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African Commission on Human & Peoples' Rights		Commission Africaine des Droits de l'Homme & des Peuples
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		

Ref: ACHPR/COMM/UGA/431/12/...824.../14
Date: 22 May 2014

Mr. Onyango John Francis
Onyango & Company Advocates
4th Floor, Greenland Towers
Plot 30, Kampala Road
P.O.Box 35881, Kampala, Uganda
Tel: +256 414 666 242
Mobile: +256 712 394 721
Email: onyango@onyangoadvocates.com / onyangojf@gmail.com

Dear Mr. Onyango ,

Subject: Communication 431/12 - Thomas Kwoyelo (represented by Onyango & Company Advocates) v Uganda

I write to inform you that during its 55th Ordinary Session held in Luanda, Angola from 28 April to 12 May 2014, the African Commission on Human and Peoples' Rights (the Commission) considered the above-mentioned Communication and declared it admissible.

The Commission's decision is herewith attached for your information.

In accordance with Rule 108 (1) of the Rules of Procedure of the African Commission, you are hereby requested to submit your observations on the Merits of the Communication within sixty (60) days of receipt of the present notification.

Please accept my best regards.



PP Dr. Mary Maboreke
Secretary to the Commission

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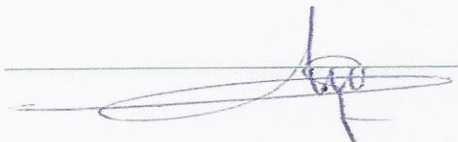
COMMUNICATION 431/12

THOMAS KWOYELO
(REPRESENTED BY ONYANGO & COMPANY ADVOCATES)

V

UGANDA

*Adopted by the
African Commission on Human and Peoples' Rights
during the 55th Ordinary Session, from the 28 April to 12 May 2014
Luanda, Angola*



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Hon. Commissioner KAYITESI Zainabo Sylvie
Chairperson of the African Commission
on Human and Peoples' Rights



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

Communication 431/12 – Kwoyelo Thomas V. Uganda

Summary of the Complaint:

1. The Complaint was received by the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on 19 October 2012. The Complaint is filed by Onyango & Company Advocates (the Complainants) on behalf of Mr. Kwoyelo Thomas (the Victim) against the Republic of Uganda (the Respondent State¹), State Party to the African Charter on Human and Peoples' Rights.
2. It is alleged that the Victim was a child soldier, abducted by the Lord's Resistance Army in 1987 in Northern Uganda. In March 2009, following the collapse of the Juba Peace Talks, it is claimed that the Victim was shot and severely wounded on the battlefield in the Democratic Republic of Congo.
3. The Complainant further alleges that the Victim was abducted from a hospital while recovering from his injuries and taken to a private residence, where he was subjected to torture and inhumane treatment for three months. He was also allegedly denied access to legal counsel and next of kin. In June 2009 he was charged with several offences under the Ugandan Penal Code and in August 2010 under the Ugandan Geneva Conventions Act.
4. The Complainant states that the Victim applied for amnesty under Uganda's 2010 Amnesty Act. In its decision, the Amnesty Commission declared the Victim was eligible for amnesty, but Uganda's Director of Public Prosecutions refused to issue an amnesty certificate. The matter was brought to the attention of the Ugandan Constitutional Court in September 2011, and the Court decided that the Victim qualified for amnesty and was denied equal protection by the Government of Uganda. The Complainant avers that the Constitutional Court further ordered cessation of the trial against the Victim. The Government of Uganda, through the Attorney General however brought two applications to the Court of Appeal of Uganda seeking an interim order for stay of execution of the Constitutional Court decision, which applications were dismissed on 10 November 2011.
5. The Complainant avers that on 11 November 2011, the International Criminal Division of the High Court of Uganda ceased the Victim's trial. However, the

¹ The Republic of Uganda ratified the African Charter on 10 May 1986.



- February 2013, the Secretariat informed the Complainant of the Commission's decision to be seized and invited the Complainant to submit its arguments on Admissibility. By Note Verbale of the same date, the Secretariat informed the Respondent State of the seizure decision and transmitted a copy of the complaint to the State.
12. On 24 April 2013, the Secretariat received the Complainants evidence and arguments on Admissibility. By letter dated 25 April 2013 the Secretariat acknowledged receipt of same and forwarded to the Respondent State by Note Verbale of the same date giving it two months in accordance with Rule 105(2) of the Rules of Procedure of the Commission to submit its observations on Admissibility.
13. On 25 June 2013 the Respondent State forwarded to the Secretariat its observations on Admissibility. By Note Verbale and letter dated 27 June 2013 the Secretariat acknowledged receipt of the Respondent State's submissions and forwarded same to the Complainant requesting it to submit any observations within one month of the receipt of the Respondents' States submissions.

