



Arusha, Tanzania
Website: www.african-court.org
Telephone+255-732-979-509

JUDGMENT SUMMARY

CHACHA WAMBURA AND MANG'AZI MKAMA
CONSOLIDATED APPLICATIONS NO. 011/2016 and 012/2016

V.

UNITED REPUBLIC OF TANZANIA

JUDGMENT ON MERITS AND REPARATIONS

5 SEPTEMBER 2023

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

Arusha, 5 September 2023: The African Court on Human and Peoples' Rights (the Court), today, delivered a Judgment in the consolidated cases of *Chacha Wambura and Mang'azi Mkama v. United Republic of Tanzania*.

Chacha Wambura and Mang'azi Mkama ("the Applicants" or individually referred to as "the First Applicant" and "the Second Applicant", respectively), are both Tanzanian nationals who at the time of filing their separate Applications were in prison, each serving a thirty (30) year sentence, having been convicted of armed robbery and causing grievous bodily harm. The Applicants alleged that their right to a fair trial had been violated by the United Republic of Tanzania (the Respondent State), when its local courts convicted them based on the unreliable evidence of visual identification. The Second Applicant also contended that the Respondent State violated his right to non-discrimination guaranteed under Article 2 of the African Charter on Human and Peoples' Rights (the Charter) as well as the right to legal assistance, and the right to be tried within a reasonable time, protected by Article 7(1)(c) and (d) the Charter.

In respect of the Court's jurisdiction, the Respondent State raised an objection to the Court's material jurisdiction. It asserted that the Applicant was asking the Court to sit as an appellate court and adjudicate matters of evidence which had been decided by its supreme judicial body, the Court of Appeal.

In resolving this objection, the Court recalled that by virtue of Article 3(1) of the Protocol Establishing the African Court on Human and Peoples' Rights (the Protocol), it has jurisdiction to examine any application submitted to it provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.

As regards the Respondent State's contention that the Court would be exercising appellate jurisdiction by examining the evidentiary basis of the Applicants' conviction, the Court observed that it does not exercise appellate jurisdiction over the decisions of domestic courts. Notwithstanding that it is not an appellate court *vis-à-vis* domestic courts, the Court however, underscored that it had the power to assess the compatibility of domestic proceedings with standards set out in international human rights instruments ratified by the State concerned, but that this does not make it an appellate court. Accordingly, the Court dismissed the Respondent State's objection to its material jurisdiction.

As regards other aspects of its jurisdiction, although not disputed between the parties, the Court confirmed that it had temporal, personal and territorial jurisdiction to hear the Applications.

On the admissibility of the consolidated Applications, the Court considered the objections raised by the Respondent State, relating to non-exhaustion of local remedies and specifically, with respect to the second Application, that his Application was not filed within a reasonable time.

Regarding the first objection, the Court noted that pursuant to Rule 50(2)(e) of the Rules, any application filed before it must fulfil the requirement of exhaustion of local remedies, unless local remedies are unavailable, ineffective, or the domestic procedure to pursue them is unduly prolonged. Recalling its established jurisprudence, the Court emphasised that this requirement seeks to ensure that, as the primary stakeholders, States have the opportunity to address human rights violations occurring within their jurisdiction before an international body is called upon to intervene.

In the instant case, the Court observed that the Court of Appeal dismissed the Applicants' appeal on 29 July 2013. Although the Second Applicant claimed to have lodged an application for review of this decision, the Court noted that the procedure by which the Court of Appeal upheld their conviction and sentence was the final ordinary judicial remedy that was available to the Applicants in the Respondent State.

In line with its caselaw, the Court further stated that the review procedure at the Court of Appeal constituted an extraordinary remedy, which an applicant is not required to pursue before seizing the Court. Similarly, concerning the filing of a constitutional petition before the Respondent State's High Court, which the Respondent State argued, must have been exhausted, the Court held that this remedy in the Tanzanian judicial system is an extraordinary remedy that Applicants were not required to exhaust prior to bringing their matters to this Court.

With regard to the Respondent State's contention that the Second Applicant did not raise the issue of legal aid during domestic proceedings, the Court was of the view that this alleged violation occurred in the course of the domestic judicial proceedings that led to the Applicants conviction and sentence to thirty (30) years' imprisonment. Accordingly, it noted that the allegation formed part of the "bundle of rights and guarantees" relating to the right to a fair trial which was the basis of the Applicant's appeals. According to the Court, the domestic judicial authorities thus had ample opportunity to address the allegation even without the Applicants having raised it explicitly. Therefore, the Court stated that it would be unreasonable to require the Applicants to file a new application before the domestic courts to seek redress for this allegation.

