

**The African Committee of Experts on the Rights and Welfare of the Child
(ACERWC)**

Ruling on Admissibility

Communication No: 0021/Com/003/2022

Decision on Admissibility No: 003/2023

Authors: People Serving Girls at Risk & Equality Now on behalf of Esnart Kenesi
(the Complainant)

Against: The Republic of Malawi

September 2023

i. Submission of the Communication and Procedure

1. The Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (the Committee/ACERWC) received a Communication dated 12 July 2022 pursuant to Article 44(1) of the African Charter on the Rights and Welfare of the Child (the Charter/ACRWC). The Communication is submitted by People Serving Girls at Risk & Equality Now on behalf of Esnart Kenesi (the Complainants) against the Republic of Malawi. According to Section IX (2) (i) of the Revised Guidelines for the Consideration of Communications and Monitoring Implementation of Decisions by the ACERWC (the Revised Communications Guidelines), the Committee transmitted a copy of the Communication to the Respondent State on 22 July 2022. The Committee requested the Respondent State to submit its arguments on the admissibility of the Communications within 60 days from the date of the request in accordance with section IX(2)(iv) of the Revised Communications Guidelines.
2. After sending a reminder Note Verbal on 29 September 2022, the Secretariat received the arguments of the Respondent State on 25 November 2022. The Respondent State's submission was duly forwarded to the Applicants for their observations as per the Revised Communications Guidelines. The Applicants' Observations were received on 12 January 2023.

ii. Summary of alleged facts

3. The Complainants allege that Esnart Kenesi, a 16-year-old Malawian National, was recruited together with another girl by a man on 22 February 2018 in the village of Neno, to work as a babysitter in Blantyre. Contrary to what they had agreed, it transpired that they would be working in a bar and were handed over to a bar owner following their arrival on 01 March 2018. The Complainants submit that the two girls were informed that, in addition to their normal duties at the bar, they would

be required to provide sexual services to patrons. It is alleged that the girls were forced to engage in sexual acts and the bar owner used to collect the money from the patrons. It is submitted that for a period of 26 days, the girls were forced to have sex with no less than 10 men per day and would be given 50 Kwacha for food per day.

4. The Complainants allege that on 26 March 2018, the two girls were able to escape to the town of Limbe where they filed a report and gave statements at the police Station in Soche. In their statements, they only identified the bar owner and did not mention the recruiter, nor the men who were paying to have sexual intercourse with them. The police took them to a medical centre in Blantyre where a doctor found that they had syphilis and are HIV positive.
5. The Complainants submit that the girls were kept in the Victim Support Unit where they were allegedly sexually abused by some police officers and not believed when they reported the case.
6. It is alleged that a criminal court case was opened against the bar owner at the Blantyre Magistrate's Court where the accused was charged with two counts of trafficking in children under section 15 as read with section 14 of the Trafficking in Persons Act. The first count was in relation to the Esnart Kenesi, and the second in relation to another girl who was also trafficked and sexually abused with Esnart Kenesi. Section 14 of the Trafficking in Persons Act criminalizes trafficking in persons, and section 15 provides that a person who traffics a child shall, upon conviction, be liable to imprisonment of 21 years without the option of a fine. It further provides that it is immaterial to the commission of the offense of trafficking of a child that the child consented or that the means of trafficking as provided in Section 2 of the Act.
7. The Complainants allege that on 30 March 2018, the day of the court hearing, a person known to the recruiter came to the police station, negotiated with the police, and forced and threatened the girls to leave with the assistance of the police.

Esnart Kenesi went back to her village and the other girl went to Lilongwe. It is submitted that the case was adjourned to 9 April as the girls were not present at court and the accused was granted bail.

