



**JUDGMENT SUMMARY**

**UMALO MUSSA V. UNITED REPUBLIC OF TANZANIA**

**APPLICATION NO. 031/2016**

**JUDGMENT ON MERITS AND REPARATIONS**

**13 JUNE 2023**

**A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

**Arusha, 13 June 2023:** The African Court on Human and Peoples' Rights (the Court) delivered a judgment in the case of *Umalo Mussa v. United Republic of Tanzania*.

Mr. Umalo Mussa (the Applicant) is a national of the United Republic of Tanzania who, at the time of filing the Application, was in prison on death row following his conviction for the offence of murder. The Applicant alleged that the Respondent State violated his rights guaranteed under Articles 7(1)(a), (c) and (d) of the African Charter on Human and Peoples' Rights (the Charter) by convicting him based on a self-incriminating statement which he retracted, by not providing him legal counsel of his choice and by allegedly delaying the hearing and determination of his application for review, respectively. He sought reparations to redress the alleged violations, that he should be paid compensation for the period of his incarceration and that he should be released from prison.

The Respondent State raised an objection to the Court's material jurisdiction. It asserted that the Applicant is asking the Court to sit as an appellate court and adjudicate matters that have been determined by its Court of Appeal, in particular the admission of an extra-judicial statement as evidence. Further, the Respondent State argued that the Court does not have jurisdiction to quash the conviction, set aside the sentence and release the Applicant from prison. The Respondent State also submitted that the Application does not raise any issue on the interpretation of the Charter, the Protocol to the Charter, on the Establishment of the African Court on Human and Peoples' Rights (the Protocol) or any relevant human rights instruments ratified by the Respondent State. Rather, it raises legal and evidentiary issues that were dealt with by the domestic courts.

Regarding the first ground of the objection, the Court determined that it will neither be sitting as an appellate court nor be reviewing evidence adduced before the Court of Appeal in Tanzania by seeking to assess the domestic proceedings that resulted in the Applicant's conviction and sentence as against the

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standards set out in the Charter or other human rights instruments ratified by the Respondent State. Regarding the second ground, that the Court lacks power to quash convictions and set aside sentences, the Court affirmed that, in accordance with Article 27(1) of the Protocol, “if it finds that there has been violation of human or peoples’ right”, it can “make appropriate orders to remedy the violation, including the payment of fair compensation or reparation” and these can relate to sentences meted out to a victim of violation of human or peoples’ rights. In relation to the third ground, the Court recalled the provisions of Article 7 of the Protocol and affirmed that it would determine the issues arising in the Application regardless of whether the Applicant had cited the correct provisions of the Charter and other human rights instruments ratified by the Respondent State. The Court therefore found that it has material jurisdiction to consider the Application.

Although other aspects of its jurisdiction were not challenged by the Respondent State, the Court nevertheless examined them. In terms of its personal jurisdiction, the Court found that it had personal jurisdiction since on 29 March 2010, the Respondent State deposited the Declaration provided for under Article 34(6) of the Protocol and this Declaration allows individuals to file applications against it as per Article 5(3) thereof. The Court further found that the Respondent State’s withdrawal of the said Declaration on 21 November 2019 did not affect this Application, as the withdrawal took effect on 22 November 2020, while the Application was filed at the Court on 8 June 2016. The Court also held that it had temporal jurisdiction because the alleged violations were continuing in nature; and lastly, that it had territorial jurisdiction, given that the facts of the matter occurred within the territory of the Respondent State which is a Party to the Protocol.

On the admissibility of the Application, the Court first considered the two (2) objections raised by the Respondent State. These were based on the failure to comply with the requirements of exhaustion of local remedies and, of filing the Application within a reasonable time after exhaustion of local remedies, as set out under Articles 56 (5) and (6) of the Charter and restated in Rules 50(2)(e) and (f) of the Rules of Court, respectively.

