

CASE COMMENT

The African Commission on Human and Peoples' Rights Affirms State Responsibility for Violence against Women

Equality Now and Ethiopian Women Lawyers Association (EWLA) V. The Federal Democratic Republic of Ethiopia

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The African Commission on Human and Peoples Rights (the ACHPR) has affirmed state responsibility for violence against women in the seminal case of Equality Now and Ethiopian Women Lawyers Association (EWLA) V. the Federal Democratic Republic of Ethiopia (hereinafter “*Equality Now and EWLA Decision*”).¹ On May 16, 2007, Equality Now and EWLA, the Complainants, submitted the communication on behalf of an Ethiopian girl named Woineshet Zebene Negash, alleging violations of the obligation to provide equal protection of the law, protection from discrimination against women and the right to integrity and security of the person as affirmed under articles 3, 4, 5, 6 and 18 (3) of the African Charter on Human and Peoples’ Rights (the Banjul Charter) and article 24(3) of the Convention on the Rights of the Child (CRC).²

In their communication, the Complainants claimed that a man named Aberew Jemma Negussie came to the residence of Woineshet Zebene, then aged 13, and abducted her and raped her together with several accomplices.³ The abduction was reported to the police who rescued Woineshet and

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¹ Equality Now and Ethiopian Women Lawyers Association (EWLA) V. the Federal Democratic Republic of Ethiopia, Communication No. 341/2007, African Commission on Human and Peoples Rights.

² *Id.*, at paras. 13, 16.

³ *Id.*, at para. 3.

detained Aberew Jemma, her assailant. Nevertheless, Woineshet Zebene was subjected to repeated victimization in the form of abduction at the hands of the same assailant when Aberew Jemma was released on bail.⁴ Aberew Jemma also compelled Woineshet Zebene to sign a contract of marriage against her volition.⁵ A month later Woineshet Zebene managed to escape from her captivity in the house of the brother of Aberew Jemma and headed to a police station.⁶ The Complainants further stated that Aberew Jemma was sentenced to 10 years imprisonment without parole and his accomplices were each convicted of abduction and sentenced to 8 years imprisonment on July 22, 2003 by the Guna Woreda Court.⁷

However, the appellate court, i.e., the High Court of the Arsi Zone, quashed the decision of the lower court in its decision rendered on December 4, 2003 stating that “evidence suggests that the act was consensual.”⁸ Accordingly, the appellate court ordered the release of the five men from prison in a decision rendered in the absence of Woineshet Zebene and EWLA.⁹ The Complainants disclosed that the judgment of the appellate court reveals that the Zonal Prosecutor said before the court that he has no objection if the defendants were released.¹⁰ The Complainants took appeal from the decision of the High Court of Arsi Zone to the Oromia Supreme Court, which dismissed the appeal stating that there are no sufficient grounds to reconsider the case and dismissed the appeal. Similarly, in its decision rendered on October 10, 2005, the Cassation Bench of Oromia Supreme Court confirmed the decision and declined to entertain the case stating that no error of law had been committed by the appellate court.¹¹ Although Oromia Prosecutor’s Office took a final

⁴ *Id.*, at para. 4.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*, at para. 5.

⁹ *Id.*

¹⁰ *Id.*, at para. 6.

¹¹ *Id.*, at para. 7.

appeal to the Cassation Bench of the Federal Supreme Court, the latter rejected the appeal stating no error of law had been committed.¹²

The Complainants stated that the contract of marriage is void owing to the fact that Woineshet Zebene was forced to sign it under duress and since she was still underage when it was executed.¹³ They further argued that courts in Ethiopia denied justice by failing to provide equal protection of the law to her irrespective of the fact that the crime of rape of a child under fifteen years of age was punishable by imprisonment of up to fifteen years under article 589 of the Ethiopian Penal Code, the contravention of which Aberew Jemma was accused of.¹⁴ This shows that Aberew Jemma was accused of the crimes of abduction and rape as stipulated under the repealed Penal Code before the entry into force of the current Criminal Code (Proclamation No. 414/2004). The Complainants stated also that the denial of access to justice for the survivor runs counter to the obligation to provide equal protection of the law.¹⁵

The Complainants brought the matter to the attention of the ACHPR for want of any further domestic remedy.¹⁶ The Complainants pleaded with the court to declare that the failure of the Respondent State, namely the Federal Democratic Republic of Ethiopia (FDRE) to impose sanctions on the defendants who were responsible for the abduction and rape of a 13 years old girl is a violation of articles 3, 4, 5, 6 and 18 (3) of the Banjul Charter.¹⁷ In terms of relief, the Complainants implored the Commission to:-

¹² *Id.*, at para. 8.

