IN THE MATTER OF

MOHAMED ABUBAKARI

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION 007/2013

PARTLY DISSENTING OPINION

JUSTICE ELSIE N. THOMPSON, VICE PRESIDENT

1. I agree substantially with the merits of the judgment of the Court except for the order of the Court at paragraphs 236, 242 (xii) and 242 (ix) which I would approach in a different manner to make a specific order.

2. The Applicant alleges violation of several articles of the African Charter on Human and Peoples' Rights which have been set out in the judgment and he seeks amongst other reliefs, that he be released from prison.

3. The Court finds violation of Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) based largely on lack of fair hearing, and then orders the state to:

> "to take all the necessary measures, within a reasonable time, to remedy the violations established, excluding the re- opening of the trial, and to notify the Court of the measures taken within six months from the date of this Judgment".

4. On the issue regarding the Court's finding that the Respondent did not violate Article 7 of the Charter when the conviction and sentencing of the Applicant was conducted in the magistrate's Chambers, I also depart from the finding of the Court. The Charter may be silent on the issue of public delivery of judgment but the Court is empowered by Articles 60 and 61 of the Charter "to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognized by the African States as well as legal precedents and doctrine".

5. The ICCPR, which the Applicant alleges to have been violated, specifically provides, in Article 14(1) thereof, that "any judgement rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children"[1].

6. Also, in General Comment No. 13, the Human Rights Committee[2] stated that: "the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized". I wish to add that the European Court of Human Rights (ECtHR) has observed that the purpose of publicity of judgment is "to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial"[3].

7. In the instant case, the Respondent's own national laws are unambiguously clear as to the mode of delivery of judgment. Section 311(1) of the Tanzanian Criminal Procedure Act states:

> 311.-(1) The Decision of every trial of any criminal case or matter shall be delivered in an open court immediately or as soon as possible after termination of trial, but in any case not exceeding ninety days, of which notice shall be given to the parties or their advocates, if any, but where the decision is in writing at the time of pronouncement, the Judge or Magistrate may, unless objection to that that course is taken by either the prosecution or the defence, explain the substance of the decision in an open court in lieu of reading such decision in full.

8. The magistrate at the national level did not give any reason for delivering the judgment in Chambers. The Applicant alluded to this, as elaborated in paragraphs 215 and 216 of this Court's judgment. The Respondent answered this by stating that due to limitation of space, the chambers of Judges are used as courtooms, whereby the public can be present during oral pleadings and delivery of judgments. This is of no moment as the the trial itself was held in open court.

---

[1] See also Article 6(1) of The Convention for the Protection of Human Rights and Fundamental Freedoms better known as the European Convention which stipulates that judgement "shall be pronounced publicly"; Article 8(5) of the American Convention on Human Rights refers only to the publicity of the proceedings as such; Articles 22(2) and 23(2) of the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, respectively, provide for the delivery "in public" of the judgment of the Trial Chamber. Finally, according to Article 74(5) of the Statute of the International Criminal Court, the "decisions or a summary thereof shall be delivered in open court"

[2] United Nations Compilation of General Comments, page 123, para 4

[3] Application 7984/77 *Pretto and Others v Italy* Judgment of 8 December 1983 para 27
Application 8273/78 *Axen v Federal Republic of Germany* Judgment of 8 December 1983 para 32

9. Having found that the Applicant's sentencing and conviction was not done in open court, the Court would have found a violation of his rights to fair trial and in the circumstance find a violation of Article 7 and Article 14(1) of the ICCPR. The majority Judgment has relied on *Lorenzetti v. Italy* where the ECtHR held that, "the requirement whereby a judgment must be rendered in public was interpreted with a measure of flexibility"[4]. The majority Judgment has found that the lack of adequate courtrooms is reason enough for flexibility. In my opinion, the totality of the prevailing conditions in the judicial process must be examined to determine whether such flexibility can be allowed. This would be appropriate where a judgment can be accessed immediately, despite it not having been rendered in open court.

10. This is not the case in the local circumstances of this matter as judgments are not immediately available to parties and the public, therefore the most appropriate means by which they would access the judgment would be when it is being rendered in open court[5]. In the instant case, since in all likelihood, as is common, the judgment would not be immediately accessible to the Applicant and it was not read in open court, a violation of Article 7 of the Charter was occasioned.

11. On the specific issue as to the Order of the Applicant's release, the Court is of the opinion and I entirely agree, that an Order of release of a convict can only be done in "very specific and/or compelling circumstances". The Court, however goes further to say that the Applicant has not shown exceptional circumstances, and also that the fact that the conviction and sentence was not delivered in open court did not constitute a violation of Article 7 of the Charter by the Respondent. This is where I depart with the majority Judgment.