On the first objection, the Respondent State argued that the Application was filed prematurely as the Applicant ought to have first filed a constitutional petition before the High Court of Tanzania pursuant to Article 13(6) of the Constitution of Tanzania (1977) and applied for the review of the Court of Appeal’s decision to redress the alleged violation of his right to be heard. The Court referred to its previous jurisprudence in cases involving the Respondent State, that the remedies of filing a constitutional petition in the High Court and use of the review procedure in the Respondent State’s judicial system are extraordinary remedies which an Applicant is not required to exhaust prior to seizing the Court. Since the

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Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had, by its judgment of 21 May 2009 on the Applicant's appeal, upheld his conviction and sentence following proceedings which he alleged violated his rights, the Court found that the Applicant had exhausted local remedies prior to filing the Application.

The Respondent State's second objection was that the Application was not filed within a reasonable time after exhaustion of local remedies, as it was filed seven (7) years thereafter. The Court determined that the Applicant exhausted local remedies on 21 May 2009, when the Court of Appeal dismissed his appeal. However, it was only after 29 March 2010 when the Respondent State deposited the Declaration accepting the Court's jurisdiction under Article 34(6) of the Protocol, that the Applicant was able to file the Application.

Ordinarily, the period to be considered for the assessment of reasonableness in filing the Application would be the period between 29 March 2010, the date of deposit by the Respondent State, of the Declaration, and 8 June 2016, the date of filing the Application, that is, six (6) years, two (2) months and nineteen (19) days. The Court further recalled its position that, although the review procedure at the Court of Appeal of the Respondent State constitutes an extraordinary judicial remedy that an applicant is not required to exhaust, in cases where they attempted to utilize this remedy, the Court would consider the time expended in pursuing this remedy in determining whether the Application was filed before the Court within a reasonable time. In the instant case, the Applicant alleged, that on 11 March 2014, he filed an application for review of the Court of Appeal's decision, after being granted leave by the Court of Appeal to do so, out of time and that this application was pending determination by the time he filed the instant Application on 8 June 2016. The Respondent State contested this allegation. The Applicant also failed to provide evidence that the Court of Appeal granted him leave to file the application for review out of time and that he did file the application for review. In these circumstances, the Court considered the application for review as having not been filed and therefore, it could not consider the time allegedly taken by the Applicant to pursue this remedy in determining the reasonableness of time for filing the Application.

The Court noted, however, that the period between 2007 and 2013 was the Court's formative years and as it previously held, during the said period, members of the public, particularly persons in the Applicant's situation, could not be presumed to have been sufficiently aware of the Court's existence so as to file their applications soon after exhaustion of local remedies. Consequently, the Court determined that the period to be assessed for compliance with the requirement for filing the Application within reasonable time, is that between 2013, when the public would be expected to have become aware of the Court, and 2016, the year the Application was filed, which is a period of three (3) years.

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The Court, having considered that the Applicant was self-represented when he filed the Application before the Court, being on death row, secluded from the general population and with restricted movements and access to information determined that the filing of the Application within three (3) years after exhaustion of local remedies was reasonable.

The Court then satisfied itself that other conditions of admissibility set out in Article 56 of the Charter were met. It held that the identity of the Applicant was disclosed, the Application was compatible with the Constitutive Act of the African Union and the Charter; and that it did not contain disparaging nor insulting language. The Court further found that the Application was not based exclusively on news disseminated through mass media and that it did not concern a case which was already settled within the meaning of Article 56 (7) of the Charter. The Court therefore found the Application admissible.

On the merits, the Court then considered whether the Respondent State violated the Applicant's rights under Articles 7(1)(a), (d) and (c) of the Charter. This was by examining the Applicant's claims regarding the alleged violation of his right to be heard, violation of his rights due to the delay in the listing and determination of his application for review and violation of his right to defence due to not being provided legal counsel of his choice, respectively.

On the first allegation of the violation of the right to be heard, the Applicant claimed that (i) the High Court wrongfully admitted into evidence his self-incriminating statement, which he retracted and (ii) the Court of Appeal erred in law and fact by failing to consider his defence, that the extrajudicial statement was made under duress.

