



PRESS RELEASE
JUDGMENT SUMMARY

ALLY RAJABU AND OTHERS
V
UNITED REPUBLIC OF TANZANIA
APPLICATION No. 007/2015
JUDGMENT ON MERITS AND REPARATIONS
A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Date of Press Release: 28 November 2019

Zanzibar , 28 November 2019: Today, the African Court on Human and Peoples' Rights (the Court) delivered judgment in the case of *Ally Rajabu and Others v. United Republic of Tanzania*.

The Applicants, Ally Rajabu, Angaja Kazeni *alias* Oria, Geoffrey Stanley *alias* Babu, Emmanuel Michael *alias* Atuu and Julius Petroare are nationals of the United Republic of Tanzania (the Respondent State) who were sentenced to death for murder and are currently detained at the Arusha Central Prison.

The Applicants alleged violation of certain fair trial rights during the proceedings before domestic courts. They alleged that the provision in the Penal Code of Tanzania for the mandatory imposition of the death penalty in cases of murder and the imposition of that penalty by domestic courts constituted a violation of their right to life guaranteed by Article 4 of the African Charter on Human and Peoples' Rights (the Charter). They further alleged that their execution by hanging as ordered by domestic courts violates their right to dignity protected under Article 5 of the Charter.

On 18 March 2016, the Court issued an Order for provisional measures in the matter enjoining the Respondent State not to implement the death sentence until this Application is concluded on the merits.



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The Court observed that, as per Article 3(1) 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 determine whether it had jurisdiction over the Application.

The Court first examined two objections to its material jurisdiction raised by the Respondent State, namely: that the Court is being asked to exercise appellate jurisdiction and to act as a court of first instance.

The Respondent State averred that the Court would be reevaluating the decision of the Court of Appeal of Tanzania by considering the prayers for the Applicants' conviction to be quashed, their sentence to be set aside, and their release ordered. In dealing with this objection, the Court reiterated its case-law and held that while it does not have appellate jurisdiction with respect to decisions of domestic courts, it retains the power to assess whether the related proceedings were conducted in line with international human rights standards enshrined in international instruments to which the Respondent State is a Party. With respect to the objection that the Court was called to act as a court of first instance, the Respondent State submitted that the Applicants' allegation that they were denied the right to be heard was raised for the first time before this Court. In dealing with the objection, the Court held that it has material jurisdiction as long as the rights whose violation is being alleged by the Applicants are protected in the Charter or other international human rights instruments ratified by the Respondent State. As a consequence, the Court dismissed both objections.

The Court noted that as regards personal jurisdiction, the Respondent State is a Party to the Protocol and has deposited the Declaration prescribed under Article 34(6) of the Protocol and this Declaration allows individuals, such as the Applicant, to file the application as per Article 5(3) of the Protocol. The Court further held that it had temporal jurisdiction because the alleged violations were continuous in nature; and lastly, that it had territorial jurisdiction, given that the facts of the matter occurred within the territory of the



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Respondent State which is a Party to the Protocol. The Court, therefore, concluded that it had jurisdiction to consider the Application.

In terms of the admissibility of the Application, the Court, as empowered by Article 6 of the Protocol and Rule 39 of the Rules of Court (the Rules), had to determine whether the requirements of admissibility, as provided under Article 56 of the Charter and Rule 40 of the Rules, had been met.

The Court then considered the two objections to the admissibility of the Application raised by the Respondent State, namely the failure to exhaust local remedies and the failure to file the Application within a reasonable time.

On the first objection, the Respondent State alleged that the Applicants should have challenged the denial of their rights to be heard as a ground of appeal before the Court of Appeal; or filed a constitutional petition under the Basic Rights and Duties Enforcement Act of Tanzania for the enforcement of their fundamental rights under Part III of the Constitution of Tanzania. With respect to the opportunity of raising the issue as a ground of appeal, the Court found that the right involved was part of a bundle of rights and guarantees which formed the basis of the proceedings before domestic courts. The Court therefore found that since the Court of Appeal had an opportunity to examine whether the right to be heard was upheld by the lower court, the Applicants cannot be expected to have expressly raised them. Regarding the constitutional petition, the Court found that it is an extraordinary remedy which the Applicants are not obliged to exhaust. After establishing that all relevant remedies were exhausted, the Court therefore dismissed the objection based on the failure to exhaust local remedies.

The Court further considered the objection based on failure to file the Application within a reasonable time. The Respondent State had submitted that the period of two (2) years that it took the Applicants to file the Application was not reasonable within the meaning of Article 56(5) of the Charter. The Applicants on their part contended that being lay and incarcerated, and having attempted to have the domestic decisions reviewed before filing their Application, the time should be found reasonable. In dealing with this objection, the Court held that the Applicants cannot be penalised for attempting to make use of the



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review process, which is a legal entitlement. As a consequence, the Court held that the time taken to file the Application was reasonable and dismissed the objection. The Court then satisfied itself that the Application had complied with all other conditions of admissibility set out under Article 56 of the Charter and Rule 40 of the Rules and found that the Application was admissible.

