AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

IN THE MATTER

OF

GLORY CYRIAQUE HOSSOU

V

REPUBLIC OF BENIN

APPLICATION NO. 012/2018

PARTIAL DISSENT BY

JUDGES Suzanne MENGUE, Chafika BENSAOULA, Dennis D. ADJEI and Duncan GASWAGA

1. We agree with the judgment of the Court, however, we are unable to agree with the majority on the legal position that when an action becomes moot during the pendency of an application as a result of the corrective action taken by the Respondent State, there shall be no grounds to grant reparations.

2. The undisputed facts of this case are that the Applicant filed this application before this Court on 10 May 2018 against the Respondent State alleging that Article 6(1)(3) and 4 of the Law adopted Law of 24 August 2004 on the Code of Persons and Family Law of Benin violates the right to equality between men and women as the right to give a surname to a child is exclusively given by the father.

3. The Applicant contended that the section 6(1)(3) and 4 of the Code of Persons and Family of Benin is in violation of Article 3 and 18(3) of the African Charter on Human and Peoples' Rights, Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Articles 2 and 16 (1) of

Convention on the Elimination of All Forms of Discrimination Against Women, and the Article 3 of the International Covenant on Civil and Political Rights.

4. The prayers sought by the Applicant from the Court are as follows:

   i. Find that the decisions of the Respondent State's Constitutional Court are not binding on the Court, as the Court was established by an international instrument that is superior to domestic laws;
   ii. Consequently, find the Application admissible.
   iii. Find that Article 6 of the Code of Persons and Family violates the principle of equality between men and women as established by the Charter, the Maputo Protocol, the CEDAW and the ICCPR;
   iv. Order the Respondent State to amend its legislation on the protection and advancement of women, in particular, Article 6 of Law 2002-07 of August 2004 on the Personal and Family Code, in order to restore the rights of Beninese women;
   v. Order the Respondent State to pay him various expenses occasioned by this litigation, which began on 18 December 2017, in particular those relating to;
      - Traveling from the town of Seme - Kpodji in the Queme Region to the Constitutional Court and to the UPS mail transfer office both located in Cotonou;
      - Costs in respect of research and of consulting resource persons in connection with the drafting of submissions;
      - Travel expenses from Cotonou to Arusha and from Arusha to Cotonou if the Court schedules a hearing in respect of the case;
      - Costs in respect of accommodation in Arusha during the trial.

5. The Respondent States on the other hand prayed the Court to;

   i. Find that the Constitutional Court has twice reviewed the constitutionality of the individual and Family Code;
   ii. Find that the Constitutional Court has already declared all its provisions to be constitutional;

iii. Find that the decisions of the Constitutional Court are not subject to appeal;
iv. Consequently, hold that the Application is inadmissible;
v. Acknowledge that a child is entitled to one or more first names but only one surname;
vi. Find that the choice of surname is a function of the established social order in each country;
vii. Find that parentage is patrilineal in the Respondent State;
viii. Find that this filiation does not violate the rights of women;
ix. Consequently, dismiss the action brought by the Applicant.

6. Notwithstanding the fact that the parties joined issues as to whether or not a child shall be given the surname of his/ her father, the Respondent on 20 December 2021, thus barely three years and six months after the filing of the application amended the impugned legislation to make it neutral. The amendment was brought to the notice of the Court on 25 July 2023.

7. The majority is of the considered opinion that the application became moot by the amendment and under such circumstances there are no grounds to grant reparations. The majority decision failed to take into account the basic principles regarding mootness such as; remedial actions do not extinguish the right to reparation, reparation is owed regardless of whether or not the violation has been remedied, and mootness does not preclude awarding reparation.[1]

8. Furthermore, the majority also failed to consider the other principles of mootness including; payment of back pay and restitution for the losses suffered before the application became moot, payment of compensation for harm or injury to address the loss suffered before the application became moot, and the grant of restitution to serve as a deterrent of future violations by the State concerned.

[1] Velasquez Rodriguez v Honduras (1988), Series C. No. 4, IACHR 1988 & Papamichalopoulos v Greece (1993) Application no. 14556 /89, ECHR 89.

9. The settled law on mootness from international perspective is that where an application becomes moot as a result of settlement, changes in situations or circumstances , if the rights are no longer violated, or the government takes corrective action, the court is bound to award back pay and restitution for loses suffered, order for reparations for harm or injury suffered before the application became moot, and to deter the respondent for future violations in order not to suggest that whenever it violates a right and it is remedied it shall avoid reparations.

10. In the case of *Papamichalopoulos v Greece*, *supra*, the European Court of Human Rights found a violation against Greece after the application has become moot. The Court in paragraph 34 of the record held thus: "the mere fact that the applicant's situation has changed does not render the application moot, as the applicant is still entitled to reparation for the harm suffered"[2] The same European Court of Human Rights in the case of Vasilescu v Romania, at paragraph 40 held thus: "even if the violation has been remedied, the applicant may still claim compensation for harm suffered".[3]

11. The position that a remedial action that renders an application moot does not extinguish the applicant's rights to reparation in respect of the violation that occurred before the application became moot was well articulated by the Inter-American Court on Human Rights in the case of *Velasquez Rodriguez v Honduras*, *supra*, where the Court in paragraph 63 of the judgment held thus : "Once the Commission has determined that a violation has occurred, the State has an obligation to provide reparation, regardless of whether or not the violation has been remedied or not." In paragraph 67, the Court further held thus; "The fact that the applicant is no longer suffering the direct effects of the violation does not render the application moot, as reparation is still owed for the harm suffered".

[3] Vasilescu v Romania (1998), Application No. 27053/95, ECHR 1998.

12. We are satisfied that violations occurred before the application became moot and the mootness shall not extinguish the right to reparation which is still owed for the harm suffered. The majority decision, if not corrected shall serve as disincentive to persons whose rights have been violated who seek redress in court and the matter becomes moot subsequently.

Signed:

Suzanne MENGUE, Judge;

Chafika BENSAOULA, Judge;

Dennis D. ADJEI, Judge;

Duncan GASWAGA, Judge;

Done at Arusha, this Thirteenth Day of November in the year Two Thousand and Twenty-Four, the English text being authoritative.