Consequently, the Court found that the Applicants had exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 40(5) of the Rules.

With respect to the Respondent State's contention that the Second Applicant failed to file his Application within a reasonable time, the Court reiterated its jurisprudence that the reasonableness of the time limit for seizure depends on the circumstances of each case and should be determined on a case-by-case basis. The Court further recalled its position that 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. However, in cases where an applicant attempted to utilise the review procedure, the Court noted that it would take into account the time that the Applicant expended in pursuing such a procedure.

In the instant case, the Court noted that the Applicants exhausted local remedies on 29 July 2013 when the Court of Appeal dismissed their appeal against their conviction and sentence. The Applicants subsequently filed their separate Applications before the Court on 26 February 2016, which means, they approached the Court after a period of two (2) years, six (6) months, and twenty-eight (28) days had elapsed from the date of exhaustion of local remedies.

The Court, having considered that the Applicants were self-represented, lay and incarcerated and, therefore, with limited access to information, found that a delay of two (2) years, six (6) months, and twenty-eight (28) days was reasonable within the meaning of Rule 50(2)(5) of the Rules and thus, dismissed the Respondent State's objection in this regard.

The Court then satisfied itself that other conditions of admissibility set out in Article 56 of the Charter were met. It held that the identities of the Applicants were disclosed, the Applications were compatible with the Constitutive Act of the AU and the Charter; and that they did not contain disparaging nor insulting language. The Court further found that the Applications were not based exclusively on news disseminated through mass media and that the Applications did not concern a matter which was already settled within the terms of Article 56 (7) of the Charter.

On the merits, the Court considered whether the Respondent State violated the rights of the Applicants enshrined in Article 7 of the Charter by examining two allegations of the Applicants (i) their conviction was based on evidence that was not credible and (ii) their defence of *alibi* was not properly examined. The Court subsequently addressed the separate allegations by each of the Applicants.

The First Applicant claimed violation of his rights under Article 7(2) of the Charter, which prohibit the punishment of an act that did not constitute a crime at the time of its commission. On the other hand, the Second Applicant alleged that he was not provided the right to legal assistance and that his application for review at the Court of Appeal was not heard meanwhile similar applications filed after his were heard. The Second Applicant also claimed violation of his right to non-discrimination guaranteed under Article 2 of the Charter.

On the first allegation that the Applicants' conviction and sentence were based on unreliable evidence, the Court acknowledged that while the right to a fair trial requires a conviction on a criminal charge to be based on credible evidence, the nature or form of admissible evidence for purposes of such conviction may vary across the different legal traditions as long as the evidence is sufficient to establish the culpability of the accused.

The Court also stated that it is not an appellate court and as a matter of principle, it is up to national courts to decide on the probative value of a particular piece of evidence. The Court affirmed that it cannot assume this role of the domestic courts and investigate the details and particulars of evidence used in domestic proceedings.

On visual identification evidence, the Court recalled its position in its established jurisprudence that when such evidence is the basis for a conviction, all possibilities for mistakes should be ruled out and the identity of the perpetrator of the crime should be established with certainty

and the said evidence must demonstrate a coherent and consistent account of the scene of the crime.

In the instant case, the Court noted from the records that the domestic courts convicted the Applicants on the basis of evidence tendered by five (5) prosecution witnesses, four (4) of whom were present at the scene of the crime. The statements made by these witnesses were found to be generally similar and revealed a consistent account of the scene of the crime. In addition, the Court observed that there were three (3) exhibits adduced by the Prosecution, including medical reports from the Hospital, although two of them were later expunged from record by the High Court, as they were obtained without full compliance with domestic laws.

As regards the Applicants' allegation that their defence of *alibi* was not properly considered, the Court observed that in the judicial system of the Respondent State, as well as in other jurisdictions, *alibi* is an important element in criminal defence, which when established with certitude, can be decisive on the determination of the guilt of the accused. For this reason, the Court underlined that whenever it is raised by an applicant, the defence of *alibi* must always be seriously considered, thoroughly examined and possibly set aside, prior to a guilty verdict.

The Court noted that in the present case, the national courts assessed the circumstances in which the crime was committed and considered the arguments of both the State and the Applicants in order to eliminate possible errors as to the identity of the perpetrators. Furthermore, the domestic courts also examined the Applicants' defence of *alibi* and dismissed it as it was not credible enough to shake the prosecution's case.