Right to be tried within a reasonable time

The Applicants alleged that the time of over four (4) years that it took the Court of Appeal to complete the review process violated their right to be tried within a reasonable time. The Respondent State averred that the delay was attributable to the Applicants who failed to file a copy of the review application. The Court examined the allegation against the complexity of the matter and the behaviour of the Parties. On the complexity of the case, the Court considered that the delay related to a review process which only involved the Court of Appeal examining issues that had been adjudicated twice both in fact and in law, and therefore did not require so much time for completion. The Court thus found that the complexity of the case was not determinant in assessing reasonableness. On the behaviour of the Parties, that is, the Parties' behaviour, the Court stated the issue as being that of who was responsible for the delay of the review proceedings. The Court first found that the Applicants did not provide the required documentation on time and did not prove failure and lack of due diligence on the part of the Respondent State. Considering that the review was completed within a year of the filing of the proper documents, the Court found that the Court of Appeal needed some minimum time to deliver the judgment in a case of death penalty; and also that scheduling constraints in the domestic judicial system should be considered. The Court therefore found that the Respondent State did not violate the Applicants right to be heard within a reasonable time protected under Article 7(1)(d) of the Charter.

Right to be heard

The Applicants' allegations related to the facts that there were variances in the testimonies of the witnesses; and the preliminary investigations were conducted by a single police officer. The Respondent State on its part averred that the issues raised were comprehensively addressed by the Court of Appeal, which found that proceedings were



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properly conducted in that respect. The Court found that both the High Court and the Court of Appeal undertook a proper examination in respect of identification, and the Applicant did not prove that investigation by a single police officer breached domestic law. The Court further found that the Court of Appeal corrected the irregularities in the proceedings before the High Court, which sentenced the Applicants before convicting them. The Court consequently found that there was no manifest error that occasioned a miscarriage of justice and found that the Respondent State did not violate the Applicants' right to be heard as protected in Article 7(1) of the Charter.

Right to be heard by a competent court

The Applicants alleged that the fact that both the preliminary hearing and trial were presided over by two different judges constituted a violation of their right to be heard by a competent court. The Respondent State submitted that the Applicants' failed to properly interpret the provisions of the law, and in any event, they should have raised this issue before domestic courts. The Court held that the Applicants did not have a proper understanding of the law, which does not make it compulsory for the same judge to preside over both the preliminary hearing and the trial. The Court therefore found that the Respondent State did not violate the Applicants' right to be heard by a competent court as guaranteed under Article 7(1)(a) of the Charter.

Right to life

The Applicants alleged that by providing, in Section 197 of its Penal Code for the mandatory imposition of the death penalty, the Respondent State violated their right to life. The Respondent State submitted that the provision for the death penalty in its laws is in line with international norms, which do not prohibit the imposition of that sentence.

The Court first set out that the claim having been raised as a violation of Article 4 of the Charter, the said claim pertained to whether the mandatory imposition of the death penalty under Section 197 of the Tanzanian Penal Code constituted an arbitrary deprivation of the right to life. On the arbitrary nature of the imposition of the death penalty, the Court relied on the jurisprudence of the African Commission on Human and Peoples' Rights to establish three criteria for assessment on whether it is imposed arbitrarily: first, the



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sentence must be provided for by law; second, it must be imposed by a competent court; and finally, it must abide by due process.

Having established that the death penalty is provided for in the Tanzanian Penal Code; and that both the High Court and Court of Appeal were competent to impose the sentence, the Court proceeded to examine whether the imposition, as provided, was in abidance of due process. On that point, the Court referred to a joint reading of Articles 1, 7(1) and 26 of the Charter to find that due process encompasses not only procedural rights but also any rights related to the sentencing process, especially the discretion of courts to take into account the particular circumstances of the accused. The Court found that mandatory imposition of the death penalty is automatic and mechanical as applied by the High Court in the case of the Applicants; that as such, the provision of the sentence and its imposition do not permit consideration of mitigating factors; applies to accused persons without any distinction; takes away the discretion inherent in the exercise of the judicial function; and does not observe proportionality between the facts and the penalty. The Court found as a consequence that the mandatory provision and imposition of the death sentence under the Respondent State's Penal Code does not uphold fairness and due process as guaranteed under Article 7(1) of the Charter.

In light of this finding, the Court further found that lack of mention of the death penalty in Article 4 of the Charter and the strongly worded provision for the right to life therein are to the effect that the failure of the mandatory death sentence to pass the test of fairness renders the penalty contrary to the right to life under Article 4 of the Charter. Considered against the abolition of the death penalty in some circumstances by the Second Optional Protocol to the ICCPR; the African Charter on the Rights and Welfare of the Child; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Court held that the mandatory death sentence for murder in Section 197 of the Tanzanian Penal Code constitutes an arbitrary deprivation of the right to life and therefore that the Respondent State has violated Article 4 of the Charter.

