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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

DISSENTING OPINION
JUDGE RAFÂA BEN ACHOUR

1. I subscribe to most of the reasoning and decisions of the Court in the Matter of Mohamed Abubakari versus the United Republic of Tanzania (Application 007/2013).

2. However, I am unable to go along with the majority of members of the Court on two issues which, in my view, are important:

- The first issue relates to the refusal of the Court to order the release of the prisoner who is currently serving 30 years prison sentence pronounced by the Moshi District Court on 21 July 1998. I had expressed similar disagreement on this point in the Matter of Alex Thomas[1].

- The second issue relates to the absence of publicity of the trial due to the fact that the Applicant's conviction was pronounced in the chamber of a judge; which in my view constitutes a serious breach of the principle of publicity of proceedings in general, and criminal proceedings in particular.

I - Refusal of the Court to order the release of the prisoner

3. As in the Matter of Alex Thomas[2], the Applicant (Mohamed Abubakari) alleges the violation of several of his rights, upon his arrest, during his remand and indeed in the course of his trial[3].

4. In light of the said allegations, the Court rightly held that the Respondent State "violated Article 7 of the Charter and Article 14 of the Covenant as regards the

[1] Judgment of 20 November 2015

[2] *Idem*

[3] *Cf.* paragraph 5 of the Judgment

Applicant's alleged right to defend himself and have the benefit of a Counsel at the time of his arrest; to free legal assistance during the judicial proceedings; be promptly given the documents in the records to enable him defend himself; not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification parade, etc". In sum, the Court admits that Mr. Abubakari did not have a fair trial.

5. The Court ordered the Respondent State to "take all the necessary measures, within reasonable time, to remedy the violations established." However, in paragraph 234 of its judgment, the Court held that the release of the Applicant could be ordered... only in special and compelling circumstances." The Court further finds that the Applicant has not indicated such exceptional and compelling circumstances. I do not share this opinion.

6. I wish to first emphasize that I accept that the order for release can be pronounced "only in special and compelling circumstances". This is an established jurisprudence of international human rights courts. It happened, however, that an order for release was indeed ordered[4].

7. In the instant case, despite the fact that the Applicant did not invoke special facts to justify exceptional circumstances, I reiterate my firm belief that the Court has itself established the said exceptional and/or compelling circumstances when it upheld all the irregularities that marred the various stages of the case, from arrest to the stage of heavy sentence of 30 years imprisonment.

8. I do not see any "circumstance" more "exceptional and/or compelling" than the one in which the Applicant found and still finds himself, having been languishing in prison for 18 years out of the 30 years inflicted on him following a trial that the Court declared unfair and at variance with certain provisions of the Charter.

9. Unfortunately, by refusing to order the release of the Applicant, the Court did not take its reasoning to its logical conclusion. Yet, it is the only "reparatory" measure that the Court could have ordered, given the circumstances of the case. Indeed, rather than leave to the Respondent the discretion to take appropriate measures, the Court should have ordered the release of the Applicant.

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[4] *Cf.* ECHR, Grand Chamber, the case of *Del Rio Prada* v. Spain, Application No. 42750/09, Judgment of 21 October 2013. " 3. *Rules by sixteen votes against one*, that it is incumbent on the respondent State to ensure the release of the applicant as soon as possible". Available: http://hudoc.echr.coe.int/eng#{"fulltext":["Arret Del RioPrada"],"languageisocode":["FRE"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-127680"]}

II - Applicant's conviction was pronounced in the chamber of the judge

10. The 30 years imprisonment conviction for the armed robbery charge was, as repeatedly alleged by the Applicant, pronounced not "in open court" but "in the chamber of a judge without any reason".

11. The Respondent State did not refute this allegation. It even confirmed the allegation, somehow. Indeed, in its response Brief, it invoked Article 310 of the Tanzanian Criminal Procedure Code which enshrines the principle that judgments should be pronounced in public, subject to certain exceptions (paragraph 218 of the judgment).

12. The Respondent State went so far as to provide justification for this practice by advancing the argument of "lack of space" and maintaining that "judges' chambers are used as courtroom", adding that "any person who wanted to be present was allowed to do so."

13. It goes without saying that the argument is specious and indeed misleading. Not only that the reasonable dimensions of a judge's chamber do not normally allow for the presence of a significant number of people; but, even if the chamber is sufficiently spacious and specially designed to receive the public, a public hearing in a judge's chamber is in itself intimidating both for the accused and for the public.

14. The Respondent State argues that hearings in judge's chambers are held only "when the doors are wide open" and that "the cause list of the court is posted in public and is available outside the courtroom"(paragraph 221 of the judgment).

15. By implication, the Court accepts this argument by affirming that "in the opinion of the Court, publicity of a judgment is assured as long as it is rendered in the premises or open area, provided that the public is notified of the place and the latter has free access to the same"(§ 225 of the judgment). The Court goes as far as finding for this *curiosity* an argument in the Charter which is "silent on the principle of publicity of court decisions pronounced in relation to the right to a fair trial under its Article 7". However, the Court does not fail to note that this principle is indeed enshrined in Article 14 of the International Covenant on Civil and Political Rights duly ratified by the Respondent State on 16 July 1976.

16. The Human Rights Committee, commenting on Article 14 (1) of the ICCPR states in paragraph 6 of General Comment 13 that "The publicity of hearings is an important safeguard in the interest of the individual and of society at large". It added however in Article 14, paragraph 1 that it "acknowledges that courts have the power to exclude all or

part of the public for reasons spelt out in that paragraph." It noted in conclusion that, *"apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons..."*[5].

17. It follows from the foregoing that pronouncing a criminal judgment in a judge's chambers even where its doors are open, and even if it is not strictly *in camera*, is nonetheless an unacceptable limitation to the principle of publicity set forth in Article 14 (1) of the ICCPR and is a key component of a fair trial. For this reason, I cannot go along with the Court's reasoning on this particular point.

Arusha, 3rd June, 2016

Judge Rafâa BEN ACHOUR

[5] Emphasis added