

**JUDGMENT SUMMARY**

**REUBEN JUMA AND GAWANI NKENDE**

**V**

**UNITED-REPUBLIC OF TANZANIA**

**CONSOLIDATED APPLICATIONS NO. 015/2017 and 011/2018**

**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 case of *Reuben Juma and Gawani Nkende v. United Republic of Tanzania*.

Reuben Juma and Gawani Nkende ("the First Applicant" and "the Second Applicant" respectively or "the Applicants" jointly) are both nationals of Tanzania who were convicted and sentenced to thirty (30) years imprisonment for the offence of rape. They both challenged the manner in which their trials were conducted in domestic courts. Although the Applicants had filed their Applications separately, the Court, acting under Rule 62 of the Rules of Court (the Rules), ordered the joinder of the Applications given the similarity of the allegations made as well as the reliefs sought.

The First Applicant alleged a violation of Articles 2, 3 and 7 of the African Charter on Human and Peoples' Rights (the Charter) due to the manner in which the domestic courts treated the evidence against him with the result that, according to him, they "ended up sustaining conviction basing on planted, fabricated and/or concocted evidence/case to justify their ill-motive". The Second Applicant also alleged a violation of Articles 2, 3 and 7 of the Charter due to the manner in which the proceedings against him were conducted by domestic courts resulting in, according to him, the procurement of the judgment against him "in great error."

The Respondent State raised an objection to the Court's material jurisdiction in respect of both Applications. It contested the jurisdiction of the Court on the basis that it is neither a court of

first instance nor an appellate court. The Respondent State also argued that the Court has no jurisdiction to quash convictions and order release of a convict.

In relation to the argument that the Court would be sitting as a court of first instance, the Court recalled its established jurisprudence to the effect that, under Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), it has material jurisdiction so long as the Application before it raises allegations of violation of human rights as protected under the Charter or any other human rights instrument ratified by the State concerned. Since the present consolidated Applications raised alleged violations of Articles 2, 3 and 7 of the Charter, the Court found that it would not be sitting as a first instance court in considering these allegations but merely discharging its mandate to interpret and apply the Charter and other human rights instruments. The Court, therefore, dismissed the Respondent State's submission.

As regards the contention that the Court would be exercising appellate jurisdiction, by examining certain claims which were already determined by the Respondent State's domestic courts, the Court reiterated its position that it does not exercise appellate jurisdiction with respect to the decisions of domestic courts. At the same time, however, and notwithstanding that the Court is not an appellate court vis-à-vis domestic courts, it retains the power to assess the propriety of domestic proceedings against standards set out in international human rights instruments ratified by the State concerned. The Court thus dismissed the Respondent State's objection on this point.

In relation to the contention that the Court lacks jurisdiction to quash convictions, set aside the sentence or order release from prison, the Court recalled that Article 27(1) of the Protocol provides that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation." The Court thus held that it has jurisdiction to grant various types of reparation, including release from prison, should the facts of a case so dictate. Accordingly, the Respondent State's objection was dismissed.

Although both Parties did not contest its temporal, personal and territorial jurisdiction, the Court nevertheless examined all these aspects of its jurisdiction and affirmed that it had jurisdiction to hear the Application.

On the admissibility of the Application, the Court considered the objections raised by the Respondent State, relating to the requirement of exhaustion of local remedies as well as the requirement of filing an Application within reasonable time.

On exhaustion of local remedies, the Respondent State contended that both Applicants filed their Applications prematurely without first having recourse to the procedure under its Basic Rights and Duties Enforcement Act, as the rights alleged to have been violated are also protected under its Constitution. According to the Respondent State, both Applicants had the option of instituting a constitutional petition before its High Court to address their grievances but failed to do so thereby confirming their failure to exhaust domestic remedies.

The Court reiterated that the requirement of exhaustion of local remedies must be complied with before any Application is admissible before it. However, this condition may, exceptionally, be dispensed with if local remedies are not available, they are ineffective, insufficient or the domestic procedures to pursue them are unduly prolonged. The Court also recalled that, as it has consistently held, the remedy of a constitutional petition in the Respondent State's judicial system is an extraordinary remedy that an Applicant is not required to exhaust prior to seizing it. Given that there was no contest that both Applicants, after being convicted and sentenced, pursued their appeals all the way to the Court of Appeal, which is the highest judicial body in the Respondent State, with their grievances, the Court found that both Applicants exhausted domestic remedies and thus dismissed the Respondent State's objection.

In respect of filing the Applications within reasonable time, the Respondent State contended that it took the First Applicant three (3) years and ten (10) months after the Court of Appeal's dismissed his appeal for him to file his Application. According to the Respondent State, "the [Second] Applicant's case at the local jurisdiction was concluded in 27th day of October 2008. The [Second] Applicant filed this Application on 08th May 2018, which is ten years after the conclusion of his case..." The Respondent State thus submitted that although the Rules do not prescribe the time limit within which applications must be filed, the Application should be declared inadmissible for not being filed within a reasonable time

In its determination, the Court emphasised that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provides that Applications must be filed "... within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter." In so far as determining reasonableness under Article 56(6) of the Charter is concerned, the Court recalled that it has held "... that the reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."