The Law on Admissibility

Complainant's Submission on Admissibility

14. The Complainant submits that the Communication meets the terms and requirements of Article 56 of the African Charter and has presented evidence and arguments to support this submission.
15. Regarding exhaustion of domestic remedies in particular, the Complainant notes that the Commission has held that the requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human right violation in order to have the opportunity to remedy such violations before being called before an international body². They note that the Government of Uganda has had ample notice of the violation as Mr Kwoyelo since his imprisonment in March 2009, has sought judicial review at every level and currently remains detained with no timelines for when his detention may be subject to further review.

² Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union interfricane des Droits de l'Homme, Les Temoins de Jehovah/DRC.



21. In its submissions, the Respondent State contends that the Communication is not admissible as it does not satisfy the requirement of Article 56(5) of the African Charter on exhaustion of local remedies.
22. It states that Article 56(5) requires that all local remedies should be exhausted before Communications can be referred to the Commission and the rationale for this is to ensure that the State concerned must have had the opportunity of redressing the alleged wrong by its own means and within the framework of its own domestic system.
23. Citing the jurisprudence of the Commission, Respondent State asserts that local remedies have not been exhausted in conformity with the well settled principle of finality of court process and legal certainty which begets that the Supreme Court of Uganda hears the Complainant's case as a last and final court within the jurisdiction of Uganda.
24. The Respondent State submits that domestic remedies still exist at the domestic level and argue that the Constitutional Court of Uganda is not the highest court in Uganda but only a Court of first instance for matters calling for Constitutional interpretation.
25. It outlines various articles of the 1995 Constitution of Uganda which recognises the Supreme Court as the final Court of appeal particularly, Article 132(3) which provides that *'any party aggrieved by a decision of the Court of Appeal sitting as a constitutional Court is entitled to appeal to the Supreme Court against the decision'*
26. The Respondent State avers that the judgment in Constitutional Reference No.36 of 2011 was delivered on 22nd September 2011 and the Attorney General of Uganda being dissatisfied with the said judgment appealed against the whole judgment and accordingly filed an appeal on 23rd September 2011.
27. They assert that the appeal is currently pending hearing and final determination and further assert that following the lodgement of the appeal, the Respondent State successfully applied to stay execution on the grounds that if execution was allowed to proceed it would in effect render the appeal nugatory.



34. The Commission has asserted that the rationale for the exhaustion of local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matter through its own local system, thus preventing the Commission from acting as a court of first instance rather than a body of last resort.⁶
35. In the present Communication, the Complainant contends that all local remedies have been exhausted to the extent that they exist and that the Victim remains detained illegally with no timeline for when his detention may be subject to further review. The respondent State on the other hand argues that local remedies have not been exhausted since the Supreme Court of Uganda before which an appeal is pending and which is the court of final jurisdiction in the Respondent state has not yet been given the opportunity to hear the matter. The Respondent State also avers that the Supreme Court has the necessary quorum to hear the appeal.
36. The Commission notes that the Victim's right to liberty was upheld by the Court of Appeal of Uganda on 10 November 2011, following earlier decisions by the Constitutional Court of Uganda to that same effect. The Commission also notes that the Attorney General of Uganda filed an appeal to the Supreme Court of Uganda against this decision on 23 September 2011, and further applied for a stay of execution of the decision of the Constitutional Court. The Commission notes further that the Victim has remained in detention since the appeal was lodged and there is no indication as to when the Supreme Court will hear the matter purportedly because it does not have the requisite quorum to do so.
37. While it is the contention of the Respondent State that the Supreme Court has the necessary quorum and should be given the opportunity to hear the appeal, the Commission has confirmed that the Court does indeed have a quorum since 01 August 2013 but does not have the necessary quorum to hear appeals of a constitutional character which can only be decided with a quorum of 7 judges.⁷

⁶ Communication 147/95 and 149/96 Sir Dawda Jawara v The Gambia para 31

⁷ Information obtained during meetings with the Principal Judge of the Supreme Court, His Lordship, Justice Yorokamu Bamwine (28/08/2013) and the Minister of Justice and Constitutional Affairs of Uganda, (29/08/2013), following a promotion mission undertaken by the Commission to the Republic of Uganda from 26 – 30 August 2013. See also http://www.judicature.go.ug/data/smenu/7//Supreme_Court.html

