EACJ First Instance Court Decides Martha Karua v Republic of Kenya: The Litmus Test for EACJ Jurisdiction and Supremacy

By:

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The East Africa Court of Justice First Instance Division has just rendered (30 November 2020) judgement in the much-anticipated case in Reference No. 20 of 2019 *Martha Wangari Karua vs The Attorney General of the Republic of Kenya*. The Court has ruled and declared that the Republic of Kenya violated Martha Karua's right to access justice through its judicial organ's (Supreme Court) acts and/or omissions. The EACJ held that Kenya violated its commitment to the fundamental and operational principles of the EAC, specifically the principle of rule of law guaranteed under Article 6(d) and 7(2) of the EAC Treaty. It issued compensation in general damages in the sum of USD $ 25,000 to the applicant at a simple interest rate of 6% per annum. This is a momentous decision for the court and a big victory for Hon. Martha Karua who had lost all

her attempts to find justice in this case since 2017 when the case was first instituted at the High Court of Kenya sitting at Kerugoya. The case is important and highly significant for the human rights jurisprudence of the EACJ, as it the first human rights oriented case where general monetary damages have been granted and not just declaratory orders.

We will recall that on 8 November 2019, Wilfred Mutubwa wrote a blog post here on Afronomicslaw to introduce us to this important case which had then just been filed. In that post Mutubwa offered an incisive introduction to Hon. Martha Karua and her legacy as the "iron lady" of Kenyan politics. Indeed, Mutubwa demonstrated the irony of Martha Karua, who was formerly minister of Justice and Constitutional Affairs under former President Mwai Kibaki's government at the time of the EACJ important case, *Prof. Peter Anyang' Nyong'o and Others Vs Attorney General of Kenya and Others*, 2006. At the time, Karua led a vicious and sustained attack against the EACJ. This irony is further magnified by the fact that the First Instance Division of the EACJ has ruled overwhelmingly in her favor. I should be careful in using the word "overwhelmingly" here because the real remedy substantively in an election dispute would be a nullification of the elections. Martha Karua, however, did not specifically seek this remedy from the Court and were it to be granted, it would have elevated the profile of the case even higher. Before delving into the significance of the case, let me retrace how it came before the EACJ.

Hon Martha Karua was a candidate for Governor the Kirinyaga County in Kenya's 2017 elections. She lost to Hon Anne Mumbi Waiguru (the first intervener) in the case. She filed an election petition in 2017 in the Court of Kenya at Kerugoya challenging Hon Waiguru's win. This petition was struck out for the non-fulfillment of the technical requirement under *rule 8(1)* of the Elections (Parliamentary and County Elections) Petition Rules, 2017 that require election petitions to state the date of the declaration of results of the election. Martha Karua then successfully appealedthis decision to the Court of Appeal in Nyeri which allowed the appeal and remitted the case back to the High Court to be determined on its merits. The High Court dismissed the case again on another technicality: the six months period for the determination of electoral petitions under sec 75(2) of the Kenyan Elections Act, 2011 had elapsed. This position was later upheld by the Court of Appeal and the Supreme

Court which is the highest court in Kenya. So, Hon. Martha Karua lost all her cases at the domestic level without ever being heard on the merits. The cases were decided on procedural technicalities on reasoning that some referred to as formalistic and mechanical.

The stage was set for the contest in the East Africa Court of Justice. By recent practice, the decision is quite short, only 70 paragraphs and 28 pages. The EACJ distilled the following four issues for determination:

1. Whether the Reference by the Applicant was time barred
2. Whether the Reference raises a cause of action against the Respondent
3. Whether the Respondent State through the acts and/or omissions of its judicial organs violated its commitments o the fundamental and operational principles of the EAC Treaty, especially the right to access to justice and a fair trial.
4. Whether the applicant was entitled to the remedies sought.

Though there was no jurisdictional issue raised in the issues above, the intervener in her classical procedural technicalities attack strategy at the domestic level, argued that the court lacked jurisdiction over a decision of the apex court of a partner State. She argued that the EACJ could not exercise appellate jurisdiction over a decision by the Kenyan Supreme Court. The court ruled that this argument would fail as the Court had jurisdiction over States for the State' internationally wrongful acts of any of its State organs including the judiciary. The Court cited Article 4(1) of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts. The Court also cited the case of *The East African Civil Society Organisations' Forum (EACSOF) v The Attorney General of the Republic of Burundi & Others* to support its view that is was clothed with jurisdiction to entertain a challenge to the judicial decisions of municipal courts, including apex courts.

