African Court on Human and Peoples' Rights

Judgment of 13 June 2023

The Matter of Umalo Mussa v. United Republic of Tanzania

Application No. 031 /2016

Dissenting Opinion

1. I have decided to write this Opinion because I disagree completely with the operative part of the above judgment where the Court:

    i. Should have made a finding on an issue that deserves to be considered as paramount and
    ii. Should have issued a ruling on the request for provisional measures within a reasonable time.

I. The Court should have made a finding on an issue that deserves to be considered as paramount

2. Indeed, it emerges from the above-mentioned judgment that in its paragraph 100 the Court clearly notes that, although it did not find a violation of the Applicants' rights in this case, it "still reiterates its finding in its previous judgments that the mandatory death penalty is a violation of the right to life and other rights enshrined in the Charter and should therefore be expunged from the Respondent State’s Penal Code".

3. It is indeed the case in some of the Court's judgments which constitute its jurisprudence, (referred to in footnote 37 to paragraph 100) where the

Respondent State is Tanzania, the Court expressly pointed out that the mandatory death penalty imposed by the Respondent State, and which deprives the judge of discretion as to whether or not to impose the death penalty, is contrary to Articles 1, 4 and 5 of the Charter. The Court has previously ordered the Respondent State to take the necessary measures to expunge from its Penal Code the provision relating to the imposition of the mandatory death penalty.

4. The rule which requires a court to rule only on the prayers of the parties and never to take up a matter *suo motu*, failing which it would be judging *ultra petita*, should be subject to exceptions when it comes to issues on which the Court has already taken a position in its rulings and has set a precedent, including the mandatory death penalty for example and, by extension, the right to life!

5. It indeed emerges from the above-mentioned application that the Applicant is incarcerated at the Butimba Central Prison while awaiting the execution of the death sentence pronounced against him following conviction of murder. He alleges the violation of his rights to a fair trial in the domestic courts.

6. It emerges from the Application that the Applicant requests the Court to order appropriate measures to remedy the violation, including an order for his release.

7. The Court, after assuming jurisdiction and declaring the application admissible, dismissed all the Applicant's allegations and requests for reparation as unfounded.

8. However, as mentioned in paragraph 3 above, the Court deemed it fit to add an *obiter dictum* reminding the Respondent State of its position on the mandatory death penalty and its jurisprudence on the matter, which establishes that this penalty constitutes a violation of the right to life and other

rights enshrined in the Charter, and should therefore be expunged from the Respondent State's Penal Code.

9. In my opinion, this *obiter dictum* does not in any way prevent the Respondent State from executing the sentence, especially as the Applicant is on death row! For, what would matter to it, and rightly so, is that the Court rejected the Applicant's allegations and, therefore, that his conviction and sentence were therefore just and well founded.

10. I therefore hold the view that the Court should have interpreted the Applicant's prayer for release as a request for the annulment of the mandatory death sentence, especially since he is self-represented before the Court and that, in the end, whether the prayers concern the procedure that led to the conviction or the right to a fair trial, the end result is the same, insofar as it concerns the death sentence meted out on an Applicant, hence implicating the right to life!

11. The raising, *suo motu* of an issue that has become public policy, because it has been established by the Court, can be considered as an exception to the principle of *ultra petita* in the broadest sense, that is, as referring not only to the application but also to the pleas put forward in support of the same.

12. It was therefore incumbent on the Court to raise, *suo motu*, the violation of a legal rule that it has, through its case law, imposed on the Respondent State. This rule is sufficiently important to be qualified as a public policy because it is in the interest of the community in general and not simply in the interest of the Applicant who is directly concerned, even beyond the arguments that the latter has put forward before the Court in support of his application.

13. The issue is no longer about fair trial but the mandatory death penalty, and therefore the right to life!

14. The principle of *ultra petita* does not prevent the Court from giving another legal interpretation to the facts of the matter because it derives from the principle of the free will of the parties and aims at ensuring the effectiveness of justice.

II. The Court should have issued a Ruling on the request for provisional measures within a reasonable time

15. It also emerges from the Applicant's Application that he requested the Court to take provisional measures because he was on death row.

16. It emergers from the record that this request for provisional measures was filed together with the Application on 8 June 2016. In my opinion, the fact that the consideration of the request eight (8) years later and doing so, jointly with the merits, resulted in an absurdity since no ruling on the request was made in the strict sense, as it was considered moot due to the determination of the matter on merits.

17. The Applicant having been sentenced to death, being on death row and in view of the powers vested in the Court by virtue of Article 27 (2) of the Protocol, the Court was bound to decide, within a reasonable period of time, on the stay of the execution of this sentence because not only was there an emergency in the matter and the extreme gravity of the case was not in doubt, but also because the execution of the sentence would have caused irreparable harm.

Judge Bensaoula Chafika