



JUDGMENT SUMMARY

HABYALIMANA AUGUSTINO AND MUBURU ABDULKARIM

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 015/2016

JUDGMENT ON MERITS AND REPARATIONS

3 SEPTEMBER 2024

A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Arusha, 3 September 2024: The African Court on human Peoples Right (the Court) delivered a judgment in the case of *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*.

The Applicants are Burundian nationals and refugees in Tanzania, who at the time of filing this Application were incarcerated at Butimba Central Prison in Mwanza in Tanzania. On 31 May 2007, the Applicants were convicted and sentenced to death by hanging for the offence of murder on 31 May 2007 by the High Court of Tanzania at Bukoba, and are currently awaiting execution. They allege violation of their rights in the course of the proceedings before domestic courts.

The Court observed that, as per Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), it had to, preliminarily, determine whether it had jurisdiction to hear the Application.

In this regard, the Respondent State had raised an objection to the material jurisdiction of the Court, averring that the latter is not a court of first instance nor is it an appellate court, and therefore has no jurisdiction to consider the Application. The Respondent State further averred

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that the Court has no jurisdiction to quash and set aside the Applicants' conviction and sentence, since both orders were upheld by the Court of Appeal, its highest court, and that this Court has no power to order the release of the Applicants from prison. The Court however, held that it had material jurisdiction because the Applicants had alleged violations of rights protected under the Charter.

The Court further held that even though it is not an appellate court, it is empowered to assess whether domestic proceedings were in compliance with international human rights standards set out in the Charter and other human rights instruments ratified by the Respondent State. The Court also held that it is empowered to make appropriate orders on reparations, if it finds a violation of the rights guaranteed by the Charter or any instrument ratified by the Respondent State.

Although the other aspects of its jurisdiction were not challenged by the Respondent State, the Court nevertheless examined them. In this regard, the Court found that it had personal jurisdiction since, on 29 March 2010, the Respondent State deposited the Declaration provided for under Article 34(6) of the Protocol. This Declaration allows individuals to file applications against the Respondent State as per Article 5(3) of the Protocol. The Court underscored that the Respondent State's withdrawal of the said Declaration on 21 November 2019 did not affect this Application, as the withdrawal took effect only on 22 November 2020, which is after the Application had been filed before the Court, that is, on 8 March 2016. The Court also held that it had temporal jurisdiction as the alleged violations occurred after the Respondent State had become a party to the Charter and the Protocol and had deposited the Declaration required under Article 34(6) of the Protocol. Lastly, it found that it had territorial jurisdiction, given that the facts of the matter occurred within the territory of the Respondent State. The Court then concluded that it had jurisdiction to hear the application.

On admissibility of the application, the Court considered the objection raised by the Respondent State on failure by the Applicants to exhaust local remedies, with respect to the allegations that their conviction was based on circumstantial evidence and the defense of an *alibi*. Furthermore, it considered the Respondent State's submission that the Applicants had the opportunity to raise these issues during the domestic proceedings with the possibility of requesting for a review under Rule 66 of the Court of Appeal's Rules, on the grounds that the decision was based on a manifest

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error which resulted in a miscarriage of justice, and finally, that they should have filed a constitutional petition for violation of their rights under the Basic Rights and Duties Enforcement Act, Cap 3 of the Laws of the Respondent State. The Court noted that the Applicants' allegations to which the Respondent State objected, all revolved around issues relating to the proceedings before the domestic courts. Furthermore, that the domestic courts considered and ruled on the issues of circumstantial evidence, defence of *alibi*, statement obtained through torture, and trial within a reasonable time.

Although the issues of access to consular assistance and the imposition of the mandatory death sentence on a mentally ill person were not expressly raised in any of the proceedings before domestic courts, the Court surmised that they substantively relate to the right to a fair trial. On the Respondent State's submission that the Applicants should have filed a constitutional petition before the High Court, as provided for under Article 13 of its Constitution, the Court recalled that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicants were not required to exhaust prior to seizing this Court. Consequently, the Court dismissed the objections and found that local remedies had been exhausted as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court (hereinafter referred to as the Rules).