8. On 30 April 2018, a local organisation, People Serving Girls at Risk (PSGR) learned about the case in the media and went to Soche police station to establish the facts and access the police file, which it was denied access. The Complainants submit that PSGR traced the file from the court and together with the Young Women Christian Women's Association (YWCA) through the support of Equality Now and a social worker in Neno, found Esnart Kenesi, but were not able to trace the other girl. Esnart Kenesi was re-prescribed for syphilis and HIV medication and received psychological counselling and further medication after having been diagnosed with post-traumatic stress disorder. The Complainants provide that in August 2018, with support from PSGR, she agreed to be transferred to a shelter in Blantyre run by an NGO for a period of three weeks and to continue with her hospital appointments.
9. The Complainants indicate that on 24 August 2018, Women Lawyers Association was able to get the Regional Prosecutor on the case and it was transferred to the Regional Magistrates' Court where it was heard for the first time on 13 September 2018. The case was heard in the Magistrate's office without a public gallery, but Esnart Kenesi and the accused met in court. Since then, the Complaints submit that, the case has been adjourned eleven (11) times with no indication of when it will be finalized.

iii. Alleged violations

10. The complaints allege that the Respondent State is in violation of:

- Article 27 in the right to be protected from sexual exploitation
- Article 29 of the prohibition against sale, trafficking, and abduction

- Article 16 on the right to protection against child abuse and torture
- Article 15 of the right to be protected from child labour
- Article 4 on the best interests of the child

iv. Applicant's submission on admissibility

11. The Complainants submit that the Communication fulfils all the requirements under Article 44 of the Charter and the provisions of the Revised Guidelines for the Consideration of Communications. The Complainants argue that they have standing before the Committee in line with Section I(i) of the Revised Communications Guidelines as they are registered in a Member State; the alleged victim was a child at the time the violations occurred, and they have obtained her consent.
12. Regarding the Form and Content of the Communication, the Complainants submit that it fulfils all the requirements contained in Section II of the Communication Guidelines considering the identity of the Victim is disclosed, the Communication is submitted in writing and duly signed, the Respondent State is a State party to the Charter.
13. Concerning the Conditions of Admissibility, the Complainants submit that the Communication fulfils the requirements contained in Section IX of the Revised Communication Guidelines.
14. On the issue of exhaustion of local remedies, the Complainants submit that according to Section IX(1)(d) of the Communications Guidelines, a Communication is admissible if it has been "submitted after having exhausted available and accessible local remedies," or if "it is obvious that this procedure is unduly prolonged or ineffective." The Complainants further provide that the requirement of exhaustion of domestic remedies could not be met in this case because the domestic remedies were unduly prolonged and were not available and effective. In support of their argument, the complainants submit that the presence of

mechanisms does not necessarily equate to availability and effectiveness. It is their submission that the Respondent State has had several years to dispense with this matter since the Complainants brought the case to its attention but failed to do so. In this regard, the Complainants submit that the local remedies have been unduly prolonged and that the principle of exhaustion of local remedies should be waived. The Complainants further argue that it is evident from the conduct of the investigations by the Police, the delay in prosecution, and the various adjournments by the Court that there is failure of the Respondent State to offer a remedy.

v. The Respondent's submission on admissibility

15. In its response to the Complainants' submission on admissibility, the Respondent State argued the Complainants' failure to exhaust local remedies and provide proofs of attempting to exhaust local remedies. The Respondent State submits that local remedies are available, sufficient, and effective and that local avenues for redress should have been exhausted before approaching the Committee.
16. The Respondent State indicates to be cognizant of the positive steps that the Complainants took to seek justice on the matter. However, it is submitted there are available accessible and effective local remedies which the complainants should have had recourse to, in order to finalise the hearing within reasonable time. The Respondent State submits that such alternatives include to request a consent from the Chief Resident Magistrate to reassign the case to another magistrate, or to seek for the services of a private lawyer.
17. The Respondent State submits that the reasons for the 11 adjournments seem plausible and justifiable and argues that the Complainants have a fair share of the blame for the delay they could request for a consent form from the CRM and for the services of a private lawyer when they found that the file was missing.

