

CENTRE FOR MINORITY RIGHTS DEVELOPMENT (KENYA) AND MINORITY RIGHTS GROUP INTERNATIONAL ON BEHALF OF ENDOROIS WELFARE COUNCIL V KENYA

African Commission on Human Rights (46th Ordinary Session)
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Communication 276/2003

African Commission on Human rights – Kenya – violations of the *African Charter* – dispossession of Indigenous community – whether a distinct community is in need of protection – whether there was a violation of art 8 (the right to practice religion), art 14 (the right to property), art 17 (the right to culture), art 21 (the right to free disposition of natural resources) or art 22 (the right to development) – duty to consult – recommendations in light of violations committed by the State against the Endorois Community

Facts:

The Endorois is an Indigenous community who resided in the Lake Bogoria area for centuries, until they were dispossessed of their land by the Government of Kenya in 1973 in order to facilitate the creation of the Lake Hannington Game Reserve, which was subsequently re-gazetted in 1978. Since this time, the Endorois have been denied access to their ancestral land, which they argue is central to their religious beliefs and cultural practices, and provides them with a means of subsistence through pastoralist use. Separation from the land was thus asserted as halting their development as a community. When Kenya gained independence in 1963, the British Crown's claim to Endorois land passed to the respective County Councils, who it is claimed were bound, under s 115 of the *Kenyan Constitution*, to hold the land on trust for the benefit of the Endorois community. Hence, the land was still for their enjoyment and use, until the 1973 gazetting of the land by the Government of Kenya.

The Centre for Minority Rights Development ('CEMIRIDE') and the Minority Rights Group International ('MRG'), with the assistance of the Centre on Housing Rights and Eviction ('CORE'), acted on behalf of the Endorois Community (with the Endorois Welfare Council ('EWC') being the representative body of the Endorois). The Endorois community sought the following: a declaration that the Republic of Kenya violated arts 8 (the right to practice religion), 14 (the right to property), 17 (the right to culture), 21 (the right to free disposition of natural resources) and 22 (the right to development) of the

African Charter in displacing them from their ancestral lands, restitution of their land with legal title, and compensation for their loss of property, development, natural resources, and freedom to practice religion and culture.

The Endorois are one of four clans who resided on the land around the Lake Bogoria area. Therefore, one of the first issues for the African Commission ('the Commission') to determine was whether the Endorois could be distinguished as a distinct Indigenous community, from the Tugen sub-tribe, in need of special protection. In order to address this, it was necessary to consider the conception of 'peoples', and whether collective rights can be recognised. The Commission then had to determine whether there were in fact violations of the *African Charter* on the part of the Republic of Kenya. In order to decide whether art 8 had been violated, the Commission had to establish whether the Endorois' spiritual beliefs and ceremonial practices constituted a religion under the *African Charter* and international law, and if so, whether the Respondent State had interfered with their religious freedom. The Commission then had to determine if the Endorois had property rights, and if such rights existed, whether measures were required to protect them. If these measures had been violated, the land could be said to have been encroached upon in violation of art 14. Furthermore, the Commission had to determine whether cultural rights had been violated under art 17(2) and (3) in respect of the restricted access and damage caused to the Endorois' pastoralist way of life. Additionally, it had to be determined whether the right to access resources under art 21, and the right to development under art 22, had been violated.

Held, accepting the claim:

1. The Commission considers the Communication admissible as it meets the seven conditions set out in art 56 of the *African Charter*. First, the complaint indicates its authors (art 56(1)). Second, it is compatible with the Organisation of African Unity/*African Union Charters* and the *African Charter* (art 56(2)). Third, it is not written in disparaging language (art 56(3)). Fourth, due to the lack of submissions from the respondent, the African Commission is not in a position to question whether the complaint is based on news from the mass media (art 56(4)), there has been an exhaustion of local remedies (art 56(5)) and there has been settlement elsewhere (art 56(7)). In relation to the requirement of exhaustion of local remedies, the Complainants took the matter to the High Court in Nakuru, Kenya, in November 1998, but the matter was struck out on procedural grounds: [58]–[59], [70].

