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PRESS RELEASE

**WEREMA WANGOKO WEREMA AND WAISIRI WANGOKO WEREMA V. UNITED
REPUBLIC OF TANZANIA
APPLICATION NO. 024/2015
JUDGMENT ON MERITS**

A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS IN HUMAN RIGHTS CASE ARISING FROM TANZANIA

Tunis, 7 December 2018: The African Court on Human and Peoples' Rights (the African Court or the Court) delivered its judgment in the case of *Werema Wangoko Werema and Waisiri Wangoko Werema v. United Republic of Tanzania*.

In their Application, the Applicants alleged violations of their rights to equality before the law and equal protection of the law, to non-rom discrimination and to a fair trial as provided for in Articles 3 (1) and (2), Article 2 and Article 7 of the African Charter on Human and Peoples' Rights (the Charter), respectively. The Applicants also submitted that violations of their fundamental rights ought to be rectified pursuant to Article 27(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) and Rule 34(5) of the Rules of Court (the Rules).

The Court made its determination on the merits after having dismissed the preliminary objections of the Respondent State, the United Republic of Tanzania, to its jurisdiction and the admissibility of the Application. The Respondent State alleged that the Court does not have an appellate

jurisdiction as the Application raises matters of law evidence which were finally by its national courts. It also submitted that the Application should be declared inadmissible as it was filed without exhausting local remedies. The Respondent State argued that the Applicants could have pursued the judgment review procedure in the Court of Appeal by requesting extension of time, rather than filing it in the Court. The Respondent State also averred that the Application was not filed in the Court within a reasonable time after exhausting local remedies.

The Court held, unanimously, that it had jurisdiction to hear the case and by a majority of nine (9) for, and one (1) against, Justice Blaise TCHIKAYA dissenting, that the case was admissible. The Court observed that as per Article 3(1) of the Protocol and Rule 26 (1) (a) of its Rules, the material jurisdiction of the Court extends to all Applications involving alleged violations of rights protected by the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned. Although it does not have appellate jurisdiction to uphold or reverse judgment of domestic courts simply on the basis of how they evaluated evidence in trials, the Court underscored that this does not prevent it from verifying the adherence of national courts to international human rights standards in the process of such evaluation. The Court, therefore, concluded that it had jurisdiction to examine the Application. (

The Court considered whether the requirements of admissibility of the Application, provided under Article 56 of the Charter and Rule 40 of its Rules had been met. The issues in contention were whether the Applicants had exhausted domestic remedies before approaching the Court and whether the Applicants seised the Court within a reasonable period of time as prescribed in Rule 40 (5) and (6) of the Rules, respectively. The Court rejected the Respondent State's contention that the Applicants could have sought an extension of time to file their request for review at the Court of Appeal before filing their Application in the Court. The Court held that the procedure for review of the Court of Appeal's judgment, as structured in the Respondent State's legal system, is an extraordinary remedy and the Applicants were not required to exhaust this remedy before seizing this Court.

As regards the issue of filing within a reasonable time, the Court noted that the Applicants seized the Court five (5) years and five (5) months after the Respondent State deposited the declaration required under Article 34 (6) of the Protocol. However, the Court stressed that the reasonableness of a time limit of seizure should be determined on a case-by-case basis.

Accordingly, the Court held that, although the Applicants did not invoke any particular reason as to why it took them five (5) years and five (5) months to seize the Court, the facts showed that the Applicants were awaiting the outcome of the review procedure at the Court of Appeal and at the time they seized this Court, it was only about six (6) months that had elapsed after their request for review was dismissed for being filed out of time. On this basis, the Court dismissed the Respondent State's objection in this regard.

After having established that it has jurisdiction and the Application is admissible, the Court examined the merits. In addressing the Applicants' allegations that the Respondent State violated Article 7 of the Charter, the Court considered three issues. On the first issue, that is, whether the conviction of the Applicants based on visual identification amounted to a violation of the right to a fair trial contained in Article 7 of the Charter, the Court emphasised that it is left to the national courts to decide on the probative value of a particular piece of evidence and that it cannot assume the role of the domestic courts and investigate the details and particulars of evidence used in domestic proceedings to establish the criminal culpability of the Applicants. However, it noted that, this does not prevent the Court from examining whether the way in which domestic courts evaluate the evidence is compatible with international human rights standards. Accordingly, after examining the records, the Court held that the manner in which the domestic courts evaluated the evidence in the instant Application did not reveal any manifest error nor did it result in a miscarriage of justice to the Applicants.

On the second issue, that is, whether the Court of Appeal's refusal to consider the Applicants' request for review filed on the basis of the new evidence contravened the Applicant's right to be heard under Article 7(1) of the Charter, the Court held that if there is new evidence, which would potentially lead the trial or appellate court to reverse its decision or make substantially different findings, mechanisms to review such findings should be put in place. In response to the Applicants' allegation that they were convicted based on a mistaken identity, the Court noted that the letter the Applicants received from the Commission on Human Rights and Good Governance (CHRGG) suggesting that the true perpetrators of the crime were other individuals, cast some doubt on the Applicant's culpability and conviction. However, such communication from the CHRGG, a government agency in the Court's view, was made following preliminary investigation rather than a full investigation into the matter, therefore, the Court was not in a position to conclude that there would have been a substantially different outcome in the

decisions of the domestic courts, had this letter been available during the trial and appellate proceedings. It was the Court's finding therefore that the Respondent State had not violated the Applicants' right to be heard in this regard.