Right to dignity

The Applicants alleged that the execution of the death penalty by hanging violates the right to dignity. The Respondent State submitted that the death penalty is not abolished in



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international law. The Court found that the methods used to carry out the death penalty amount to torture; and inhuman and degrading treatment given the suffering inherent thereto; that due to the arbitrary nature of the mandatory imposition of the death penalty, its execution by hanging is consequently and inevitably in violation of the right to dignity in respect of the prohibition of torture and inhuman and degrading treatment. The Court therefore found that the Respondent State had violated Article 5 of the Charter.

Obligation to give effect to the rights in the Charter

The Applicants allege that by not amending its law to remove the mandatory death sentence, the Respondent State allowed its courts to impose the sentence, therefore violating its obligation under Article 1 of the Charter to give effect to the right to life protected under Article 4. The Respondent State averred that the death sentence is allowed in international law. The Court restated its case law that violations of substantive provisions of the Charter will amount to a consequent violation of Article 1 thereof. The Court found that having enacted its Penal Code or amended it subsequent to the entry into force of the Charter, the Respondent State was under the duty to bring the said Code in line with the Charter upon ratification. The Court therefore found that the failure to do so and its finding of violation of Articles 4 and 5 of the Charter amount to a violation of Article 1.

Having found the violations of these rights, the Court then considered the issue of reparations.

Pecuniary Reparations

Material loss

The Applicants prayed the Court to grant them moral damages for loss of income and costs incurred in proceedings before domestic courts. The Respondent State prayed the Court to dismiss the prayers as unjustified and not proved. The Court dismissed the Applicants' prayers for lack of evidence.

Moral loss

The Applicants prayed the Court to grant them damages for the moral prejudice that ensued from their trial and imprisonment. The Court dismissed the prayer on the ground



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that it did not make any finding to the effect that their incarceration was unlawful. The Court made the same finding with respect to anguish due to trial and imprisonment. However, in light of its finding that the mandatory imposition of the death penalty violated the right to life, the Court found that moral prejudice was assumed as in cases of human rights violation; that the very mandatory imposition of the death penalty caused moral prejudice; that the death penalty is one of the most severe punishment with the gravest psychological consequences as the sentenced persons are bound to lose their ultimate entitlement that is life; that the prejudice was effective from the date of the judgment of the High Court sentencing the Applicants to death; that eight (8) years elapsed until the present Judgment; that the waiting added to the psychological tension experienced by the Applicants who lived for that long with the uncertainty as to when they would be executed; and awarded each of the Applicants the amount of Tanzanian Shillings Four Million (TZS 4,000,000) for moral damages.

The Respondent State is required to pay this amount, free from tax, within six (6) months of the notification of the judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

With respect to prayers for compensation for the alleged moral damage suffered by the Applicants' families as indirect victims, the Court dismissed them on the basis that the Applicants did not provide evidence to establish the relationship between them and the alleged indirect victims.

Non-pecuniary reparations

Restitution

The Applicants prayed the Court to quash their conviction, set aside the sentence and order their release. The Court dismissed the prayers for the conviction to be quashed on the ground that its findings did not affect the Applicants' conviction. With respect to the prayer that the sentence should be set aside, the Court found that, given its finding that the mandatory imposition of the death penalty violated the right to life protected under Article 4 of the Charter; however, in light of its further finding that its decision in the present



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Judgment did not affect the Applicants' conviction, their sentencing is affected only to the extent of the mandatory nature of the penalty, a remedy is warranted. The Court therefore ordered the Respondent State to set aside the sentence and replace it with any other order that it will deem appropriate within its domestic processes. This order is to be implemented within one (1) year of the notification of this Judgment.

The Court dismissed the prayer for release on the same ground stated above in relation to the prayers for the Applicants' conviction to be quashed.

Guarantees of non-repetition

The Applicants prayed the Court to order the Respondent State to guarantee non-repetition of the violations. The Court found that its finding that the death penalty meted against the Applicants should be set aside amounts to a systemic pronouncement since it will inevitably require a change in the law. The Court therefore made a consequential order that the Respondent State undertakes the necessary measures to repeal from its Penal Code, the provision for the mandatory imposition of the death penalty in cases of murder. This order is to be implemented within one (1) year of the notification of this Judgment.

Publication of judgment

Although the Applicants did not pray for the publication of this Judgment as a measure of satisfaction, the Court recalled that it can order such publication *suo motu* where it deems it necessary. The Court found that the violation of the right to life by provision for the mandatory imposition of the death penalty is established beyond the case of the Applicants; and is therefore systemic in nature; that the finding bears on the supreme right in the Charter that is, the right to life; that an order for publication is warranted for these reasons. The Court therefore ordered the Respondent State to publish the Judgment on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs and avail it for at least one (1) year after the date of publication. This order is to be implemented within three (3) months of the notification of this Judgment.



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Report on implementation

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.

The Court ordered that each Party should bear its costs.

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 <http://www.african-court.org/en/index.php/55-finalised-cases-details/859-app-no-006-2013-wilfred-onyango-nganyi-9-others-v-united-republic-of-tanzania-details>.

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

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