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| الاتحاد الأفريقي | | UNIÃO AFRICANA |
| AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS<br>COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES | | |

**THE MATTER OF**

**BAHATI MTEGA**

**AND**

**FLOWIN MTEVE**

**V.**

**UNITED REPUBLIC OF TANZANIA**

**APPLICATION No. 009/2019**

**RULING**

**(PROVISIONAL MEASURES)**

**26 JULY 2023**

**The Court composed of:** Modibo SACKO, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Dennis D. ADJEI – Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"),[1] Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

*In the matter of*

Bahati MTEGA and Flowin MTEVE
*Self-represented*

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

Mr. Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General

After deliberation,

*Delivers this Ruling*:

[1] Formerly Rule 8(2), Rules of Court, 2 June 2010.

## I. THE PARTIES

1. Bahati Mtega and Flowin Mteve (hereinafter referred to as "the Applicants") are both nationals of the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). They are currently imprisoned and serving life sentences after being convicted of the offence of gang rape. They allege a violation of their rights during the proceedings in the domestic courts.

2. The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one year after its deposit.[2]

## II. SUBJECT OF THE APPLICATION

3. The main Application in this matter, was filed on 22 March 2019. By their Application, the Applicants alleged that the Respondent State had violated their right to dignity inherent in a human being and to the recognition of their legal status under Article 5 of the Charter in respect of how the proceedings in domestic courts, leading up to their conviction and sentencing, were conducted.

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, § 38.

4. It emerges from the record that on 2 September 2013, the District Court sitting at Ludewa convicted the Applicants of the offence of gang rape and sentenced them to life imprisonment and twelve (12) strokes of the cane. The Applicants, being dissatisfied with the District Court's judgment, appealed to the High Court sitting at Iringa which, on 18 September 2015, dismissed their appeal. The Applicants' further appeal to the Court of Appeal was dismissed on 3 August 2016.

5. In the present application, the Applicants state that they are seeking provisional measures "… in accordance with Article 27 of the Protocol" without providing any particulars.

## III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Registry received the main Application on 22 March 2019. On 11 April 2019 the Registry acknowledged receipt of the main Application and notified the Applicants of the need to file further pertinent documents in support of their Application.

7. On 23 May 2019, the Applicants acknowledged receipt of the Registry's Notice and, in their response, while not submitting the requested documentation, they listed their prayers for reparations. In the same response, the Applicants requested the Court "… to order provisional measures in accordance with Article 27 of the Protocol or Rule 51 of the Rules..." but without providing any further details.

8. The main Application, together with the request for provisional measures, was served on the Respondent State on 23 October 2019**.** The Respondent State was given sixty (60) days within which to file its Response.

9. The Respondent State filed its Response to the Application on 19 June 2020 but did not specifically address the request for provisional measures.

## IV. *PRIMA FACIE* JURISDICTION

10. Neither of the Parties made any submission regarding any aspect of the Court's jurisdiction.

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11. Article 3(1) of the Protocol stipulates that:

> The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

12. Rule 49(1) of the Rules provides that "the Court shall conduct preliminary examination of its jurisdiction … in accordance with the Charter, the Protocol and these Rules." However, in examining applications for provisional measures, the Court need not ascertain that it has jurisdiction on the merits of the case, but it simply needs to satisfy itself that it has *prima facie* jurisdiction.[3]

13. In the instant matter, the Applicants allege violation of rights that are protected under Article 5 of the Charter, an instrument to which the Respondent State is a party.

14. The Court notes that the Respondent State has ratified the Protocol. It has also made the Declaration by which it accepted the Court's jurisdiction to receive

[3] *African Commission on Human and Peoples' Rights v. Libya* (provisional measures) (25 March 2011) 1 AfCLR 17, § 15; *African Commission on Human and Peoples' Rights v. Kenya* (provisional measures) (15 March 2013) 1 AfCLR 193, § 16, and *Komi Koutche v Republic of Benin* (provisional measures) (2 December 2019) 3 AfCLR 725, § 14.

applications from individuals and Non-Governmental Organisations in accordance with Articles 34(6) and 5(3) of the Protocol, read jointly.

15. The Court further notes, as indicated in paragraph 2 of this Ruling, that on 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration filed on 29 March 2010, in accordance with Article 34(6) of the Protocol. The Court recalls that the withdrawal of a Declaration comes into effect after one year of its deposit, has no retroactive effect, and does not have any bearing on pending and new cases filed before the withdrawal comes into effect.[4] The Court further recalls, as it has held in *Andrew Ambrose Cheusi v. United Republic of Tanzania*,[5] that the withdrawal of the Declaration took effect on 22 November 2020 with respect to the Respondent State. Noting that, in the present matter, the main Application was filed on 22 March 2019 and the request for provisional measures, was filed on 23 May 2019, the Court finds that the said withdrawal does not affect its personal jurisdiction.

16. In light of the foregoing, the Court holds that it has *prima facie* jurisdiction to hear the Application for provisional measures.

## V. ON THE PROVISIONAL MEASURES REQUESTED

17. The Court observes that the Applicants have simply requested it to order provisional measures. They have not made any submissions expounding on the basis of their request.

18. The Court also observes that the Respondent State did not make any submissions in respect of the request for provisional measures.

[4] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (jurisdiction, withdrawal) (3 June 2016) 1 AfCLR 562, § 67.
[5] *Supra*, note 2.

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19. The Court recalls that pursuant to Article 27(2) of the Protocol, it may, at the request of a party, or on its own accord, in cases of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.

20. Notably, it lies with the court to decide in each case whether, in light of the particular circumstances, it must exercise the jurisdiction conferred upon it by Article 27(2) of the Protocol. [6]

21. The Court recalls that, in determining whether a request for provisional measures should be granted or not, it is required to establish extreme gravity and urgency as well as the necessity of avoiding irreparable harm. In the present application, there is nothing in the submissions by the Applicants that points to the existence of extreme gravity and urgency necessitating the issuance of an order for provisional measures. There is also no indication of the irreparable harm that the Applicants are likely to suffer if no order for provisional measures is issued. The Applicants have simply made a request for provisional measures without substantiating it.

22. In the circumstances, therefore, the Court decides to dismiss the Applicants' request for provisional measures.

23. For the avoidance of doubt, this Order is provisional in nature and in no way prejudges the findings that the Court might make as regards its jurisdiction, admissibility of the Application, and the merits of the Application.

[6] *Armand Guehi v United Republic of Tanzania* (provisional Measures) (18 March 2016) 1 AfCLR 587, § 17 and *Charles Kajoloweka v. Republic of Malawi* (provisional measures) (27 March 2020) 4 AfCLR 34, § 17.

## VI. OPERATIVE PART

24. For these reasons:

THE COURT,

*Unanimously*,

*Dismisses* the request for provisional measures.

Done at Arusha this Twenty-Sixth day of July in the Year Two Thousand and Twenty-three, in English and French, the English text being authoritative.

Signed:

Modibo SACKO, Vice President

Robert ENO, Registrar