2. The concepts of ‘peoples’ and ‘Indigenous peoples/communities’ are contested terms. The emerging consensus on objective features of a people include: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy or suffer collectively from the deprivation of such rights. The evidence supports a finding that the Endorois can satisfactorily fulfil the criterion of distinctiveness as a tribal group: one whose members enjoy and exercise certain rights; in a distinctly collective manner from the Tugen sub-tribe; sharing a common history, culture and religion. The Endorois are a ‘people’, a status that entitles them to benefit from provisions of the *African Charter* that protect collective rights. Furthermore, the Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands: [147], [151], [156], [161], [162]; *Moiwana v Suriname* Series C No. 124 [2005] IACHR 5, followed; *Saramaka v Suriname* Series C No. 172 [2007] IACHR 5, applied.

3. The spiritual beliefs and ceremonial practices of the Endorois constitute a religion under the art 8 of the *African Charter*. It is noted that the freedom of conscience and religion should, among other things, mean the right to worship, engage in rituals, observe days of rest, and wear religious garb. The forced eviction of the Endorois from their ancestral lands interfered with their right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, rendering it virtually impossible for

the community to maintain religious practices central to their culture. This total expulsion was not based on exceptionally good reasons, and was neither proportionate nor reasonable and was, therefore, in violation of art 8: [166]–[168], [172]–[173]; *Amnesty International and Others v Sudan*, African Commission on Human and Peoples’ Rights, Communication No 48/90, 50/91, 52/91, 89/93 (1999), cited.

4. The Endorois have a property right with regard to their ancestral land, to the possessions attached to it, and to their animals. This right extends to the undisturbed use and control of property, and is a right which has been recognised by neighbouring tribes. The property rights of members of Indigenous communities should be protected by special measures within the framework of communal property. The possession of land by Indigenous communities is equivalent to state granted full property title and entitles Indigenous people to demand official recognition and registration of property title. The members of Indigenous communities, who have unwillingly left their land, retain property rights, unless those lands have been transferred to third parties. In the case of the transfer of land to third parties, the Indigenous communities are entitled to restitution or to obtain equally valued lands: [184], [190]–[191], [209].

5. The Republic of Kenya has an obligation under art 14 of the *African Charter* to respect and protect the Endorois community’s right to property. In this case their property rights have been severely encroached on by the Republic of Kenya; however, this only constitutes a violation of art 14 where that encroachment is not conducted in the ‘interest of public need’ or in the ‘general interest of the community’, and not in accordance with appropriate laws. The encroachment in this case is not proportionate to any public need and is not in accordance with national and international law, and thus does not satisfy the two-pronged test in art 14: [199], [211]–[215], [224].

6. The requirements of consultation and compensation necessitate that consent be sought and accorded. There was no effective consultation or benefit for the Endorois in this instance, which is in violation of art 14: [225]–[228].

7. Through the forceful eviction of the community and denial of access to vital resources for the health of their livestock, the very essence of the Endorois’ right to culture has been denied, rendering the right illusory. Consequently, the Republic of Kenya is in violation of arts 17(2) and (3):

[251].

8. The Endorois have the right to freely dispose of their wealth and natural resources as they wish. They have never received adequate compensation or restitution for their land, and accordingly, the Republic of Kenya is in violation of art 21: [267]–[268]; *Saramaka v Suriname* Series C No 172 [2007] IACHR 5, applied.

9. Article 22, the right to development, involves a two-pronged test. A violation of either the procedural or substantive element constitutes a violation of the right to development. The failure to provide adequate compensation and benefits, or provide suitable land for grazing, as well as the failure to obtain prior informed consent in consultation with the community, indicates that the Republic of Kenya did not adequately provide for the Endorois in the development process. Subsequently, the Republic of Kenya is in violation of art 22: [277], [290]–[292], [298].

10. The African Commission recommends that: the Endorois peoples' rights of ownership to their ancestral land should be recognised; they should be given unrestricted access to religious, cultural and grazing sites; and they should be provided with adequate compensation for loss suffered. Also, royalties should be paid from existing economic activities and registration should be granted to the EWC. The Respondent state should also engage in a dialogue with the Endorois community for effective implementation of these recommendations and report, within 3 months from the date of notification, on their implementation: Recommendations a–g.