18. The Respondent State also argues that COVID -19 has contributed to the delay, and that the file is still open and being effectively dealt by its courts. Accordingly, the Respondent State submits that the Committee declares the case inadmissible.

vi. The Committee's analysis on admissibility

19. The Committee's analysis of the admissibility of a Communication relies on Article 44 of the Charter and the Revised Communication Guidelines. Article 44 of the Charter and Section I (1) of the Revised Communication Guidelines state that 'non-governmental organisations legally recognised by one or more of the Member States of the African Union or State Party to the Charter or the United Nations, among others can submit a Communication before the Committee.' The Committee notes that PSGR is registered in Malawi and Equality Now is registered as an international non-governmental Organisation in Kenya and enjoys observer status with the ACERWC. Moreover, it is noted that the Respondent State is a State Party to the Charter as it ratified the Charter in 1999. Furthermore, in terms of Section I (4) (a) of the Revised Communication Guidelines, the Committee's jurisdiction is determined by the complainant's age at the time of the alleged violation which in this case, occurred when the victim was 16 years old. As such, the Committee holds that the Complainants have *locus standi* to submit the case.
20. The admissibility of a Communication is determined based on the conditions of admissibility provided under Section IX (1) of the Revised Communications Guidelines. Therefore, the Committee assesses whether or not the Communication meets these conditions.
21. The first condition is whether the Communication is compatible with the provisions of the Constitutive Act of the African Union and the African Children's Charter. The Committee notes that the claims made by the Complainants in the Communication seek to protect the rights of the victim guaranteed under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union, as stated in Article

- 3(h) thereof, is the promotion and protection of human and peoples' rights. Therefore, the Committee considers that the Communication is compatible with the Constitutive Act of the African Union and the Charter.
22. The second condition requires that the Communication is not exclusively based on information circulated by media or manifestly groundless. The Committee notes that the information contained in the Communication is part of court proceedings in the Respondent State and supported by concrete. The Committee reached at this conclusion after carefully analysing the content of the Communication as well as the documents annexed to the Communication including signed statements from the victim and efforts undertaken by the Complainants throughout the procedure.
23. Another condition is that the Communication does not raise matters pending settlement or previously settled by another international body or procedure in accordance with any legal instruments of the Africa Union and principles of the United Nations Charter. To ensure that the matter is not pending before another international body or has not been previously settled, the Committee took the initiative to verify by requesting information from other similar bodies. From the responses it received and absence of opposition by the Respondent State on this matter, the Committee concludes that the present Communication is not pending before or has not been settled by another procedure.
24. The fourth condition is that the Communication is submitted after having exhausted available and accessible local remedies, unless it is obvious that this procedure is unduly prolonged or ineffective. The Committee, from the Complainants and the Respondent State's submissions on admissibility, identifies two issues that require analysis namely;
- a. *Whether or not local remedy is unduly prolonged*
 - b. *Whether or not local remedies are available and effective*

a. Whether or not the local remedy is unduly prolonged

25. Section IX (1) (d) of the Revised Guidelines on Communications provides exemption of the condition of exhaustion of local remedies where they are unduly prolonged. In assessing whether local remedies are unduly prolonged, the Committee analysis the procedural history of the case taking into consideration the principle of best interest of the child pursuant to Article 4 of the Charter.
26. The Committee has a longstanding position substantially developed in its Jurisprudence where it has found that delays of four years may be considered unduly prolonged when the State has been aware of the ongoing violations.¹ In *Minority Rights Group International v. Mauritania*, where over four years had passed since the domestic case was filed, including nearly two years since the appeal hearing was repeatedly and indefinitely postponed, the Committee found that the State had been duly notified of the violation and had failed in its responsibility to move the justice process forward.² Similarly, in the *Nubian Children Case*, the Committee concluded that there had been undue delay where local proceedings had been initiated more than six years prior but were delayed due to various procedural issues including a bench not being constituted or a substantive hearing date being not set. In both abovementioned cases, the Committee determined that four and seven years of delays, constituted to be 'sufficient period of time attempting to see if local remedies would offer any prospect of success and adequate remedies'.³

¹ ACERWC, Communication 002/Com/002/2009, Communication 007/Com/003/2015, *Minority Rights Group International et.al v. Mauritania*, paras. 24, 29; ACERWC, *Institute for Human Rights and Development in Africa (IHRDA) and others on behalf of Children of Nubian descent v. Kenya*, at para. 27.

