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الاتحاد الأفريقي <i>African Commission on Human & Peoples' Rights</i>		UNIÃO AFRICANA <i>Commission Africaine des Droits de l'Homme & des Peuples</i>
<p>31 Bijilo Annex Layout, Kombo North District, Western Region, P. O. Box 673, Banjul, The Gambia Tel: (220) 4410505/ 4410506; Fax: (220) 4410504 E-mail: au-banjul@africa-union.org; Web www.achpr.org</p>		

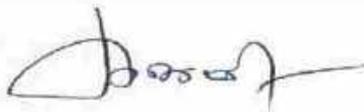
Communication 569/15

Digbeejaye Koonjul

v

The Republic of Mauritius

*Adopted by the
African Commission on Human and Peoples' Rights
during the 64th Ordinary Session from 24th April to 14th May 2019
Sharm El-Sheikh, Arab Republic of Egypt*



.....
Commissioner Soyata Maiga
Chairperson of the African Commission
on Human and Peoples' Rights




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Dr. Mary Maboreke
Secretary to the African Commission on
Human and Peoples' Rights

Communication 569/15: Digbeejaye Koonjul v. The Republic of Mauritius

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 15 June 2015 from Mr Digbeejaye Koonjul (the Complainant). The Complaint is submitted against the Republic of Mauritius, which is a State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹
2. The Complainant states that he has been convicted and sentenced to a jail term of 38 years, for the offence of murder under the Constitutional law of Mauritius. He asserts that his conviction was in breach of Section 222 of the Mauritian Criminal Code in relation to the penalty for murder.
3. The Complainant submits that the Complaint is based on the fact that there had been a serious miscarriage of justice at the trial and appeal hearing of the Complainant, thereby breaching his fundamental human rights.
4. The Complainant submits that he was initially sentenced to 30 years' imprisonment by the Court of Assises on 27 July 2007 for the offence of murder, even though he had pleaded 'not guilty', following which he appealed the decision to the Supreme Court of Mauritius on the basis that there was a substantial miscarriage of justice. The Director of Public Prosecution cross-appealed. Apart from dismissing his appeal, and allowing the cross-appeal, the Complainant avers that the Appellant Judges on 25 February 2010 also increased his sentence to 38 years.
5. The Complainant states that he thereafter on 14 March 2011 applied to the Supreme Court for conditional leave to appear before the Judicial Committee of the Privy Council. The Complainant avers that the application was refused by the Supreme Court of Mauritius, and submits that "the mathematical reasoning of the Supreme Court together with the interrogatory answer at the end of the judgement leaves the clear impression that the court was sitting on appeal against its own judgement instead of examining the questions which ought to be submitted for determination by the Judicial Committee".

¹ The Republic of Mauritius ratified the African Charter on 19 June 1992.



6. The Complainant states that he thereafter in July 2012 applied directly to the Judicial Committee of the Privy Council by way of special leave on the ground that there had been a serious miscarriage of justice. The Complainant submits that his appeal to the Privy Council was rejected, and that he thus has no means to proceed with such an application, hence the need to approach the African Commission.
7. The first ground for stating that there was a miscarriage of justice, according to the Complainant is that the period that he spent in remand prior to his conviction was not subtracted from his sentence, as was the case for one of his co-accused.
8. The Complainant further avers that the court erred in disallowing the defence from calling witnesses to testify on his behalf pursuant to Section 10)(2)(e) of the Constitution, thereby depriving him of a fair trial. He further asserts that he was not allowed to tender a prosecution witness, who was a co-accused who allegedly masterminded the murder, which would have enabled the Complainant to corroborate his defence of duress. In addition he was prevented from adducing an evidentiary basis to substantiate what he calls 'trial by the press', which in fact refers to the overwhelming adverse publicity generated by the case. He alleges that the adverse publicity made it impossible for him to have a fair trial.
9. The Complainant further alleges that the court refused to allow the defence to proceed with the opening speech and that the jury then reached conclusions on facts not within their purview.
10. In addition, the Complainant avers that the court allowed hearsay evidence submitted by the prosecuting counsel, that the court misdirected the jury in its summary of the defence of duress, and that the Court of Appeal increased the Complainant's sentence on erroneous premises.
11. The Complainant also alleges that during the trial the interpreters, who translated the proceedings from English to Creole, translated in low tones such that the counsels and the judge could not hear the translations. He further alleges that the translations were not digitally recorded, and as such, they could not be counter-checked by the appellate court. Additionally, the Complainant also