Although other conditions of admissibility were not challenged by the Respondent State, the Court nonetheless had to ensure that they had been fulfilled. In this regard, it held that, the Applicants had been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules. It also held that the allegations by the Applicants sought to protect their rights in line with Article 3(h) of the objectives of the Constitutive Act of the African Union, and thus the Application complied with Rule 50(2)(b) of the Rules. Furthermore, the Court found that the language used in the Application was not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules, and that the Application was not based exclusively on news disseminated through mass media in fulfilment of Rule 50(2)(d) of the Rules. Regarding the filing of the Application within a reasonable time, the Court further notes that the final decision of the Court of Appeal of Tanzania was delivered on 2 March 2012 and the Applicants filed their Application before this Court on 8 March 2016. The Court found a period of three (3) years and six (6) days that was taken before filing his Application before this Court to be reasonable in these circumstances, considering, among others, that the Applicant is incarcerated, lay and self-represented, and,

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therefore, holds that the requirement in Rule 50(2)(f) of the Rules has been met. Furthermore, the Application did not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.

The Court then concluded that all admissibility requirements under Article 56 of the Charter and Rule 50 of its Rules have been met, and accordingly declared the application admissible.

On the merits of the case, with regard to the alleged violation of the right to a fair trial, in respect of the Respondent State's failure to facilitate consular services to the Applicants, the Court recalled that under Article 36(1) of the Vienna Convention on Consular Relations (VCCR), consular assistance is facilitated in two ways. First, the host State must inform the Applicant of this right and second, the Applicant should be able to request for consular assistance at the time of arrest. On the first aspect, the Court noted that both Applicants were not notified of their right to consular assistance, although the Respondent State was aware of their foreign status. On the second aspect, the Court noted that the records on file do not reveal that the Applicants made any request for consular assistance that was considered or denied by the Respondent State. In this regard, it recalled its jurisprudence that an Applicants' failure to request for consular assistance does not absolve the Respondent State from its duty of informing them of their right as prescribed by Article 36(1) of the VCCR. The Court, therefore found that the Respondent State violated the Applicants' right to access consular assistance by failing to inform them of their rights to access the said services, thereby violating Article 7(1)(c) of the Charter as read together with Article 36(1) of the VCCR.

With regard to the alleged violation of the right to a fair trial, in respect of the Respondent State failing to provide interpretation services, the Court observed that at different stages of the proceedings, the Applicants informed the police authorities, their lawyers and the trial court that they did not understand Kiswahili well, the language in which their interrogation and trial was conducted, and that, as a result, they were unable to participate meaningfully in those proceedings. The Court therefore, held that the Respondent State violated Article 7(1)(c) of the Charter, as read together with Article 14(3)(a) of the International Covenant on Civil and Political

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Rights (ICCPR), with regard to the alleged failure to provide the Applicants with interpretation services during their arrest, interrogation, detention and trial.

On the failure to provide effective legal representation, the Court recalled its jurisprudence that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. The quality of the defence provided is essentially a matter between the client and his representative and the State should intervene only where the lawyer's manifest failure to provide effective representation is brought to its attention. The Court observed that the Applicants were both represented by a counsel freely provided by the State during the trial and that there was nothing on record to demonstrate that the Respondent State impeded counsel from accessing the Applicants and consulting them on the preparation of their defence or denied the designated counsel adequate time and facilities to enable the Applicants to prepare their defence. It therefore found that the Respondent State discharged its obligation to provide the Applicants with effective free legal assistance and finds that the Respondent State has not violated Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR.

On the failure to try the Applicants within a reasonable time, the Court observed that there was no justifiable reason as to why following the Applicants' arrest, their committal was held three (3) years, four (4) months and sixteen (16) days later after the preliminary hearing. To exacerbate the situation, it was the lawyer for the Applicants who had to twice remind the High Court that the committal proceedings had not been finalised and a trial date set. Additionally, the Court observed that there was nothing on record to demonstrate that the Applicants impeded the progress of the investigations before their arraignment at the High Court, the case was not a complex one, there were no multiple applications filed or adjournments requested as observed from the record of proceedings. The Applicants were committed on 2 March 2006 and trial at the High Court commenced on 27 March 2006. In the circumstances, the Court found that the time of six (6) years, ten (10) months and nineteen days (19) days from the date of arrest to the commencement of the trial, could not be considered as reasonable. It therefore, found that the Respondent State had violated the Applicants right to be tried within a reasonable time as provided for under Article 7(1)(d) of the Charter.



