

KIJA NESTORY V. UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 015/2018

JUDGMENT ON MERITS AND REPARATIONS

13 NOVEMBER 2024

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

ARUSHA, 13 November 2024, the African Court on Human and Peoples' Rights (the Court) today delivered a judgment in the matter of *Kija Nestory v. United Republic of Tanzania*.

Kija Nestory (the Applicant) is a national of the United Republic of Tanzania who, at the time of filing this Application, was incarcerated at Uyui Central Prison, awaiting execution of the death sentence, having been convicted of the offence of murder. He alleged that the United Republic of Tanzania (Respondent State), violated his rights to a fair trial owing to the manner in which the trial court arrived at his conviction.

The Respondent State did not file a defence in this Application. The Court, therefore rendered a judgment in default in this case after it considered the requirements for rendering a judgment in default as stipulated under Rule 63 (1) of the Rules of Court. The Court was satisfied that the two conditions that, the Respondent State had been duly served all the documents pertaining to the proceedings; and that the Respondent State had defaulted by failing to file its Response had been met.

In accordance with 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), the Court observed that, it was obligated to preliminarily, determine whether it had jurisdiction to hear the Application. 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 which 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

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21 November 2019 did not affect this Application, as the withdrawal took effect on 22 November 2020, which is after the Application had been filed at the Court, on 6 June 2018.

The Court held that it had material jurisdiction because the Applicant had alleged violations of his rights, protected under the Charter. Furthermore, the Court held that it had temporal jurisdiction as the alleged violations occurred after the Respondent State had become a party to 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.

On admissibility, the Respondent State did not raise any objection to admissibility of the Application. The Court observed that pursuant to Article 6(2) of the Protocol, the content of which is restated in Rule 50(1) of the Rules, it must rule on the admissibility of the cases brought before it. Therefore, the Court considered whether the application complied with all the admissibility requirements set out under Article 56 of the Charter and as restated in Rule 50 of the Rules of Court were met.

The Court found that the Applicant has been clearly identified by name as provided for under Rule 50(2)(a); The Application did not contain any claim or prayer that was incompatible with a provisions of the Constitutive Act of the African Union and the Charter as provided for under Rule 50(2)(b); 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); The Application was not based exclusively on news disseminated through mass media, as it was founded on court documents from the domestic courts of the Respondent State, in fulfilment of Rule 50(2)(d); The requirement of exhaustion of local remedies has been met in accordance with Rule 50(2)(e), since the Applicant had utilized the courts at the domestic level up to the Court of Appeal, the highest judicial organ of the Respondent State. Furthermore, the Court considered that the Application had been filed before it, within a manifestly reasonable time, of nine (9) months and nine (9) days after exhausting of local remedies in fulfilment of the requirements of Rule 50(2)(f) of the Rules. In this regard, it also noted that it had previously held that within the Respondent State's judicial system, the procedure for the Court of Appeal to review is decision is an extraordinary remedy which Applicants are not required to exhaust before filing their Applications before this Court; and finally, it observed that 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 and

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was in compliance with Rule 50(2)(g). The Court therefore held that the Application had met all admissibility requirements and declared it admissible.

On the merits, the Court considered the alleged violation that in arriving at his conviction based on the doctrine of recent possession, the Respondent State had relied on circumstantial evidence, which was weak, amounting to mere suspicions and not proved beyond a reasonable doubt, resulting in the violation of his right to a fair trial. This Court observed that the Applicant had failed to demonstrate how he was convicted on the basis of evidence not proved beyond a reasonable doubt. It further observed that the High Court exhaustively considered the evidence presented in the Applicant's case and its findings were upheld by the Court of Appeal. Resultantly, it found that the Respondent State did not violate the Applicants right to a fair trial.

Although the Applicant did not expressly claim that he was mandatorily sentenced to death for the offence of murder and that his right to dignity was violated, the Court decided on its own cognizance to make a determination as to whether a finding in this respect was warranted, given that it had previously adjudicated on these issues.

It emerged from the record that the Applicant was mandatorily sentenced to death under a law that does not allow the judicial officer discretion to impose a different punishment. The Court recalled its jurisprudence, which established that the mandatory imposition of the death penalty constituted a violation of the right to life as guaranteed under the Charter. It therefore held that the Respondent State had violated Article 4 of the Charter.

Regarding the violation of the Applicant's right to dignity under Article 5 of the Charter, the Court observed from the record that the Applicant was sentenced to death by hanging. Similarly, the Court recalled its established jurisprudence that hanging as a method of implementing the death penalty involved significant and unnecessary pain and was therefore cruel, inhuman, and degrading. The Court accordingly held that the Respondent State had violated the Applicant's right to dignity by imposing the death sentence through hanging.

On reparations, in accordance with Article 27(1) of the Protocol, the Court recalled that if it finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

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With regard to moral damages, the Court recalled that it had established the violation of the right to life and right to dignity compounded by overall inhuman and degrading treatment. The Court further observed that while the death sentence was yet to be carried out, the Applicant had inevitably suffered prejudice from the established violations caused by the imposition of the mandatory death sentence. It therefore awarded the Applicant the sum of Three Hundred Thousand Shillings Tanzania Shillings (TZS 300,000) as moral damages, taking into account awards of similar cases involving the Respondent State.

On non-pecuniary reparations, the Court, dismissed the Applicants prayer for release; ordered the Respondent State to revoke the death sentence imposed on the Applicant and remove him from the death row; ordered the Respondent State to take all necessary measures to remove within six months of the notification of this Judgment the mandatory death penalty from its laws; ordered the Respondent State to take all necessary measures within one 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 ordered the Respondent State to take all necessary measures within six months of the notification of this Judgment to remove "hanging" from its laws as the method of execution of the death sentence.

Additionally, the Court, ordered the Respondent State to publish this judgment, within a period of three months from the date of notification, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the judgment is accessible for at least one year after the date of publication. The Respondent State was ordered to submit, within six months from the date of notification of this judgment, a report on the status of execution of its orders and thereafter, every six months until the Court considers that there has been full implementation thereof.

Each Party was ordered to bear its own costs.

Pursuant to Rule 70(3) of the Rules, Justice Blaise Tchikaya and Justice Dumisa B. Ntsebeza issued Declarations on the issue of the death penalty.

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/0152018>

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

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