alleges that the judge's secretary and the Chief Court Officers acted as official interpreters, which action breached section 31 of the Court's Act. He concluded that these vitiated the trial process and resulted in a breach of his constitutional right to the protection of the law and due process.

12. He submits that he has exhausted all local remedies.

Articles alleged to have been violated

13. The Complainant alleges that the Respondent State has violated Articles 2, 3, 5 and 7 of the African Charter.

Prayers

14. The Complainant seeks the following:

- (a) A reversal of the alleged miscarriage of justice; and
- (b) A review of all the circumstances surrounding his alleged trial and sentence.

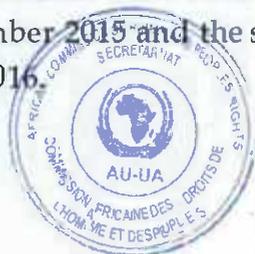
Procedure

15. The Secretariat received the Complaint by post on 15 June 2015. The Secretariat acknowledged receipt and informed the Complainant that the Complaint would be tabled before the Commission for consideration.

16. The Commission was seized of the Communication during its 18th Extra-Ordinary Session held from 29 July to 07 August 2015, and communicated the decision to be seized to the Parties on 26 August 2015. The Complainant was requested to submit on admissibility within two months.

17. The Complainant's submissions on admissibility were received at the Commission and transmitted to the Respondent State on 19 October 2015. The Complainant submitted revised submissions on 26 October 2015, which were transmitted to the Respondent State on 28 October 2015.

18. The Respondent State submitted on the admissibility of the Communication on 30 November 2015 and the submissions were transmitted to the Complainant on 06 June 2016.



19. On 05 July 2016 the Complainant requested for an extension in submitting his observations on the admissibility submissions of the Respondent State, a request which was repeated on 24 July 2016.
20. On 25 July 2016 the Secretariat informed both Parties that the Commission had delayed consideration of the Communication during its 20th Extra-Ordinary Session, pending the observations of the Complainant on the submissions of the Respondent State.
21. On 27 July 2016 the Secretariat requested for a clarification from the Complainant in relation to the request for an extension.
22. From the 59th Ordinary Session to the 60th Ordinary Session, the Commission deferred consideration of the Communication.
23. On 25 September 2017 the Parties were informed that the Complainant had been granted an extension of thirty (30) days within which to make any additional submissions.
24. The Commission deferred consideration of the Communication during its 61st Ordinary Session.
25. On 29 November 2017 the Respondent State sent a Note Verbale Ref: 541/AA/POL/19 requesting to be provided with the additional submissions of the Complainant.
26. On 20 December 2017 the Secretariat informed the Parties that the timeline for submission of the Complainant's additional observations on the State's submissions on admissibility had expired and that no further submissions had been received.
27. From the 23rd Extra-Ordinary Session to the 25th Extra-Ordinary Session the Commission deferred consideration of the Communication.