The Court also found that the manner in which the domestic courts evaluated the evidence leading to the Applicants' conviction did not disclose any anomaly or manifest error or miscarriage of justice to warrant its intervention. Accordingly, the Court did not hold the Respondent State in violation of the Applicants' right to a fair trial under Article 7 (1) (c) of the Charter.

On the Second Applicant's alleged violation of his right to free legal assistance, the Court observed that although it was only the Second Applicant who alleged the violation of his right to legal assistance, the record showed that both the First and Second Applicants were not represented by Counsel during the domestic proceedings. The Court further noted that, the Respondent State did not dispute that the Applicants were not provided legal assistance, although they were indigent and were charged with grave offences carrying serious punishment.

The Court recalled its established jurisprudence that where accused persons are charged with serious offences which carry heavy sentences and they are indigent, free legal assistance should be provided as of right, whether or not the accused persons request for it. On this basis, in the instant case, the Court found that the Respondent State violated the Applicants' right to free legal assistance in violation of Article 7 (1) (c) of the Charter as read together with Article 14 (3) (d) of the ICCPR, by failing to provide the Applicants' legal aid both at trial and appellate stages.

On the Second Applicant's alleged violation of the right to be tried within a reasonable time with respect to his application for review at the Court of Appeal, the Court noted the Respondent State's submission that the Applicant did not provide evidence to prove his allegation. Upholding the Respondent State's objection, the Court found that the burden of proof remained with the Second Applicant, but he had not discharged it, as he failed to provide any supporting evidence or an explanation for his failure. Accordingly, the Court found that the Respondent State did not violate Article 7(1)(d) of the Charter.

The Court also addressed the First Applicant's individual allegations that his conviction and sentence was based on unclear law and violated his right to freedom from discrimination.

Regarding the first limb of the First Applicant's contention, the Court analysed the content of Article 7 (2) of the Charter dealing with the principle of legality. The Court stated that the principle of legality requires that criminal laws must exist at the time of the commission of the crime and such laws must possess sufficient clarity in specifying the nature of a crime and the punishment its commission entails.

In the instant case, the Court observed that the First Applicant and his co-accused, the Second Applicant, were charged with the offence of armed robbery and causing grievous bodily harm in accordance with Sections 285 and 286 of the Respondent State's Penal Code as amended by Act No 10 of 1989 and 27 of 1991, and sentenced in accordance with the Minimum Sentences Act No. 1 of 1972 which was amended by Section 2 of the Written Laws (Miscellaneous Amendment) Act No. 6 of 1994.

Having noted that the offences of which the Applicants were convicted were committed on 29 March 2005, the Court found that the Applicants were convicted and punished on the basis of legislation that existed and were in force at the time of commission of the crimes. The Court also found that the said laws provided a clear definition of the elements that constitute the

crime of armed robbery and grievous bodily harm and the punishments thereof. Accordingly, the Court concluded that the Respondent State did not violate Article 7(2) of the Charter.

On the second limb of the Second Applicant's allegation, the Court noted that Article 2 of the Charter stipulates that every individual shall enjoy the rights and freedoms guaranteed in the Charter without distinction of any kind including race, ethnic group, colour and any other status. In the present case, the Court observed that the Second Applicant merely alleged that the Respondent State violated his right to non-discrimination, without providing explanation on how he was treated differently compared to other individuals with a similar status as him. Consequently, the Court held that the Respondent State had not violated Article 2 of the Charter.

On the Applicants' request for reparations, the Court noted that the onus is on an applicant to provide evidence to justify prayers for material damages. With regard to moral damages, the Court recalled its established caselaw that the requirement of proof is not strict, since it is presumed that there is prejudice caused when violations are established. In the instant case, the Court also recalled its finding that the Respondent State had violated the Applicants' right to defence under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR by failing to provide them with free legal assistance during their trial and appeals in the domestic courts. On this basis, exercising its discretion in equity, the Court awarded each Applicant the amount of Three Hundred Thousand Tanzanian Shillings (TZS 300,000) for moral prejudice he suffered in relation to this violation.

The Court denied the Applicants' prayer for release from prison and dismissed the second Applicant's request for material damages. The Court justified that the nature of the established violation of the right to free legal assistance did not reveal any circumstance to consider the Applicants' imprisonment as arbitrary or as causing a miscarriage of justice to warrant an order for their release. Furthermore, the Court noted that the second Applicant failed to adduce evidence for his alleged material prejudice.

On costs, each Party was ordered to bear its own costs.

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/0112016>

For any other queries, please contact the Registry by email registrar@african-court.org

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