² ACERWC, Communication 007/Com/003/2015 *Minority Rights Group International et.al v. Mauritania*, paras. 8-11, 24, 27-30.

³ ACERWC, Communication 002/Com/002/2009, *IHRDA et.al on behalf of Children of Nubian descent v. Kenya*, para. 34; ACERWC, Communication 007/Com/003/2015, *Minority Rights Group International et.al v. Mauritania*, para. 30.

27. Regarding the present case, the Committee notes that the violations occurred in 2018 while the case was brought before the Committee in 2022. In analysing the facts submitted in the Communication, the Committee finds that the Complainants have, since the occurrence of the violations, taken actions that were in line with the judicial requirements, including filing a complaint before the magistrate court and undertaking required action for the outcome of the justice process. Further, the Committee finds that the case is still at the pre-trial stage. Additionally, the Committee notes that the file of the case is missing which increases the probability of further delay.
28. At the same time, the committee finds that the multiple postponements that have been experienced throughout the procedure are not in line with the access to justice for the victim, and no such delay can be regarded as justifiable. The Committee notes that the reasons provided by the Respondent State justifying the delay cannot exonerate the responsibility of the Respondent State in its obligation to provide justice for citizens and in this case, for the victim.
29. The Committee recalls its various jurisprudences where it held that delayed court proceedings are not in the best interest of the child as “the implementation and realization of children’s rights in Africa is not a matter to be relegated for tomorrow, but an issue that needs proactive immediate attention and action”⁴ The Committee finds that the causes of the various adjournments by the national authorities, the long period during which these postponements continuously took place, and the fact that the file is missing among other things, are elements that are not in accordance with the principle of best interest of the child as stated in article 4 of the Charter.
30. Taking the specificity of the violations into account, especially on the issue of rape, the Committee reiterates that ‘time is of the essence especially in cases involving

⁴ ACERWC, Communication 002/Com/002/2009, *IHRDA et.al on behalf of Children of Nubian descent v. Kenya*, at para.35.

rape” because delays “may render the entire investigation ineffective.”⁵ The Committee notes that more than 5 years have passed since this matter was first brought to the attention of the Respondent State in Malawi and the accused person is still to be brought to trial.

31. In conclusion, the Committee is of the view that the delay caused by these adjournments is “undue” and therefore imputable to the Respondent state.

b. Whether the local remedies were available and effective

32. The Committee notes that aside from the issue of undue delay, issues of availability and effectiveness have been raised by both Parties to the Communication. In relation to the Respondent State’s argument that the alternatives measures, namely the option of requesting the Chief Regional Magistrate to review the court record and the option of seeking private prosecution of the matter with permission from the Director of Public Prosecutions as available local remedies, the Committee finds that these measures are beyond the ambit of local remedies. The Committee reiterates that only judicial remedies which are available, effective, and sufficient should be exhausted.⁶ The Committee underlines that Complainants are not required to exhaust non-judicial remedies in the context of in the context of Section IX (1) (d) of the Revised Communications Guidelines. In the present case, the Committee notes that the alternative measures referred by the Respondent State are non-judicial remedies which the Complainants should not be subjected to recourse to. Moreover, the Committee recalls its jurisprudence where it held that remedies are “available” if a complainant can pursue them without impediment or they can make use of them in the

⁵ ACERWC, Communication 006/Com/002/2015, *IHRDA and Finders Group Initiative on behalf of TFA v. Cameroon*, para. 56

⁶ ACERWC, Communication 002/Com/002/2009, *Institute for Human Rights and Development in Africa (IHRDA) and other v Kenya*, para 28; ACHPR, Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, (May 2000), para 31.

circumstances of their case and “effective” if they offer a reasonable prospect of success.⁷ Therefore, even if remedies are available in principle, yet, have not been available for the Complainants in their specific case, the Committee finds that such remedies are unavailable.⁸

33. The Committee notes that the availability referred to, goes beyond the simple “existence” and questions the accessibility which may be impacted by various factors, including, among others, the costs of pursuing a remedy and proximity, etc. The Committee is of the view that the other options, namely requesting the Chief Regional Magistrate to review the court record and seeking private prosecution of the matter with permission from the Director of Public Prosecutions, might have not been accessible for the victim, and therefore, supports that they were not available.