¹³ *Id.*, at para. 10.

¹⁴ *Id.*, at para. 12.

¹⁵ *Id.*

¹⁶ *Id.*, at para. 9.

¹⁷ *Id.*, at para. 11.

- give recourse to Woineshet Zebene under the Charter for the violation of her rights, and to ensure equal protection of the law, and end discrimination for girls subjected to abduction and rape in the FDRE;
- request the FDRE to mandate comprehensive training in human rights for all law enforcement officials, including all levels of the judiciary, on the law against rape in Ethiopia and to take appropriate remedial action in the case at hand;
- award compensation to Woineshet Zebene for the violations she has endured because of the failure of the FDRE to provide equal protection of the law, protection from cruel inhuman and degrading treatment, and protection from discrimination against women, as well as the right to the integrity and security of the person guaranteed by the Banjul Charter; and
- request the FDRE to file charges against Aberew Jemma.

Following the filing of submissions on admissibility, the parties demonstrated their overture to resolve the matter through amicable settlement and conducted preliminary meetings to that effect. Nevertheless, upon failure of efforts to resolve the matter amicably by the parties, the African Commission declared the Communication admissible.¹⁸ Although the parties came forward with competing arguments regarding the admissibility of the Communication and the Commission also analyzed their respective submissions at length, the decision regarding admissibility will not be the focus of this case comment since the main objective of this case comment is to scrutinize the merits of the case and substantive issues thereof.

Before pronouncing its decision on the merits, the ACHPR weighed on the respective submission of the Complainants and the Respondent State on the

¹⁸ *Id.*, at paras. 11, 36.

merits. In their Communication, the Complainants asserted that the judge of Arsi High Court which set the defendants free was influenced by his personal belief that rape could only be committed on a virgin woman.¹⁹ The Complainants pointed out the bench erred in drawing the wrong conclusion that the medical evidence was inconclusive on whether the victim was a virgin.²⁰ The Complainants highlighted the fact that virginity is not a prerequisite of the crime of rape and the law should protect every woman from rape.²¹ The Complainants point to arbitrariness in the decision of the Court which runs counter to the right of Woineshet Zebene to equal protection of the law (article 3); protection from cruel, inhuman or degrading treatment (article 5, Article 4); protection from discrimination (article 2); and integrity and security of the person (article 6, article 4).²²

Furthermore, the Complainants argued that the bench drew the wrong inference that Woineshet Zebene had consented to the principal offender's sexual inducement.²³ They argued that Woineshet Zebene and her legal representative had no opportunity to provide information that she has been abducted, raped and compelled to sign a purported contract of marriage, if they were notified of the appellate proceedings at Arsi High Court.²⁴ The Complainants also cited the failure on the part of the Zonal Prosecutor to ensure the conviction of the assailant in the lower court is not overturned by invoking relevant points of law.²⁵ The Complainants stated that the Respondent State failed in its duty to diligently investigate the alleged violations and the higher tiers of the courts of the Respondent State also failed to rectify the mistake on the part of the bench of Arsi High Court which was

¹⁹ *Id.*, at paras. 88.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*, at paras. 89.

²⁴ *Id.*

²⁵ *Id.*

seized of the case at the appellate stage. The Complainants drew attention to the now repealed Ethiopian Penal Code which exonerated the defendant from criminal responsibility upon subsequent marriage with the survivor of the crimes.²⁶ Most importantly, the Complainants also pointed out that abduction, rape and forced marriage continue unabated despite the repeal of the 1957 Ethiopian Penal Code.²⁷ The Complainants also submitted that the Respondent State has failed to prevent discrimination against women which includes violence against women by its failure to protect the rights of the survivor.²⁸ They went on to state that the failure on the part of the Respondent State conveyed the wrong message to the general public that girls can be abducted, raped, forced in to forced marriage with impunity.²⁹ The Complainants pointed out that the failure on the part of the Respondent State is in violation of articles 4, 5 and 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (the Maputo Protocol) which the country signed on June 1, 2004.³⁰ The Complainants pleaded with the African Commission to award monetary compensation to the survivor to the tune of \$250,000-\$500,000 for economically assessable damage and for the moral, material and other forms of harm suffered as a result of the violations.³¹ The Complainants also, among others, requested the African Commission to require the Respondent State to periodically and regularly update the Commission on the implementation of its recommendations.³²

²⁶ *Id.*, at paras. 93.