Admissibility

The Complainant's Submissions on Admissibility



28. The Complainant submits that "in August 2015 the African Commission on Human and Peoples' Rights (the Commission) seized this matter and the Complainant is now required to present arguments and evidence on the admissibility of a Communication dated 26th August 2015 pursuant to Rule 105(1) of the Rules of Procedure of the Commission". The Complainant submits that all domestic remedies have been exhausted.
29. The Complainant reiterates the submissions in relation to the Complaint as set out above, and also provided further information about the Complaint, which has subsequently been incorporated above. The Complainant further submitted questions for determination by the Commission related to whether there was an unfair trial and a substantial miscarriage of justice.²
30. Under the heading, "The Complainant's Submission" the Complainant submits that the Supreme Court and the Judicial Committee of the Privy Council fell into errors when it successively refused the Complainant's appeal. The Complainant further submits that from the outset of the case, as early as the investigative stage, as a result of adverse and prejudicial publicity by the press, the Complainant's right to a fair trial pursuant to Section 10 of the Constitution of the Republic of Mauritius could not have been possible. Furthermore, due to all the facts set out in this Complaint which amount to breaches of human rights, the Complainant submits that there has been a serious miscarriage of justice. The Complainant further refers to the lack of parity of treatment between the Victim and the co-accused regarding consideration of time spent on remand.
31. The Complainant requests the Commission to make a determination that there had been a miscarriage of justice and declare the conviction a nullity, as well as such other relief as the Commission may deem fit.

The Respondent State's Submissions on Admissibility

² The questions submitted for determination by the Commission are as follows: a) whether the Presiding Judge was wrong to direct the defence witness, resulting in an unfair trial; b) whether the Presiding Judge ought to warn defence witness only when incriminating questions were put to him and not otherwise; c) whether the Presiding Judge wrongly exercised his discretion in refusing to order the prosecution to tender a particular prosecution witness; d) whether the prosecution in not calling a particular witness deprived the Victim of a fair trial; e) whether the Presiding judge caused confusion in the minds of the jury, thereby rendering the verdict unsafe; and f) whether the sentence imposed and thereafter increased breaches the Complainant's right to protection from inhuman treatment.

32. The Respondent State submits that it is an established principle that a Communication must comply with all the conditions laid down under Article 56 of the African Charter for it to be admissible. The Respondent State avers that the Complainant has failed to comply with Articles 56(2) and 56(5) of the African Charter.
33. In relation to Article 56(2), the Respondent State submits that compatibility with the African Charter entails that a Communication should prove *prima facie* case of violation of specified Articles, failing which there can be no Communication before the Commission. The State further cites the Commission's jurisprudence in the case of *Samuel T. Muzerengwa and 110 Others (Represented by Zimbabwe Lawyers for Human Rights) v Zimbabwe*, in which the Commission held that *prima facie* violation of the provisions is said to have occurred "where the facts presented in the Complaint show that a human rights violation has likely occurred. The Complaint should be one that compels the conclusion that a human rights violation has occurred if not contradicted or rebutted by the Respondent State."³
34. The Respondent State submits that while the Complainant made general references to Articles 2, 3, 5 and 7, it does not substantiate how the Articles referred to have been violated. The State avers that the contents of the Complaint is limited to mere allegations aimed at attacking the intellectual and moral integrity of the Mauritian Courts, and materially fails to show how human rights violations have occurred.
35. The Respondent State in addition avers that the Complainant is using the Commission to re-litigate a matter which came to a rest in July 2012 when the Judicial Committee of the Privy Council refused to hear the Complainant's application for special leave. The Respondent State further submits that the content of the present Communication is similar to that placed before the Supreme Court of Mauritius in an appeal lodged by the Complainant as well as in the appeal to the Judicial Committee of the Privy Council. The Supreme Court held that there was no merit in the application and leave was accordingly refused. The Respondent further submits that the Communication, by calling

³ Communication 306/05 - *Samuel T. Muzerengwa and 110 Others (Represented by Zimbabwe Lawyers for Human Rights) v Zimbabwe* (2011) ACHPR para 56.



upon the Commission to look into a matter that has already been thrashed out before the Supreme Court of Mauritius and the Judicial Committee of the Privy Council, amounts to an abuse of process.

