AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

SEPARATE OPINION OF JUSTICE BEN KIOKO

IN THE MATTER OF

HABYALIMANA AUGUSTINO AND MUBURU ABDULKARIM

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 015/2016

JUDGMENT OF 3 SEPTEMBER 2024

1. I agree with the findings and conclusions in the majority judgment, of which I am part, in all aspects of the Application, as filed by Mr. Habyalimana Augustino and Mr. Muburu Abdulkarim against the United Republic of Tanzania, in which both Applicants were sentenced to death on 31 May 2007.

2. I have, however, felt the need to express my separate opinion, under Rule 70(2) of the Rules, on the Court's analysis and reasoning relating to one of the allegations made by the second Applicant to the effect that he "suffers from mental illness and therefore should have been ineligible for the death penalty," and, that "the domestic courts failed to identify the illness as they did not take any steps to ascertain whether he was mentally fit to stand trial through a psychiatric evaluation prior to imposing the death penalty."

3. In its analysis of this allegation, both at admissibility stage and the merits, the Court did not consider whether the Respondent State ascertained the Second Applicant's alleged mental illness. Instead, within the context of the Respondent States's objection based on non-exhaustion of local remedies, the Court merely observed that "the mental health status of a person accused of murder is an irrelevant factor in respect of sentencing as far as the Respondent State's criminal law is concerned. This is so because the accused cannot possibly challenge his death sentence on the grounds of his mental illness owing to the fact that the judicial officer is totally deprived of discretion in the sentencing process for the crime of murder, being obligated to impose the death penalty."[1]

[1] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (2019) 3 AfCLR 539, §§ 107-112*; Ibrahim Yusuf Calist Bonge and Others,* ACtHPR, Applciation No. 036/2016, Judgment of 4 December 2023, §§ 78-81*; Ghati Mwita v. United Republic of Tanzania,* ACtHPR, Application No. 012/2019, Judgment of 1 December

4. The Court also considered "that there was no remedy for the Applicants to exhaust given that they had no room in the sentencing process to raise their mental illness as a mitigating factor," and, therefore, concluded that local remedies have been exhausted in respect of that allegation.[2] In the merits section, the Court rightly considered the allegation as falling under the alleged violation of the right to life, under two aspects, namely, imposition of the mandatory death penalty without considering the circumstances; and imposition of the death penalty on a person suffering from mental illness.

5. While I agree with the conclusions reached on both aspects, in my view, the Court's analysis is problematic because it failed to consider and make findings on the following important aspects directly arising from the Second applicant's allegations and submissions:

   i. Whether the Respondent State had an obligation to ascertain the alleged second Applicant's mental illness before sentencing him to death;
   ii. Whether mental illness makes an accused person ineligible to the death penalty as alleged by the second Applicant;
   iii. The options available to a judicial officer where mental illness has not been alleged during the trial or sentencing as is the case with the second Applicant;
   iv. Whether an accused person can challenge his death sentence on the grounds of his mental illness within the Respondent state's domestic courts.

6. I will now proceed to address all the above issues together as they are intrinsically connected.

7. The Second Applicant submitted before this Court, supported by medical reports, that he suffers from post-traumatic stress disorder (PTSD), which is a severe mental illness thereby making him ineligible for the death penalty[3]. He asserts that the domestic courts failed to identify the illness as they did not take any steps to ascertain whether he was mentally fit to stand trial through a psychiatric evaluation prior to imposing the death penalty. The Applicants relying on various jurisprudence, argued that persons suffering from severe mental disability, mental retardation or extremely limited mental competence, whether at the stage of sentence or execution are exempted from facing the death penalty.

8. In its judgment, the Court correctly noted that the Applicant had neither raised his mental illness before the domestic courts nor had the court ordered *suo motu* a medical evaluation to be undertaken. Furthermore, the medical reports before this Court were based on evaluations undertaken after completion of domestic processes and therefore were not available before the domestic courts.

2022, § 122*; Amini Juma v. United Republic of Tanzania,* ACtHPR, Application No. 024/2016, Judgment of 30 September 2021, §§ 124-131.

[2] See paragraph 56 of the Court's judgment.