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With regard to the Respondent State using a coerced confession to convict the Second Applicant, the records on file illustrated that there were other pieces of evidence used to convict and sentence him, including witness statements, the trial within the trial, the identification parade and finally, the fact that he was able to show the police authorities where to find the alleged murder weapon and the ballistics report. The Court noted that although the method of extracting the confession and recording the statement posed a major procedural irregularity, it cannot be said that the Second Applicant was convicted and sentenced solely on the strength of the disputed caution statement. Accordingly, the Court held that the Respondent State did not violate the Second Applicant's right to fair trial as enshrined under Article 7(1)(c) of the Charter, with regard to the Second Applicant's conviction and sentence, solely on the basis of a disputed coerced statement.

On the failure of the District Magistrate to order investigations into the alleged cruel, inhumane and degrading treatment, the Court noted the District Magistrate during the trial, observed and recorded that both Applicants bore scars, some of which had healed. The Court surmised that once the Applicants adduced *prima facie* evidence of ill-treatment or torture, the burden automatically shifted to the Respondent State to prove the contrary. It asserted that the District Magistrate bore the duty to provide the Applicants with adequate protection upon being arrested as suspected criminals, and to conduct an investigation into how they sustained the injuries and, finally, to bring the culprits to book. The Court therefore, held that the Respondent State failed in its duty to investigate allegations of abusive cruel, inhumane and degrading treatment, provided for under Article 5 of the Charter, due to the inactions of its agent, the District Magistrate.

Regarding the alleged violation of the right to freedom from torture, cruel and inhumane and degrading treatment by the police authorities, the Court observed from the record of proceedings that counsel for the First Applicant informed the Court that his client was a refugee, that he was beaten and that he did not speak Kiswahili. Moreover, that the police brutality was reported to the District Magistrate by the Applicants, who examined the Applicants and took a record of the wounds and body scars. In light of the above, the Court held that the Respondent State violated the Applicants right not to be subjected to cruel, inhuman and degrading treatment as provided under Article 5 of the Charter through the actions of the police authorities who are agents of the State.

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With respect to the allegation on execution of the death penalty by hanging, the Court reiterated its position that methods of execution must exclude suffering or cause the least possible suffering in cases where the death penalty is permissible. The Court found that the method of enforcing the death sentence, inevitably encroached upon the Applicants dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment. It held that the Respondent State had violated the Applicants right to dignity enshrined in Article 5 of the Charter with regard to the method of execution of the death penalty by hanging.

Regarding the allegation relating to the exposure of the Applicants to the death row phenomenon in deplorable conditions and causing them psychological torment, the Court recalled its jurisprudence in the *Ally Rajabu and Others v. United Republic of Tanzania* case, where it held that eight (8) years on the death row constituted cruel, inhuman or degrading treatment or punishment. In light of this, the Court held that the Respondent State violated the Applicants' right to dignity enshrined in Article 5 of the Charter, insofar as it kept the Applicants on death row for a a period of (8) years, nine (9) months and eight (8) days, which amounted to cruel, inhuman or degrading treatment or punishment.

In relation to the allegation of being subjected to deplorable prison conditions, the Court observed that the allegations were buttressed with published reports and that the Respondent State did not provide any information in rebuttal. In the absence of contrary information debunking these allegations, the Court considered that these allegations were well-founded and held that the Respondent State violated the Applicants' right to dignity guaranteed under Article 5 of the Charter by subjecting the Applicants to anguish and living in deplorable conditions of detention.

On the allegation by the Second Applicant that he was discriminated against by the police authorities when they made inaccurate presumptions because of his status as a refugee, precipitated by the increasing intolerance of refugees to the "Open door policy toward refugees from Congo, Rwanda and Burundi", the Court found no basis for the claim. It held that the Respondent State did not violate the Second Applicant's right not to be discriminated against on the basis of national origin and refugee status, provided for under Article 2 of the Charter and Article 3 of the Charter on equality before the law and equal protection of the law

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On the alleged violation of the right to equal protection of the law, the Court observed that the Applicants made similar claims under the right to a fair trial, which had already been addressed, therefore, did not deem it necessary to examine the claims any further.

