

Communication 331/06 [R] - Kamanakao Association, Reteng & Minority Rights Group v. The Republic of Botswana

Summary of the Application for Review

1. On 18 February 2013, the Secretariat of the African Commission on Human and Peoples' Rights (the Commission) received a request for reconsideration of the decision of the African Commission on Human and Peoples' Rights (the Commission), on Communication 331/06 - Kamanakao Association, Reteng & Minority Rights Group v. The Republic of Botswana.
2. The request is submitted by **Kamanakao Association, Reteng and Minority Rights Group International** (the Complainants), on behalf of the non-Setswana minorities in Botswana, including the Wayeyi tribe (the Victims).
3. The request is submitted in accordance with Rule 107(4) of the Commission's Rules of Procedure.
4. It should be recalled that Communication 331/06 was declared inadmissible by the Commission during its 10th Extra-Ordinary Session, held from 12 – 16 December 2011, on grounds of non-exhaustion of local remedies and the timeliness of submission of the Communication to the Commission following the exhaustion of local remedies.
5. The Complainants base their request for review on the fact that the requirement to exhaust available, effective and sufficient domestic remedies has been met in the present Communication, as confirmed in a recent decision of the Court of Appeal of **Kgosikgolo Kgafela II Kgafela and Dithshwanelo (The Botswana Centre for Human Rights) v. Attorney General of Botswana and Others (2012)** (the **Kgosikgolo** case), which endorses the Complainants submissions on admissibility.

6. The Complainants note that the principal reason given for declaring the communication inadmissible was the failure to exhaust domestic remedies by not appealing the domestic decision of the High Court to the Court of Appeal.
7. The Complainants submit that the Commission has previously held, in **Communication 147/95-149/96 - Sir Dawda K. Jawara v. The Gambia**, that the underlying rationale of the local remedies rule was to ensure that the State concerned had the opportunity to remedy the matter through its own local system before proceedings were brought before an international body, and these remedies must be available, effective and sufficient.¹
8. The Complainants submit that in the domestic case filed before the High Court, the Court made it clear that it did not consider that it had the power to declare on the constitutionality of provisions of the Constitution. The Complainants aver that no appeal was brought against the domestic case on the basis of a previous Court of Appeal decision in which it held that any such case was bound to fail. The Complainants further submit that in a subsequent domestic case, the Court of Appeal unanimously endorsed the views expressed by the High Court in **Kamanakao and Others v. the Attorney General and Others**.
9. The Complainants submit that in the **Kgosikgolo** case, the Court of Appeal held that: "... to strike out one section of the Constitution as offending another is to rewrite the Constitution ... to be able to do so ... Court would need to have express powers derived from the body of the Constitution itself, enabling the revisionary instrument for the alteration of the Constitution ... That is not the normal function of a Court. That function is usually left, as has been done in the Botswana Constitution, to representatives of the electorate who can, through discussions and consultation among themselves and with their constituents, agree new provisions to right what is wrong or lacking ... We do not think that such awesome powers as to rewrite the Constitution can be assumed to exist unless they are clearly and expressly granted by unambiguous language." The Complainants assert that this ruling of the Court of Appeal is further evidence

¹ Communication 147/95-149/96 - *Sir Dawda K. Jawara v. The Gambia* (2000), para 31, 32

that any appeal brought directly against the High Court decision regarding the discriminatory nature of the Constitutional provisions, would have been bound to fail.

10. The Complainants therefore submit that the above constitutes new evidence which establishes that Article 56(5), on the exhaustion of local remedies, has been met in the present Communication.

Prayers of the Complainants

11. The Complainants request the Commission to set aside its earlier decision, and find the Communication admissible.

Procedure

12. The request for review was received at the Secretariat on 18 February 2013. The Secretariat acknowledged receipt and transmitted the request to the Respondent State for its comments on 01 March 2013. The Respondent State has not submitted any comments on the request for review. The Commission will proceed to examine the application on the basis of the Complainants submissions.

Analysis of the Commission on the Review

13. The present request for review is submitted pursuant to Rule 107(4) of the Rules of Procedure of the Commission. The Rule provides as follows: *If the Commission has declared a Communication inadmissible, this decision may be reviewed at a later date, upon submission of new evidence in a written request to the Commission by the author.*
14. In order to determine whether the Commission's decision in the above Communication is reviewable, the Commission will assess whether the issues raised by the Complainants constitute new evidence in terms of Rule 107(4) of the Commission's Rules of Procedure.

15. The Commission notes that in applications of this nature “the application would be granted where it is proved that some facts have been discovered which intrinsically might have had a decisive influence on the judgment had it been brought to the attention of the Commission at the time the decision was made, but which at the time was unknown to both the Commission and the party making the application and also which could not, with reasonable diligence, have been discovered by the party before the judgment was made or on account of some mistake, fraud or error on the face of the record or because an injustice has been done.”²
16. The Commission notes that the new evidence provided in the request for review submitted by the Complainants is the recent decision of the Court of Appeal, in the **Kgosikgolo** case.
17. The Commission’s jurisprudence highlighted above contemplates a review on the basis of evidence which existed at the time the Commission took its decision on Admissibility, but was not known to the Complainants at the time. However from the facts of the review adduced by the Complainants, the evidence being relied on did not exist at the time the Commission declared the communication inadmissible in 2011, and therefore does not constitute new evidence within the meaning adopted by the Commission.
18. From the above, it is evident that the Complainants have not adduced new evidence to warrant a review of the Commission’s decision.

Decision of the Commission

19. The application is hereby dismissed.

Done at the 14th Extra-Ordinary Session of the African Commission on Human and Peoples’ Rights, held from 20-24 July 2013, in Nairobi, Kenya

² Communication 384/09 - *Kevin Ngwang Gumne et al v. Cameroon* (2012), para 37