On the question of whether the Reference was time barred and whether the reference raises any causes of action against the Respondent, another classical procedural technicality argument that Respondents normally deploy in the Court, was also dismissed. All references to the EACJ have to be filed two months after the date the cause of action alleged took place (Article 30(2) of the EAC Treaty). The Court found, and the Respondents seemed to have been

in agreement on this, that while High Court and Court of Appeal cases where time barred, the Supreme Court decision rendered on 7 August 2019 was well within time (Recall the case was instituted on 4 October 2019). Additionally, the Court emphasized that it has both interpretive and enforcement jurisdiction under Article 23(1) of the EAC Treaty to adjudicate on a violation of municipal law, which itself can give rise to a cause of action. Notably, the Court was effectively stating that it has extensive jurisdiction to adjudicate over both municipal and international law violations under Article 30(1) of the EAC treaty. The Court cited its *British American Tobacco (BAT) limited v. the Attorney General of the Republic of Uganda* (2017) decision to support this conclusion.

On the substantive claim on violation of the EAC treaty, the Court found that while the right to a fair trial under article 14 of the ICCPR was not violated, (i.e that the parties were heard at the domestic level by a competent, independent and impartial court), the right to access to justice under article 48 of the 2010 Kenyan Constitution was violated. The Court found that Supreme Court did not use the interpretative tools in Article 159 of the 2010 Constitution that require holistic interpretation in a manner that promotes the purpose and principles of the Constitution for the promotion of the rule of law, democracy and human and people's rights. The Court found that the 6 months rule (expeiditions disposal of elections disputes) was not intended to lock out litigants who through no fault of their own had their cases remitted back to a lower court by the court of appeal. The argument by the Respondent that the Court should not delve into matters within the Respondent State's election petition time lines or the Elections Act was dismissed with the Court citing the case of *Henry Kyarimpa v The Attorney General of the Republic of Uganda* where it held that in the course of determining Treaty compliance, the court can inquire into the Partner States adherence with their domestic laws. The Court held that the case was neither a disguised appeal nor an electoral offence trial. It was a case where a "partner state's supreme court misapplied the Partner state's municipal law so as to forment a scenario whereby, a party's right to appeal against electoral malpractice notwithstanding, such a party may have his/her right to access to substantive justice curtailed on a account of a *lacuna* in constitutional times lines." The Court thus makes the following finding as regards access to justice, which is apt to quote at length:

> "Accordingly, purely form the access to justice perspective, the impugned Supreme Court decision is deeply troubling. The chronology of events in this case was that the trial court upheld a point of law that the Applicant's failure to include in her petition the results of the elections and the date of declaration results was fatal. The applicant undoubtedly had a right of appeal in that matter, which she opted to exercise. The Court of appeal was also well within its remit to overturn the trial court's decision and refer the matter to it for determination on its merits; particularly since its appellate jurisdiction in lection petitions is limited to questions of law not fact. Unfortunately, the trial court was unable to determine the matter within the time fixed by statute. The applicants quest for justice saw her return to the appellate court to challenge a decision on the merits, albeit one that was delivered beyond the prescribed time-line. On this occasion she was unsuccessful *inter alia* on the premise of the time limitation, as decision that that was upheld by the apex court."

The Court specifically found fault with the Supreme Court's view that the court of appeal 'should have decided to terminate the matter at that stage, well aware that any substantive determination of the petition by the High Court would been an exercise in futility.' The Court found this statement on futility to violate the applicant's right to access justice, including exhausting her right of appeal and denoted a recommendation to courts to disregard their duty to administer justice purely because in their estimation, to do so would be "an exercise in futility."

Finally, on remedies, the court in addition to the declaratory remedies granted the Applicant general damages of USD 25,000 for moral, non-material or non-pecuniary loss. They do these through citing Article 35 and 36 of the ILC Article on State Responsibility on restation and compensation. The Court cited *Grand Lacs Supplier S.A.R.L v The Attorney General of the Republic of Burundi* case as a basis to justify the damage award. In that case, the EACJ had granted damages USD $ 20,000 as general damages for unlawful seizure of a consignment of goods worth USD 130,524, and for Treaty and Protocol violations including the wrongful deprivations of property, and hampering EAC citizen's business, trade, and economic activity. In the Karua case, the EACJ also cited Article 38(1) of the ILC Articles to further justify the damage award.

The Court also granted the Applicant costs and interest at the 6% per annum on the damage award.

This damage award is unprecedented. Recall that in October 2019 Prof Tomasz Milej faulted the overly declaratory remedies granted by the EACJ in human rights cases on this blog. Perhaps this is an indication that the Court is moving away from that stance as it reasserts its role as a preeminent human rights court. I expect that the Respondent will appeal this case and that many of the issues raised in the case will be revisited by the Appellate division. Until then this is a highly welcome decision. This case was litigated by among others the indefatigable Don Deya whose work continues to exemplify the importance of the protection of human rights through the regional courts. Today's decision in the Karua case and the decisions of the African Court last week continue to demonstrate that Arusha is indeed a global capital of international law.

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