36. The Respondent State therefore submits that the Complainant has failed to comply with the requirements of Article 56(2) of the African Charter.
37. Article 56(5) requires that a Communication should be considered if it is sent after exhaustion of local remedies, if any, unless it is obvious that this procedure is prolonged. The Respondent State submits in this regard that Mauritius enacted the Protection of Human Rights Act in 1998, thereby establishing a National Human Rights Commission (NHRC), having as its main objective the protection and promotion of human rights.
38. The Respondent State submits that the Complainant has an avenue under Section 4A of the Act to seek redress for the alleged human rights violations through forwarding his grievances to the NHRC, who would conduct an inquiry as to whether there is sufficient fresh and compelling evidence and will thereafter refer the matter to the Court of Criminal Appeal. The Respondent State submits that a failure by the Complainant to avail himself of this local remedy is a breach of Article 56(5) of the African Charter.
39. The Respondent State additionally reiterates the principle established by the Commission that the rationale for exhaustion of local remedies is to give the State an opportunity to remedy the situation through its own system, before the matter is taken up by an international body. The Respondent State further refers to the test laid down by the Commission in *Jawara v The Gambia* in which it held that local remedies must be available, effective and efficient. The State submits that the remedy under Article 4A meets all of these criteria as there is no impediment for the Complainant or his representative to apply to the NHRC and if the NHRC is of the view that there is sufficient fresh and compelling evidence, the matter will be referred to the Court of Criminal Appeal on the issue of conviction.
40. The Respondent State therefore submits that the Communication has failed to satisfy Articles 56(2) and 56(5) of the African Charter and must be ruled inadmissible.



Commission's Analysis on Admissibility

41. Article 56 of the African Charter outlines seven (7) conditions which must all be met for a Communication to be declared admissible. Failure to comply with one or several of these conditions renders the Communication inadmissible.
42. The Commission notes that when the Complainant was requested to submit on the admissibility of the Communication, he only made observations with regards to Article 56(5) of the African Charter, and despite being given the opportunity to submit additional observations on the admissibility submissions of the State, refrained from doing so. The Commission in its jurisprudence has held that in such cases it will still examine the admissibility of a Communication in respect of each condition based on the available information.⁴ Accordingly, the Commission undertakes the following analysis on admissibility on the basis of the Respondent State and Complainant's submissions on admissibility in addition to information relevant to the admissibility of the case, as provided in the original Complaint.
43. In relation to the requirement in Article 56(1) of the African Charter, which provides that Communications should indicate their authors even if the latter requests anonymity, the Commission notes that the identity and the contact details of the Complainant is indicated in the Communication, and accordingly finds that the Communication satisfies Article 56(1) of the African Charter.
44. In accordance with Article 56(2) of the African Charter, the Communication must show a prima facie case⁵ and must be compatible with the AU Constitutive Act and the African Charter. The Respondent State submits that the Complainant has failed to comply with the requirements of Article 56(2), in that 1) the Complainant does not substantiate how the Articles referred to have been violated and thus materially fails to show how human rights violations have occurred; 2) the contents of the Complaint is limited to mere allegations aimed at

⁴ Communication 304/05 – *FIDH and others v Senegal* (2006) ACHPR para 38; Communication 338/07 - *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* (2010) ACHPR para 43; and Communication 284/03 - *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) ACHPR para 81; and Communication 299/05 - *Anuak Justice Council v Ethiopia* (2006) ACHPR para. 44; Communication 328/06 - *Front for the Liberation of the State of Cabinda v Republic of Angola* (2013) ACHPR para. 38.

⁵ See Communication 333/06 - *Southern Africa Human Rights NGO Network & Others v. Tanzania* (2010) ACHPR, para 51.



attacking the intellectual and moral integrity of the Mauritian Courts; and 3) the Complainant is using the Commission as a Court of Appeal for a matter which had been settled at the national level.

