

38. It follows that at the material time, the Supreme Court of Uganda did not have the requisite quorum to hear the victim's case. In the present circumstances, the Commission considers that the Supreme Court cannot be considered an available remedy for purposes of exhaustion of local remedies given that at the material time, it could not hear the case in question and there is no indication of the time when the Court will be regularly constituted to hear such cases. It is evident therefore that the remedy cannot be utilised in the present circumstances and can therefore not be invoked to the detriment of the Complainant.⁸

39. The Respondent State has failed to persuade the Commission that at the material time, the Supreme Court as a local remedy, was available and effective both in theory and in practice. Although the Respondent State has demonstrated that the Supreme Court can in theory hear the appeal lodged by the Attorney General, it has failed to prove that it could be made use of in practical terms by the victim in the present circumstances of lack of quorum. It would therefore be unfair to ask of the victim to await the outcome of the appeal before the Supreme Court while languishing in detention, without any knowledge of when his detention will be reviewed and thorough no fault of his. In the present circumstances, the Commission considers that all available local remedies have been duly exhausted.

1. In view of the above, the African Commission on Human and Peoples' Rights:

- i. Declares this Communication Admissible in accordance with Article 56 of the African Charter and Rule 106 of its Rules of Procedure;
- ii. Defers the consideration of the Communication for the parties to make their submissions on the Merits in accordance with Rule 107(2) of the Rules of Procedure; and
- iii. Requests the Complainants to forward its submissions on the Merits within 60 days of notification pursuant to Rule 108(1) of the Rules of Procedure.

Done in Banjul, The Gambia during the 54th Ordinary Session of the African Commission on Human and Peoples' Rights from 22 October – 05 November 2013

⁸ See Communication 147/95, 149/96 – Jawara v Gambia (2000) ACHPR para 34.



28. The Respondent State submits that the Supreme Court of Uganda is duly constituted and has quorum to hear and entertain the appeal. They further submit that the Court be allowed an opportunity to hear and pronounce itself on the finality of the matter regarding the release of the Victim from detention pending the appeal which is the same issues the Commission is being invited to consider.
29. The Respondent State argues that in the discharge of its judicial responsibilities regarding appeals from the Constitutional Court of Uganda, the Supreme Court is governed by Article 128 of the Constitution of Uganda which guarantees the independence of the judiciary in the exercise of judicial power and safeguards against direction or control from any person or authority in Uganda.
30. The Respondent State notes that in the event that the Supreme Court of Uganda confirms and upholds the decision of the Constitutional Court of Uganda in Constitutional Reference No.36 of 2011, the Victim will be released and adequately compensated for any wrong visited upon him. The Respondent State requests the Commission to declare the Communication inadmissible as the Victim could still avail himself of remedies locally.

Analysis of the Commission on Admissibility

31. The African Charter in Article 56 sets out seven requirements that a Communication brought under Article 55 of the Charter must satisfy to be considered admissible by the Commission. The Commission held in **Article 19 v Eritrea** that failure to satisfy any one or more of those requirements render the Communication inadmissible.⁵
32. The Commission notes that the sole contentious issue between the parties is with respect to the requirement in Article 56(5) of the Charter. After carefully examining the Communication and the submissions of the parties, the Commission is of the view that Articles 56 (1), (2) (3) (4) and (7) are satisfied. To this end, the analysis on admissibility will focus on the requirements contained in Article 56(5) of the Charter.
33. Article 56(5) of the African Charter provides that Communications received by the Commission shall be considered “if they are sent after exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged”

⁵ Communication 275/03 - Article 19 v Eritrea (2007) ACHPR, Para 43



16. They argue further that the Commission has set out three criteria which guides it in considering whether a petitioner has fulfilled the exhaustion of local remedies requirement namely that the remedy must be available, effective and sufficient³They argue that Mr Kwoyelo has pursued all available remedies ,to the extent they exist. They note that although the Government may argue that Mr Kwoyelo is held pursuant to a stay issued by the Ugandan Supreme Court, it should be noted that the Supreme Court did not have a constitutional quorum to decide constitutional issues at the time the stay was issued.
17. The Complainant goes further to state that even if the Government argues that a remedy exists (despite the numerous appeals completed by Mr Kwoyelo), it is clear that such a remedy is 'unduly prolonged' and thus exhaustion of that remedy is not required.
18. With regards to Article 56 (6) he notes that the Communication is submitted in a reasonable time frame. The Ugandan Supreme Court stayed the Constitutional Court ruling on March 2012 and since then additional proceedings have not occurred. Although the Charter does not provide a definitive date for a communication to be submitted, the Commission has held that it be submitted within a reasonable period of time. To support this, the Complainant cites the jurisprudence of the Commission in **Article 19 and others v Zimbabwe and Darfur Relief and Documentation Centre v Sudan**⁴.
19. The Complainant states that Mr Kwoyelo perfected his communication with the Commission on October 19, 2012 as it became clear he would continue to remain arbitrarily detained and the harm is in fact continuing and on-going.
20. In relation to Article 56(7), the Complainant submits that Mr Kwoyelo's case has not been settled before any other international body and he prays the Commission to conclude that the Complaint meets the terms and requirements of Article 56 of the African Charter.

Respondent State's submission on Admissibility

³ Communication 147/95 and 149/96 Sir Dawda Jawara v The Gambia

⁴ Communication 305/05 at 91 ,Communication 310/05 at 75



Government of Uganda refused to release the victim from detention. On 25 January 2012, the High Court issued an order of mandamus compelling the Chairman of the Amnesty Commission and the Director of Public Prosecutions to process and grant amnesty to the victim, but to no avail.

6. The Complainant further states that on 30 March 2012, the Supreme Court of Uganda stayed the execution of any consequential orders arising from *Constitutional Reference No.36 of 2011*. It is claimed that the Supreme Court did not give a reason for disregarding the Constitutional Court decision.
7. The Complainant also questions the impartiality of the Supreme Court alleging that the Chief Justice of Uganda who headed the panel of judges of the Supreme Court is also the head of Justice Law & Order Sector in Uganda, a body that had previously criticised the decision of the Constitutional Court in Constitutional Reference No.36 of 2011. They allege that the Chief Justice played a major role in the formation of the International Crimes Division which was meant to try the Victim.
8. The Complainant states that the Supreme Court did not have quorum to consider a constitutional appeal at the time of stay of execution and on 18 October 2012 still did not have a quorum and is therefore unable to hear the case until more judges are appointed to the Supreme Court. It is claimed that there is no time frame for the appointment of judges and therefore the Victim remains in indefinite detention.

Articles alleged to have been violated:

9. The Complainant alleges that the Respondent State has violated the rights of the Mr Kwoyelo as guaranteed in Articles 2,3,4,5,6,7.1(a),(b) and (d),16 and 26 of the African Charter.

Procedure:

10. The Secretariat received the Compliant on 19 October 2012, and acknowledged receipt of the same on 7 December 2012.
11. At its 13th Extra-Ordinary Session, held in Banjul, The Gambia from 19 to 25 February 2013, the Commission decided to be seized of the Communication. On 27

