to abandon their responsibility and to approbate and reprobate. And where they have purported to do so, the African Union, the body they have established to facilitate their collective will and action, can and should be amenable to being held liable for such failure and or abandonment.

The right of access to justice is a peremptory norm- jus cogens. This right is in the African Charter and other International Human Rights instruments to which State parties are signatories. The instruments have been properly stated by the Applicant at page 11 of his rejoinder on June 6, 2012. See

i.Article 7 of the African Charter on Human and Peoples' Rights

ii.Article 8 of the Universal Declaration of Human Rights

iii.Article 2(3) of the International Covenant on Civil and Political Rights and;

iv.Article 10(3) of the African Charter on Democracy, Elections and Governance

We agree with the applicant on this assertion. It is for this reason that we distinguish our position in Femi Falana v African Union as enunciated in our Dissenting Opinion therein.

The State Parties have the duty to ensure that the Peoples of Africa have access to judicial protection of their rights and this cannot be achieved with the clog of Article 34(6) of the Protocol. The right to access the Court is an essential element in the protection of human rights. In ensuring access to Court, the Court is competent to set aside any impediment. It is for the above reasons, together with the reasons we have already articulated in the aforesaid case of Femi Falana v. the African Union, that we have no hesitation declaring Article 34 (6) null and void.

Justice Sophia A.B. Akuffo – President

Justice Bernard M. Ngoepe

Justice Elsie N. Thompson

Dated in Arusha this fifteenth day of March in the year Two Thousand an Thirteen.

SEPARATE OPINION OF VICE-PRESIDENT FATSAH OUGUERGOUZ

I fully subscribe to the decision on the Court's lack of jurisdiction to hear the Application filed against the African Union by Mr. Atabong Denis Atemnkeng. The Protocol establishing the Court indeed provides that only States Parties to the said Protocol may be brought before the Court (see Articles 3 (1), 5 (1, *littera* c)), 7, 26, 30, 31 and 34 (6)). The African Union not being a State entity party to the Protocol, the Court manifestly lacks the jurisdiction to hear this Application. Consequently, I am of the opinion that the Application ought not to have given rise to a judgment *per se* on the basis of Article 52 (7) of the Rules, relating to preliminary objections; it ought to have been dismissed *de plano* by a simple letter from the Registrar (see *mutatis mutandis* my separate opinion attached to the Court's judgment of 26 June 2012 in a similar case namely *Femi Falana v. The African Union*; see also my separate opinion attached to the decision of 30 September 2011 in the case of *Efoua Mbozo'o Samuel v. Pan African Parliament*).

Besides, the fact that the Court manifestly lacks the jurisdiction to hear this Application is clearly exhibited in the relative brevity of the reasons for the judgement (see paragraphs 36 to 40, and more specifically paragraphs 36 and 39).

Hon. Fatsah Ouguergouz
Vice President

Robert Eno
Registrar

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