On the alleged violation of the right to life by the mandatory imposition of the death penalty, the Court recalled its jurisprudence in *Ally Rajabu and Others v. United Republic of Tanzania*, that the death penalty, as imposed by the courts of the Respondent State in instances of murder, such as in this case, does not abide by due process as it does not allow the judicial officer discretion to consider alternative forms of punishment. The Court therefore found that the Respondent State violated the Applicants' right to life as provided under Article 4 of the Charter, by imposing the mandatory death penalty, thereby limiting the discretion of the judicial officer to sentence the accused.

With regard to the alleged violation of the right to life by imposing the death penalty on persons suffering from mental illness or disorders, the Court found that the Respondent State violated the Applicants' right to life as guaranteed under Article 4 of the Charter owing to the fact that the judicial officer was only afforded the mandatory imposition of the death penalty.

On reparations, the Applicants prayed the Court to grant them reparations for the violations they suffered, including quashing their convictions and sentences and ordering their release; releasing them from prison; vacating the conviction and sentence of the death penalty imposed on them and accordingly to remove them from death row or commutation of the mandatory death; amending the law to remove the mandatory death penalty for the statutes; compensate them for the loss of earnings from their livelihood; and paying appropriate reparations for all the suffering and harm caused. On its part, the Respondent State prayed that the Court dismiss the Applicant's prayers for reparations in their entirety on the grounds that they were baseless, since the Court has no jurisdiction to quash and set aside the conviction, furthermore, that the Applicants were convicted and sentenced in accordance with the law.

The Court recalled its findings that the Respondent State violated the Applicants rights by: denying them access to consular assistance as Article 7(1)(c) of the Charter as read with Article 36(1) of the VCCR; failing to provide them with interpretation services during their trial, as

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provided under Article 7(1)(c) of the Charter as read together with Article 14(3)(a) of the ICCPR; failing to try them within a reasonable time, as provided for under Article 7(1)(d) of the Charter; failing to treat them with dignity and subjecting them to inhumane, cruel and degrading treatment, protected under Article 5 of the Charter; and by imposing the mandatory death penalty, contrary to the provisions of Article 4 of the Charter.

With respect to both Applicants, the Court on pecuniary reparations: did not grant reparations for material prejudice; granted Tanzanian Shillings Five Hundred Thousand (TZS 500,000) to each Applicant for moral damage; and *ordered* the Respondent State to pay the amount indicated above free from taxes within six (6) months, effective from the notification of this judgment, failing which, it will pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

With respect to both Applicants, the Court, on non-pecuniary reparations: did not grant the Applicants' prayer for release; ordered the Respondent State to revoke the death sentence imposed on the Applicants and remove them from death row; ordered the Respondent State to take all necessary measures, within six (6) months from the notification of this Judgment to remove the mandatory imposition of the death penalty from its laws; ordered the Respondent State to take all necessary measures, within six (6) months from the notification of this Judgment, to remove "hanging" from its laws as a method of execution of the death penalty; ordered the Respondent State to take all necessary measures, within one (1) year of the notification of this judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death sentence and upholds the discretion of the judicial officer; and finally, ordered the Respondent State to publish this judgment, within a period of three (3) months from the date of notification, on the websites of the Judiciary, and the Ministry of Constitutional and Legal Affairs, and ensure that the text of the judgment is accessible for at least one (1) year after the date of publication.

On implementation and reporting, the Court, ordered the Respondent State to submit to it, within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months, until the Court considers that there has been full implementation thereof.



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Each party was ordered to bear its own cost.

In accordance with Article 28(7) of the Protocol and Rule 70 (2) of the Rules, the Separate Opinion of Justice Ben KIOKO was appended to the Judgment. Additionally, in accordance with Article 28(7) of the Protocol and Rule 70(3) of the Rules, the Declarations of Justices Rafaâ BEN ACHOUR, Blaise TCHIKAYA and Dumisa B. NTSEBEZA were appended to the Judgment.

Further Information

Further information about this case, including the full text of the decision of the African Court, may be found on the website at: <https://www.african-court.org/cpmt/details-case/0152016>

For any other queries, please contact the Registry by email registrar@african-court.org.

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