34. Regarding the issue of effectiveness, and as mentioned above, the Committee, reiterates that local remedies are “effective” if they offer a reasonable prospect of success.⁹ The Committee held in the Nubian case¹⁰ in situations where violations are widespread, widely reported by international or domestic observers, or at least one legal case has been filed before domestic courts, the Committee recognizes that the State had adequate notice and opportunity to address those violations, and has held that Complainants are exempted from exhausting local remedies. Additionally, the Committee recalls from its jurisprudence and the jurisprudence of the African Commission on human and Peoples’ rights, that remedies are not

⁷ ACERWC, Communication 007/Com/003/2015, *Minority Rights Group International et.al v. Mauritania*, para. 23; ACHPR, Comm. No. 477/14, 2015 *Crawford Lindsay von Abo v. The Republic of Zimbabwe*, , Para. 67.

⁸ ACERWC, Communication no 012/Com/001/2019, *Center for Reproductive Rights and Legal and Human Rights Center (on behalf of Tanzanian girls) v Tanzania*, Decision no 0012/Com/001/2019, para 21; Inter-American Court of Human Rights, *Durand and Ugarte v. Peru*, Preliminary Objection, 1999.

⁹ ACERWC, Communication 007/Com/003/2015, *Minority Rights Group International et.al v. Mauritania*, para. 23; ACHPR, Comm. No. 477/14, 2015, *Crawford Lindsay von Abo v. The Republic of Zimbabwe*, , Para. 67

¹⁰ ACERWC, *IHRDA et.al on behalf of Children of Nubian descent v. Kenya*, para. 27

effective where the State has received ample notice of the alleged violations taking place in its country but failed to investigate or prosecute those responsible.¹¹

35. In this case, the Committee notes that the fact that the State has had ample notice and opportunity to adjudicate on this matter is not in contention. The Committee further notes that the Complainant has attempted at several occasions to engage with various departments on the challenges faced in obtaining justice on this matter, including a final meeting with the Director of Public Prosecutions in September 2021 after which it was confirmed that the file is missing. The Committee finds that these are evidences of the Respondent State amply notified in addition to the complaint itself being filed before the Court since 2018.
36. The Committee reiterates that “an unduly prolonged domestic remedy cannot be considered to fall within the ambit of an ‘available, effective, and sufficient’ local remedy.”¹² Based on this and the abovementioned analysis, the Committee, finds that in the present case local remedies were unduly prolonged and therefore, are unavailable, ineffective. It is the Committee’s longstanding position that in similar situations, the requirement of exhaustion of local remedies is waived.
37. Regarding the condition that the Communication is presented within a reasonable period after exhaustion of local remedies at the national level, the Committee notes that given that local remedy was unduly prolonged and its exhaustion has been waived, this condition is not applicable in the present Communication.
38. As for the last condition, the Committee found that the Communication does not contain any disparaging or insulting language and therefore, meets this requirement.

¹¹ ACHPR, Comm. No. 379/09, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, para. 56-64 (2014); ACHPR, Comm. No. 275/03 (2007), *Article 19 v. State of Eritrea*, para. 77-78, ACHPR, Comm. No. 301/05, (2011), *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials/Ethiopia)*, para. 113,.

¹² ACERWC, Communication 002/Com/002/2009, *HRDA et.al on behalf of Children of Nubian descent v. Kenya*, paras. 31-32.

vii. Decision on admissibility

39. Based on all the above analysis, the African Committee of Experts on the Rights and Welfare of the Child concludes that the Communication fulfils all the admissibility conditions laid down in the Revised Communications Guidelines, hence, declared admissible.

Adopted in May 2023 during the 41st Ordinary Session of the ACERWC

Honourable Anne Musiwa



Acting Chairperson of the African Committee of Experts on the Rights and
Welfare of the Child