45. The Complainant submits that Articles 2, 3, 5 and 7 of the African Charter have been violated. The Commission disagrees with the Respondent State that the Complainant does not substantiate how the Articles have been violated. The Commission is of the view that the Complainant in paragraphs 7 to 10 above clearly sets out the alleged irregularities in the process before the national courts which he avers violated the abovementioned rights, including the allegations of the Courts disallowing the Complainant from calling a witness, allowing hearsay evidence and the dissimilar treatment between his case and similar cases. In relation to the State's second objection, the Commission notes that the Communication must show a *prima facie* case. The Respondent State refers to jurisprudence of the Commission which held that a *prima facie* violation has occurred "where the facts presented in the Complaint show that a human rights violation has likely occurred. The Complaint should be one that compels the conclusion that a human rights violation has occurred if not contradicted or rebutted by the Respondent State".
46. As noted above, the Commission has held that the Complainant has presented facts which would likely amount to a human rights violation. The State did not submit any contradictory evidence to show that the facts presented were false. Thus the challenge by the State that these are mere allegations does not mean that a *prima facie* case has not been established. Complainants are expected at the merits stage of the Communication to provide full submissions and evidence on the alleged violations to prove their case on a balance of probabilities. While not making any determination on violations, the Commission thus finds that a *prima facie* case has been established. Additionally, the State has not substantiated its submission that the Complaint is "aimed at attacking the intellectual and moral integrity of the Mauritian Courts", and the Commission does not find any suggestion to this effect in the Communication.
47. The third objection raised by the State is that the Complainant is using the Commission as an appellate court. The Commission has held in its jurisprudence that "[i]n assessing the compatibility of the ruling of a national court with the African Charter, the African Commission does not act as an appellate body with



powers to overrule the decisions of national courts but simply discharges its mandate of ensuring compliance by a State Party, with the provisions of the African Charter in its interpretation and application of the law".⁶ The Commission notes that the Complainant in its admissibility submissions specified the areas which it wants the Commission to consider, set out in paragraph 29 above, and that some of these areas do not fall within the jurisdiction of the Commission and would indeed amount to an appeal of the decision of the national Courts. However, to the extent that the alleged violations relate to rights protected under the African Charter, namely, those that relate to the right to a fair trial, equality before the law and non-discrimination, they do fall within the *rationae materiae* jurisdiction of the Commission.

48. Further, the Respondent State is a State Party to the African Charter, accordingly the Communication falls within the *rationae personae* jurisdiction of the Commission. The Commission has *rationae temporis* jurisdiction, since the alleged violations took place after the ratification of the Charter by the Respondent State in 1992. The Commission finds that the Communication satisfies Article 56(2) of the African Charter.
49. Article 56(3) of the African Charter provides that Communications shall be considered if they are not written in disparaging or insulting language directed at the State concerned and its institutions or to the Organization of African Unity [now African Union]. The Respondent State had not raised any challenge in relation to this requirement. The Commission has, in reading the Complaint, not come across anything which would amount to disparaging or insulting language. The Commission therefore finds that the requirements of Article 56(3) have been met.
50. In relation to Article 56(4) of the African Charter, which requires that the Communication must not be based exclusively on news disseminated through the mass media, the Respondent State has not raised any challenge. The Commission notes that the Complaint is submitted by the Victim himself and is based on his own experience, and thus finds that the Communication complies with the requirements under Article 56(4).

⁶ Communication 375/09 - Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya (2011) ACHPR para 36.