²⁷ *Id.*

²⁸ *Id.*, at paras. 94.

²⁹ *Id.*

³⁰ *Id.* One of the remedies sought by the Complainants is the ratification, domestication and implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). The Respondent State ratified on March 30, 2018 by virtue of Proclamation 1082/2018. Nevertheless, much remains to be desired when it comes to the domestication and implementation of the Maputo Protocol.

³¹ *Id.*, at paras. 95.

³² *Id.*

In its submission to the Complaint, the Respondent State argued that it has a legal framework for the promotion and protection of the fundamental human rights and freedoms of women and children.³³ The Respondent State recounted the legislative measures it has taken to ensure the protection of the rights of women to equality and non-discrimination, access to justice, the right to life, security of the person and liberty, etc.³⁴ It made mention of constitutional provisions aimed at enforcing the right of women to protection from harmful practices.³⁵ The Respondent State also stated that it is a signatory to a number of international human rights instruments relating to the rights of women.³⁶ It also recounted practical measures undertaken to give effect to the rights of women enshrined under the FDRE Constitution and ratified international and regional human rights treaties including awareness raising and training to law enforcement officers.³⁷ In regard to the case at hand, the Respondent State asserted that it has provided adequate and effective remedies based on the amicable settlement reached with EWLA, the legal representative of the survivor.³⁸ The Respondent State contended that it has provided compensation, employed the survivor in one of its institutions and built a house for her and delivered the title deed in her name.³⁹ The Respondent State also asserted that it has taken disciplinary measure against the judge who quashed the decision of the lower court and dismissed him from his position due to his failure to properly apply the law.⁴⁰ The Respondent State prayed that the African Commission should dismiss the

³³ *Id.*, at paras. 96.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*, at paras. 98.

³⁸ *Id.*, at paras. 100.

³⁹ *Id.*

⁴⁰ *Id.*

Communication since the demands of the survivor have been met through her legal representative, EWLA.⁴¹

In their counter-reply to the submissions of the Respondent State, the Complainants explained that the survivor, Woineshet Zebene, has severed her relationship with EWLA and asserted her rightful legal representative is Equality Now only.⁴² The Complainants also argued that the amicable settlement negotiations were terminated effectively in 2012 due to the failure of the Respondent State to respond to proposals which could have formed the basis for the settlement.⁴³ The Complainants rejected the claim on the part of the Respondent State that the matter has been settled amicably.⁴⁴ They further stated that the Respondent State has not adduced evidence of the title deed of the house which is said to have been constructed for Woineshet Zebene, for the removal of the judge who quashed the conviction decision of the lower court and provision of adequate and additional compensation.⁴⁵ The Complainants further stated that the Respondent State has not adduced evidence which can prove that the zonal prosecutor and the actual assailants were held to account.⁴⁶

After examining the respective submissions of the parties, the AFCHPR proceeded to analyze the merits of the case in accordance with the applicable law. From the outset, the African Commission underscored the fact that the veracity of the facts of the case as claimed by the Complainants have not been contested by the Respondent State.⁴⁷ The Commission also pointed out that the Respondent State does not also contest the fact that the investigating police

⁴¹ *Id.*, at paras. 101.

⁴² *Id.*, at paras. 102.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*, at paras. 103.

⁴⁶ *Id.*, at paras. 104.

⁴⁷ *Id.*, at paras. 111.

and the zonal prosecutor failed to diligently investigate the acts, properly identify the perpetrators, prosecute them, and secure their punishment as part of the remedies for the criminal violations Woineshet Zebene endured.⁴⁸ Conversely, the Commission highlighted the fact that the Respondent State confirmed the failure of its agents and claimed to have taken disciplinary proceedings against them and also removed the defaulting judge from his position.⁴⁹ Similarly, the Commission also pointed out the fact that the Respondent State claimed to have provided personal remedies to the survivor in the form of a job placement and construction of a dwelling house.⁵⁰ The Commission states that the Respondent State is making efforts to be absolved from international responsibility by demonstrating that it has redressed the violations.⁵¹

The Commission stated the bone of contention in the case at hand is the nature and extent of the Respondent State's responsibility and whether the measures the government took absolve it from responsibility.⁵² Before all things, the Commission stated that a state incurs international responsibility for violation of rights and freedoms when it breaches international law obligations with respect to the rights and freedoms.⁵³

The Commission asserted that the Federal Democratic Republic of Ethiopia bears the responsibility to discharge the quartet layers of obligations of duties of respect, protect, promote and fulfill the rights and freedoms enshrined under the Banjul Charter.⁵⁴ The Commission took note of the fact that the violations complained of in the case at hand are committed by private

⁴⁸ *Id.*, at paras. 112.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*, at paras. 113.