The Court then considered the third issue, that is, whether the alleged isolation of the Applicants during the domestic proceedings amounted to a violation of the right to fair trial as enshrined in Article 7 (1) of the Charter. The Court held that the right to a fair trial and the right to conduct one's defence require that an accused person must be given the opportunity to take part in all the hearings in respect of his trial, and to adduce his arguments and evidence in accordance with the adversarial principle. In the instant Application, the Court noted that the Applicants took part in all the trial and appeal proceedings, and were represented by a lawyer at the District Court and at the High Court. In these circumstances, the Court observed that it was not clear why and how the Applicants alleged to have been isolated during the proceedings and the Applicants did not substantiate their claims. The Court, therefore, held that the Applicants' allegations were not founded and accordingly, held that the Respondent State had not violated the Applicants' right to fair trial (in Article 7 of the Charter).

The Court also examined the Applicants' allegation that their conviction and the alleged refusal by the Court of Appeal to review their conviction violated their right to equality and equal protection of the law and the right to non-discrimination. The Court held that Article 3 is essentially intertwined with Article 2 of the Charter, and for the Court to find a violation of Article 3, it must be demonstrated that the applicant was discriminated against compared to other persons who are in the same situation. The Court noted that the Applicants did not state the circumstances in which they were subjected to which resulted in their unjustified differential treatment and that there was nothing on record showing that they were treated differently in comparison to other individuals in a situation similar to theirs. The Court, therefore, dismissed the Applicants' claim that their rights under Article 3(1) and (2) of the Charter were violated.

Overall, the Court held that the Respondent State did not violate the Applicants' right to a fair trial enshrined in Article 7 of the Charter, the right to equality before the law and equal protection of the law provided for in Article 3 of the Charter. In relation to reparations, the Court noted that as no violation had been established, the issue of reparation did not arise. The Applicants'

prayers for reparations were therefore dismissed. On the question of costs, the Court ordered that each party should bear its own costs.

Dissenting Opinion

On the admissibility, particularly, relating to the filing of the Application within a reasonable time, Justice Blaise TCHIKAYA wrote a dissenting opinion. He observed that the Applicants' delay of five years and five months from the Respondent State's deposit of the declaration contemplated in Articles 5 (3) and 34 (6) of the Protocol allowing them to file a case was unreasonable and hence, the Application should have been declared inadmissible. Justice TCHIKAYA opined that the Applicants' delay in pursuing the review procedure at the Court of Appeal was not justified and there is no reason why the Court should consider their awaiting of the outcome of their request for review as a factor to compute the reasonable time stipulated in Rule 40 (6) of the Rules. He noted that each State has its own rules regarding procedures of appeals and reviews of judgments and that in the instant Application, it was the Applicants' task to comply with the rules of procedure of the Court of Appeal, which they failed to do and as a result their request for review was dismissed by the Court of Appeal. Justice TCHIKAYA underlined that the Applicants' inordinate delay to file their Application in the Court stemmed from their own failure and the Court should not have declared the Application admissible, given that the Applicants provided no other reasons to justify the delay of five years and five months to seise the Court.

Separate Opinion

Justices Ben KIOKO and Tujilane R. CHIZUMILA issued a Separate Opinion. While concurring with the findings of the Court, Justices Kioko and Chizumila differed in their reasoning from the majority in addressing the Applicants' allegation that they were convicted on the basis of a mistaken identity. They observed that the Court should have given more importance to the letter that the Applicants received from CHRGG and eventually, even if as an *obiter dictum*, ordered the Respondent State to undertake further inquiry into the matter to ascertain that the Applicants were not convicted wrongly. In this regard, Justices KIOKO and CHIZUMILA stressed that the said letter was issued, albeit a preliminary investigation, by a government institution with the mandate of protecting human rights in the Respondent State and its content is consistent with the account of the Applicants that the true perpetrators of the crime in question were other individuals and prosecution witnesses erred in identifying the true perpetrators. In their considered view, this cast some doubt on the Applicants' conviction which should, despite the fact that the Respondent State's responsibility is not engaged, be cleared by the Respondent State to make sure that innocent individuals were not convicted on the basis of mistaken identity. Recalling the old legal maxim: 'It is far *better* that ten *guilty* men go *free* than one *innocent* man is wrongfully *convicted*', Justices KIOKO and CHIZUMILA expressed their regret that the majority failed to instruct or encourage the Respondent to do so.

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://en.african-court.org/index.php/56-pending-cases-details/887-app-no-024-2015-werema-wangoko-werema-and-another-v-united-republic-of-tanzania-details>

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