The Court determined that there was nothing in the procedure followed by the High Court, that is, conducting a *trial within a trial*, to admit the Applicant's self-incriminating statement into evidence, that showed that the Applicant's right to be heard was violated. Furthermore, the High Court discarded two of the prosecution witnesses' testimony which was contradictory and relied on the oral testimony of only one prosecution witness, the documentary evidence of the deceased victims' postmortem reports and the Applicant's medical examination report indicating that he was not tortured as alleged. The documentary evidence was admitted into evidence after Applicant's counsel did not object.

On the applicant's second claim regarding the alleged error of law and fact by the Court of Appeal, this Court noted that the Court of Appeal affirmed that the statement admitted into evidence by the High Court was a lawfully obtained confession because it revealed material aspects of the murders such as the weapons used in the killings, which were confirmed by the victims' post-mortem reports that were tendered



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at the High Court. This Court further observed that the Court of Appeal also assessed whether the Applicant's confession was made voluntarily. On the claim of torture especially, the Court of Appeal was of the view that the Applicant did not inform the justice of peace that he was tortured while in police custody, and neither did the justice of peace find any bruises on his body during the physical examination. The Court of Appeal concluded that the statement was not procured through torture and the same was truthful as corroborated by the justice of peace's testimony before the High Court.

The Court notes further that the Court of Appeal referred to its jurisprudence, which dictates that reliance on a confession where there is no corroboration is subject to strict requirements. These are, ascertaining whether the statement was voluntarily made, whether it was truthfully made and whether corroboration was unavailable. The Court of Appeal applied these criteria to the facts of the case involving the Applicant and satisfied itself that the Applicant was properly convicted based on a confession he made voluntarily.

The Court, therefore, held that there was nothing on record to show that the Court of Appeal of the Respondent State denied the Applicant the opportunity to challenge his conviction and sentence. The Court concluded that the High Court and the Court of Appeal's treatment of the Applicant's extra-judicial statement and consideration of the claims of torture did not reveal non-compliance with the standards set out in the Charter.

On the second allegation relating to the violation of the Applicant's rights due to the delay in the hearing and determination of the application for review, the Court recalled that the Applicant failed to provide evidence that the Court of Appeal granted him leave to file the application for review out of time. He also failed to provide evidence that, after being granted such leave, he filed the application for review before the Registry of the Court of Appeal and duly served it on the Respondent State as required under the Court of Appeal Rules. In view of this, the Court dismissed the Applicant's allegation and found that there was no violation of his rights.

The Applicant's third allegation was that the Respondent State violated his right to defence under Article 7(1)(c) of the Charter by failing to provide him with legal counsel of his choice. The Court recalled that it has held that Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), guarantees anyone charged with a serious criminal offence, the right to be automatically assigned counsel free of charge whenever the interests of justice so require, and that this applies to both the trial and appellate stages. The Court found that the Respondent State provided the Applicant with free legal representation at its expense, by availing three (3) Counsel who represented him at the trial and appellate stages. The Court also found that, nothing on the record



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showed that there was any objection raised before the national courts relating to whether the Counsels carried out their duties to the detriment of the Applicant's right to defence. The Court, therefore, found that the Respondent State did not violate the Applicant's rights under Article 7(1)(c) of the Charter.

Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterated its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State.

On reparations, the Applicant prayed for an order that he be paid compensation for the period of his incarceration to be assessed based on "the national ratio of a citizen's income per year". He also prayed the Court to order his release to repair the prejudice he suffered. The Court, having found that no violation of the Applicant's rights was established, dismissed the Applicant's prayers for reparations.

Each Party was ordered to bear its own costs.

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, Justice Blaise TCHIKAYA issued a Partially Dissenting Opinion, Justice Ben KIOKO, Justice Tujilane R. CHIZUMILA and Justice Dennis D. ADJEI issued a Joint Dissenting Opinion and Justice Chafika BENSAOULA issued a Dissenting Opinion.

### **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: <https://www.african-court.org/cpmt/details-case/0312016>

For any other queries, please contact the Registry by email [registrar@african-court.org](mailto:registrar@african-court.org).

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