12. In spite of the fact that the Applicant does not state that particular facts exhibit exceptional circumstance, I am of the firm view that the Court found such specific and/or compelling circumstances when it noted that the resumption of the trial or retrial of the Applicant would not be "fair to the Applicant in as much as he has already spent 19 years in prison, more than half of the sentence, and given that a fresh local judicial procedure could be long".

---

[4] Judgment of 10 April 2012, para 37

[5] Application No. 005/2013, *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 paras 108 and 109

13. The Court also found that the Applicant was convicted on "inconsistent testimony of a single witness in the absence of any identification parade" and that "the Applicant's alibi defence was not given serious consideration by the Respondent State's police and judicial authorities".

14. From the foregoing, I cannot find more "specific and/or compelling" circumstances than that the Applicant's conviction was based on the inconsistent testimony of a single witness in the absence of any identification parade; that the Applicant's alibi defence was not given serious consideration by the Respondent's police and judicial authorities; and that the Applicant has been in prison for 19 years out of the 30 years prison term, following a trial which the Court has declared to have been an unfair trial, in violation of the Charter.

15. The Court in this case is hesitant in making an order of releasing the Applicant and has opted to leave the issue to the discretion of the Respondent. The Court may want to note that it had previously made similar Orders in Application No. 005/2013, *Alex Thomas v United Republic of Tanzania*[6], which the Respondent State has not complied with.

16. The ECtHR in the case of *Del Río Prada v Spain* [7] after finding that the Applicant had been unjustly kept in prison and her rights violated had held "by sixteen votes to one, that the respondent State is to ensure that the applicant is released at the earliest possible date". This case related to the alleged violation of Article 7 of the European Convention on Human Rights which provides that "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

17. The applicant in that matter argued that an amendment to the criminal code and the adoption of a new approach to the remission of sentences which resulted in the extension of her release date by 9 years amounted to the retroactive application of a penalty that did not exist at the material

[6] Application No. 005/2013, *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 page, 65, 161(ix)

[7] Judgment in Application No. 42750/09 *Case of Del Río Prada v. Spain*, 21 October 2013 at page 51, para 3 of the disposition

time she was sentenced. The Respondent State in that case maintained that the changes in the law and the new approach to remission of sentences were outside the scope of the requirement of non-retroactivity as they did not create a penalty retroactively, but were only addressing the enforcement of a penalty. The European Court found that where changes to the law or the interpretation of the law affected a sentence or remission of sentence in such a way as to seriously alter the sentence in a way that was not foreseeable at the time when it was initially imposed, to the detriment of the convicted person and his or her Convention rights, those changes, by their very nature, concerned the substance of the sentence or penalty and not the procedure or arrangements for executing it, and accordingly fell within the scope of the prohibition of retroactivity[8]. That Court therefore found a violation of Article 7 of the Convention and having done so, decided on the alleged violation of Article 5 of the Convention, which is in terms similar to Article 6 of the Charter setting out the right "not to be deprived of one's freedom except for reasons and conditions laid down by law". The applicant had argued that a finding of a violation of Article 7 of the Convention would mean that her continued imprisonment from the date when she was due to have been released from prison based on the former sentencing and remission of sentences approach, was therefore not according to a procedure prescribed by law as is required by Article 5 of the Convention. The European Court, having found that the new sentencing and remission of sentences approach fell within the scope of the principle of non-retroactivity set out in Article 7 of the Convention, found that the applicant's continued imprisonment was therefore not according to a procedure prescribed by law and therefore found a violation of Article 5 of the Convention.[9] It is on this basis that the Court ordered her release from prison.

18. In the case of *Loayza-Tamayo v. Peru*, the Inter-American Court of Human Rights ordered the release of the victim as not doing so would have resulted in a situation of double jeopardy, which is prohibited by the American Convention on Human Rights[10].

---

[8] Ibid paras 108, 109 and 171

[9] Ibid para 131

[10] Inter-American Court of Human Rights *Case of Loayza-Tamayo v. Peru* Merits Judgment of 17 September 1997 Series C No. 33, Resolutory paras 5 and 84

19. My view is therefore that, there is no other remedy in the circumstances of this case other than that, the Applicant be released. The Court even in the operative paragraph fell shy of pronouncing itself on the release and sought to leave it to the discretion of the State. Going by the attitude of the Respondent in the compliance with the Court's orders in the *Alex Thomas* case, the Court would have granted the Applicant's relief and ordered that he be released, rather than leaving the issue to the discretion of the Respondent, a discretion which the Respondent may never exercise.

Done at Arusha this 3rd day of June in the year 2016 in English and French, the English text being authoritative.

Justice Elsie N. THOMPSON - Vice President

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
ARUSHA
TANZANIA