[3] The 1st Medical report by Dr Isaac Lema, a Clinical Psychologist & Assistant Lecturer at Muhimbili University of Health and Allied Sciences (MUHAS) in Tanzania, concludes that Abdul the 2nd Applicant,

9. The Court also found that because of the provision on mandatory imposition of the death sentence, It is “immaterial whether the accused person raised the issue of their mental illness during the sentencing process as the decision on conviction irretrievably binds the judicial officer in terms of sentencing,” because “even if the Applicants had raised the issue of their mental illness at the stage of sentencing, doing so would not have changed their fate.” [4]

10. Additionally, the Court considered that “the fact that the domestic courts were deprived of the discretion in respect of sentencing did not allow them to examine the very possibility of the Applicants’…mental illnesses during the domestic proceedings,” because “the criminal law of the Respondent State did not allow the Applicants in this case to raise any issue concerning their mental health as the judicial officer would have dismissed the said issues.” [5]

11. I find this argument on immateriality problematic, as it overlooks the provisions of the domestic law, as insanity is a ground for defence. Similarly, it is not correct to argue that the Applicant could not have raised his mental health status and that it would have been futile to do so since the judicial officer would have dismissed the said issues. Significantly, although the Court reached these conclusions after undertaking a compressive analysis of different sections of the Respondent State’s Criminal Procedure Act (CPA) and the Constitution,[6] it strangely failed to examine relevant sections of the Penal Code relating to this issue, [7] as well as other sections of the Criminal Procedure Act of the Respondent State, which would have allowed it to be faithful to the facts.

12. In this respect, Section 12 of the Penal Code, Chapter 16 of the Laws (Revised) of the Respondent State) stipulates that “every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved. This clearly indicates that an accused person has a right to adduce proof to the contrary. More importantly, section 13 entitled ‘insanity’ provides that

    “A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.”

13. The same section 13 provides a caveat to the effect that “a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

14. Regarding the CPA, the import of sections 216, 217 and 218, is that the Court has a detailed procedure to follow where during a trial, it has reason to believe that the accused is of unsound mind and consequently incapable of making his

[4] See Paragraph 213 of the Judgment
[5] See Paragraph 214 of the Judgment
[6] See Paragraphs 110, 115,120, 205 of the Court’s judgment
[7] The Court did refer to Section 197 of the Penal code in relation to the well-established international human rights case-law on the criteria to apply in assessing arbitrariness of a death sentence. In this regard See paragraph 204 of the judgment.

defence. The procedure involves the prosecution adducing all evidence in support of the charge, at the end of which the Court may discharge the accused person. However, where it appears to the court that a case has been made out against the accused person, it shall then proceed to inquire into the fact of the unsoundness of mind of the accused and, for this purpose, may order him to be detained in a mental hospital or other suitable place of custody until released. Subsequently, if the accused is deemed capable of defending himself the trial may resume.[8]

15. In addition, Section 219 (1) of the CPA, entitled 'Defence of insanity at trial', provides that the defence of insanity must be raised at the time of the plea taking. Furthermore, under its subsection (2), where the charge is established against an accused person but he was insane so as not to be responsible for his action at the time when the act was done or the omission was made, the court shall make a special finding to the effect that the accused did the act or made the omission charged but by reason of his insanity, is not guilty of the offence.[9]

16. Indeed, in Hilda Abel V. R[10], the Court of Appeal of Tanzania held that insanity is a question of fact which can be inferred from the circumstances of the case and the conduct of the person at the material time. It concluded that the onus rests upon the accused person to prove insanity. In addition, in The Republic v Muhiri Nyankaira Nyangaira, the defence of insanity was raised but was rebutted by medical evidence.[11]

17. In light of the foregoing, the mental health status of a person accused of murder is not an irrelevant factor in respect of sentencing. Furthermore, an accused person can raise the defence of insanity and if proven, may be acquitted of the charge. However, the onus of raising the issue of mental illness rests with the accused person except where the Court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence.

Judge Ben KIOKO

Done at Arusha, this Third Day of September in the year Two Thousand and Twenty-Four, the English text being authoritative.

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[8] See sub sections 1 to 7 of Section 216 entitled 'Procedure in case of the insanity or incapacity of an accused person'

[9] Section 219 (2) states as follows: "Where on the evidence on record, it appears to the court that the accused did the act or made the Commission charged but was insane so as not to be responsible for his action at the time when the act was done or the omission was made, the court shall make a special finding to the effect that the accused did the act or made the omission charged but by reason of his insanity, is not guilty of the offence."

[10] [1993] TLR246. See also Republic V. Siza Pembe Maneno Criminal Session Case no. 61 of 2001, at https://tanzlii.org

[11] See Criminal Sessions Case No. 78 of 2021, High Court of Tanzania at Musoma at www.https://tanzlii.org.