⁵³ *Id.*, at paras. 122.

⁵⁴ *Id.*, at paras. 114.

individuals as opposed to state agents.⁵⁵ It also asserted that the acts committed by these private individuals constitute violations of a range of rights affirmed under the Banjul Charter.⁵⁶ It underscored the right to personal liberty guaranteed under article 6 of the Banjul Charter implies that no one should be restricted at all by the State or non-state actors including private individuals.⁵⁷ Thus, the Commission made it clear that the abduction of Ms. Woineshet Zebene by private individuals constituted a clear infringement of both the liberty and the security of her person affirmed under article 6 of the Banjul Charter.⁵⁸ Nevertheless, the Commission is quick to add that this infringement does not per se entail the international responsibility of the Respondent State. The Commission also asserted that the crime of rape and the treatment of Ms. Woineshet Zebene as mere object of sexual gratification is a violation of the right to human dignity affirmed under article 5 of the Banjul Charter. It is at this point that the Commission cited the seminal *Velasquez Rodriguez* case which established that the international responsibility of the state for the acts of a private person due to lack of due diligence to prevent the violation or to respond to it as required by the law.⁵⁹

The Commission asserted that the duty to protect rights and freedoms in turn requires the Respondent State to adopt and implement laws and other measures to prevent violations including by non-state actors, or to provide for redress when the rights and freedoms have been violated.⁶⁰ It goes on to state that the state fails in its duty to prevent violations when it tolerates a situation where private persons or groups act freely and with impunity in violation of the rights guaranteed under the Banjul Charter.⁶¹ The Commission noted that

⁵⁵ *Id.*, at paras. 115.

⁵⁶ *Id.*

⁵⁷ *Id.*, at paras. 116.

⁵⁸ *Id.*, at paras. 117.

⁵⁹ *Id.*, at paras. 122; *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrHR), 29 July 1988

⁶⁰ *Equality Now and EWLA Decision*, *supra* note 1, at paras. 124.

⁶¹ *Id.*, at paras. 125.

the Respondent State is required to take escalated measures against abduction and rape owing to the fact that these crimes are pervasive and entrenched in Ethiopia.⁶² In particular, the Commission pointed to the fact that Ms. Woineshet Zebene was abducted twice demonstrates the fact that the Respondent State has failed in its duty to ensure guarantees of non-repetition of violations as part of the right to effective remedy.⁶³ Although the Commission duly acknowledged the fact that the Respondent State is vested with the margin of appreciation regarding what measures are need to curb the scourge of abduction and rape, it specifically recommended launching sensitization campaigns about the illegality of these acts and the concomitant penal consequences, provision of direct security at the residences of girls attending school, conducting random patrols in the vulnerable areas and also requiring owners of properties accommodating school-attending girls to adequately secure the premises.⁶⁴

The Commission stated that the Respondent State did not adopt specific measures prior to the abduction of Ms. Woineshet Zebene, apart from taking legislative measure of criminalization of abduction and rape. It goes on to state that the Respondent State had not been prosecuting perpetrators of abduction and rape.⁶⁵ The Commission noted that the ripple effect of arrests and prosecution of perpetrators could have long operated as an effective deterrent.⁶⁶ The Commission also lamented the order of the court releasing the perpetrator without any conditions which emboldened the latter to abduct Ms. Woineshet Zebene for the second time.⁶⁷

⁶² *Id.*, at paras. 126.

⁶³ *Id.*, at paras. 127.

⁶⁴ *Id.*, at paras. 128.

⁶⁵ *Id.*, at paras. 129.

⁶⁶ *Id.*

⁶⁷ *Id.*, at paras. 130.