51. Article 56(5) requires that Communications be submitted after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. While the Complainant submits that he has exhausted all domestic remedies, the Respondent State submits that the Complainant had not complied with this requirement. The State submits that the Complainant has an avenue under Section 4A of the Protection of Human Rights Act of 1998 to seek redress for the alleged human rights violations through forwarding his grievances to the NHRC, who would conduct an inquiry as to whether there is sufficient fresh and compelling evidence and will thereafter refer the matter to the Court of Criminal Appeal. The Respondent State submits that a failure by the Complainant to avail himself of this local remedy is a breach of Article 56(5) of the African Charter.
52. It is a well-established principle of the Commission's jurisprudence that only those remedies which are "ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice" have to be exhausted.⁷ The Commission has held that in exhausting ordinary domestic remedies there is no duty on the Complainant to submit cases to national commissions such as a national human rights institution (NHRI), even if they can grant remedies, as they are "non-judicial institutions", and Complainants only have to exhaust judicial remedies.⁸ For this reason the Commission holds that the Respondent State's objection in this regard fails.
53. In addition, the Complainant avers that he has appealed to both the Supreme Court of Mauritius as well as the Judicial Committee of the Privy Council and that his appeals in both cases were dismissed. The Respondent State does not provide any evidence of further judicial remedies which should be exhausted. The Commission thus finds that the Complainant had exhausted domestic judicial remedies and thus complies with Article 56(5).

⁷ 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; *Kennedy Oving Onyachi and Others v. United Republic of Tanzania*, App. No. 003/2015, Judgment of 28 September 2017, para 56.

⁸ Communication 221/98- *Alfred B. Cudjoe v. Ghana* (1999) ACHPR para 14; Communication 375/09- *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya* (2011) ACHPR para 56. *African Commission on Human and Peoples' Rights v. Republic of Kenya*, App. No. 006/2012, 26 May 2017, para 97; Communication 268/03 - *Ilesanmi v Nigeria* (2005) ACHPR para 42.

54. Article 56(6) requires that a Complaint must be “submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter”. Neither the Complainant nor the Respondent State had submitted arguments on this provision. The Charter does not define what constitutes ‘a reasonable period’, and the Commission adopts the approach that ‘each case must be treated on its own merit’.⁹ In the present case the Complainant in July 2012 applied directly to the Judicial Committee of the Privy Council and while the Complainant does not state at which time his appeal to the Privy Council was rejected, it appears from the submissions of the Respondent State in paragraph 35 above that the rejection was also in July 2012. The Complainant states that his Complaint was thereafter submitted to the Commission in June 2015.

55. In *Michael Majuru v Zimbabwe*, the Commission ruled that, “(w)here there is good and compelling reason why a Complainant could not submit his/her Complaint for consideration on time, the Commission may examine the Complaint to ensure fairness and justice”.¹⁰ In the cases of *Darfur Relief and Documentation Centre v Sudan*¹¹ and *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*,¹² the Commission held that two years and five months, and fifteen months respectively, did not comply with Article 56(6), as “no sufficient reason [were] given as to why the Communication could not be submitted within a reasonable period”. In light of its jurisprudence, and as no justification was given by the Complainant for the three year delay between July 2012 and June 2015, the Commission finds that the Complaint in this case is not submitted within a reasonable time and thus does not meet the requirements of Article 56(6).

56. In relation to Article 56(7) of the Charter, the Commission does not find evidence which indicates that the issues and claims in the Communication have been brought before, or settled by any other international forum. The Respondent State did not provide any contrary argument. Accordingly, the Commission finds that Article 56(7) of the African Charter has been satisfied.

⁹Communication 308/05 –*Michael Majuru v Zimbabwe* (2008) ACHPR para 109.

¹⁰ *Ibid*, Para 109.

¹¹ *Ibid*, Para 80.

¹² *Ibid*, Para 77.



57. For the reasons set out above, the Commission finds that Article 56 (1), (2), (3), (4), (5) and (7) have been met, but that the Complainant has failed to meet the criteria for Article 56(6).

Commission's Decision on Admissibility

58. In view of the above, the African Commission on Human and Peoples' Rights:
- i. Declares the Communication inadmissible for failure to comply with Article 56(6) of the African Charter; and
 - ii. Notifies its decision to the Parties in accordance with Rule 107(3) of its Rules of Procedure.

Done in Sharm el Sheikh, The Arab Republic of Egypt, during the 64th Ordinary Session of the African Commission on Human and Peoples' Right from 24 April to 14 May 2019.