The Commission observed that the aforementioned facts establish that the Respondent State has failed in regard to its obligation to prevent the abduction and rape of Ms. Woineshet Zebene.⁶⁸ The Commission asserted that the Respondent State has breached its obligation under article 1 of the Banjul Charter.⁶⁹ The Commission is quick to add that the Respondent State is accordingly internationally liable for failing to prevent violations.⁷⁰

The Commission is also quick to add that the Respondent also failed to discharge its duty to protect which flows from the obligation to adopt measures to give effect to the rights and freedoms under the Charter.⁷¹ It also established the international responsibility of the Respondent State on account of its failure to diligently investigate the violations to identify and prosecute those responsible for the violations.⁷² The Commission came to the conclusion that decisions of the higher tier courts are manifestly arbitrary and affront to the most elementary conception of the judicial function.⁷³ It went on to state that their decisions are barely reasoned.⁷⁴ The Commission highlighted the failure of the courts to provide reasoned judgments including conclusions and evidence. In particular, the Commission criticized the ruling of the Cassation benches of Oromia Supreme Court and Federal Supreme Court which simply held that there was no error of law to review on appeal.⁷⁵ Moreover, the Commission observed that the failure of the higher tiers of court to re-examine the matter in respect of the two key offenders constitutes a denial of justice to Ms. Woineshet Zebene and amounts to violation of the right to have one's cause heard, affirmed under article 7(1)(a) of the Banjul

⁶⁸ *Id.*, at paras. 131.

⁶⁹ *Id.*

⁷⁰ *Id.*, at paras. 132.

⁷¹ *Id.*, at paras. 131.

⁷² *Id.*, at paras. 134.

⁷³ *Id.*, at paras. 137.

⁷⁴ *Id.*

⁷⁵ *Id.*

Charter.⁷⁶ The Commission characterizes this failure as a breach of the duty to offer a decent system of justice for the victim and a denial of justice.⁷⁷ Consequently, the Commission concluded that Ms. Woineshet Zebene suffered two-tiered violations both at the hands of her assailants and the mechanism of criminal justice in place.⁷⁸

Furthermore, the Commission came to the conclusion that the multiple failures in the case at hand attract the international responsibility of the Respondent State in respect of the rights violated.⁷⁹ It observed that although these acts were committed by private individuals, the failure of the Respondent State to diligently investigate the criminal acts and respond appropriately through the judicial system violated Woineshet Zebene's rights to integrity of her person (article 4), dignity (article 5), liberty and security of her person (article 6), protection from inhuman and degrading treatment (article 5), her rights to have her cause heard (article 7(1)(a)) and her right to protection of the law (article 3).⁸⁰

Moreover, the African Commission required the Ethiopian government to effect a payment of USD 150,000 for Woineshet Zebene in compensation for the non-material damage she suffered; adopt and implement escalated measures specifically to address marriage by abduction and rape, monitor such instances, and prosecute offenders, continue training judicial officers on specific human rights themes including on handling cases of violence against women, report to the African Commission in 180 days on measures adopted; and include in its next periodic report statistics on prevalence of marriage by

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*, at paras. 138.

⁷⁹ *Id.*, at paras. 139.

⁸⁰ *Id.*, at paras. 160.

abduction and rape, documentation of any successful prosecutions, and any challenges faced.⁸¹

The case entails system-wide implications which reverberate across the various stages of criminal investigation and adjudication of gender-based violence cases in Ethiopia. The decision also makes mention of the fact that the Respondent State is aware of the prevalence of marriage by abduction and rape in Ethiopia and that girls were living under the constant threat of being abducted, raped and forcibly married.⁸² The Commission's decision also demonstrates the increasing blurring of the public/private divide. The seminal *Equality Now and EWLA Decision* calls for the need to undertake concerted efforts to eliminate the incidence of violence against women in Ethiopia. The contribution of the decision for the improvement of the mechanism of criminal justice is multifold. First, the case implies the need to adopt survivor-centered approach in the investigation and adjudication of gender-based violence cases in Ethiopia. The decision shows how wrongful release of the defendants in the case exposed the survivor to repeated victimization. It also demonstrates the need for gender sensitive approach in handling such cases so as to avoid secondary victimization of the survivors as a result of the mechanism of criminal justice system. Second, the case implies that criminal investigation and adjudication of gender-based violence cases should be informed by human rights-based approach. The lack of compliance with bare minimum human rights standards in the case at hand shows the deeply entrenched negative stereotypes which perpetuate discrimination against women. This calls for extensive training of law enforcement and judicial personnel so as to familiarize them with international standards on criminal investigation and adjudication of gender-based violence cases in Ethiopia.

⁸¹ *Id.*

⁸² *Id.*, at paras. 126.