In relation to these consolidated Applications, the Court considered that domestic remedies were exhausted, by the First Applicant, when the Court of Appeal dismissed his appeal on 11

August 2014. Given that the First Applicant filed his Application on 2 May 2017, the total time lapse, after exhaustion of domestic remedies, was two (2) years and (8) months. The Court further observed that the First Applicant was self-represented in proceedings before domestic courts and he had also conducted the litigation before this Court in person. Given his lack of counsel, and also as an incarcerated person, the Court held that the period of two (2) years and eight (8) months was not unreasonable in the circumstances of his case.

In respect of the Second Applicant, the Court noted that he was convicted by the District Court on 22 October 2004 and that his appeal before the High Court was dismissed on 27 October 2008. His appeal to the Court of Appeal was dismissed on 1 November 2012. The Second Applicant, however, filed an application for review of the decision of the Court of Appeal and this was dismissed on 3 August 2017. His Application before the Court was filed on 8 May 2018. The time lapse between the last decision of the domestic courts, and the filing of the Application was, therefore, nine (9) months and five (5) days.

The Court recalled that while an applicant, within the Respondent State's legal system, is not obliged, for purposes of determining exhaustion of domestic remedies, to file a petition for review of the Court of Appeal's decision, where one opts to avail himself of this remedy, the Court takes this into account in determining whether or not an Application was filed within a reasonable time. In the present case, taking into account the time that lapsed between the decision of the Court of Appeal on the Second Applicant's application for review and the time the Application was filed, the Court held that the time of nine (9) months and five (5) days was not unreasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

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 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 the Application did not concern a case which was already settled within the terms of Article 56 (7) of the Charter. The Court, therefore, found the Application admissible.

On the merits of the Application, the Court considered whether the Applicants' rights under Articles 2 (non-discrimination), 3 (equality before the law) and 7 (fair trial) of the Charter were violated by reason of the manner in which their trials before the domestic courts were conducted.

In so far as the allegations of a violation of Articles 2 and 3 of the Charter were concerned, the Court observed that "[g]eneral statements to the effect that [a] right has been violated are not

enough. More substantiation is required.” Any alleged violation of Articles 2 and 3 of the Charter, therefore, must be accompanied by adequate evidence to substantiate the allegation. In the present case, although the First Applicant had asserted that his rights under Articles 2 and 3 of the Charter were violated due to fabrication of evidence which in turn led to his unfair treatment, the Court noted that it was not presented with any evidence to justify this allegation. The Court’s perusal of the record did not also show the particular manner in which the Second Applicant was treated differently from other accused persons, facing similar charges to the First Applicant, before the Respondent State’s courts. In so far as the First Applicant’s case was grounded on the alleged fabrication of evidence before domestic courts, the Court reiterated its established position that it does not, generally, interfere with evidential findings made by trial courts unless a grave injustice is manifest. The Court thus found that the First Applicant had not raised any justification to invite the Court to interfere with the evidential findings by the domestic courts.

The Court also found that the Second Applicant, having made no submissions to demonstrate how his rights under Articles 2 and 3 of the Charter were violated, has failed to prove his allegations. The Court thus held that there was no basis for it to hold that the Applicants’ rights under Articles 2 and 3 of the Charter were violated. It thus dismissed the Applicants’ allegations.

As for the First Applicant’s allegation that the offence of rape under the Respondent State’s Penal Code contravenes the Charter on the ground of “sexism”, the Court found that the First Applicant had just made the averment without substantiating the same. The Court thus dismissed this submission.

In relation to the right to fair trial, the Court observed that both Applicants alleged a violation through the denial of free legal assistance during domestic proceedings. Additionally, the Second Applicant alleged a violation of his right to fair trial through the manner in which the domestic courts treated the evidence preferred against him.

In their submissions, both Applicants submitted that during proceedings before the Respondent State’s courts, they were without the benefit of legal counsel as the Respondent State failed to accord them free legal assistance. They submitted, therefore, that this is a violation of Article 7(1)(c) of the Charter as well as of the Respondent State’s own Constitution. In this connection, the Court observed that Article 7(1)(c) of the Charter provides that: “Every individual shall have the right to have his cause heard. This comprises: ... c) the right to defence, including the right to be defended by Counsel of his choice”. The Court also noted that although Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance it can be read together with Article 14(3)(d) of the International Covenant on Civil

and Political Rights (ICCPR), to establish the right to free legal assistance as part of the general right to fair trial. The right to free legal assistance arises where a person cannot afford to pay for legal representation and where the interest of justice so requires.

The Court confirmed that both Applicants were not afforded free legal assistance throughout proceedings in the national courts. It was the Court's finding, however, given that both Applicants were charged with a serious offence, to wit rape, which carries a minimum sentence of thirty (30) years imprisonment, and that their indigence had not been questioned by the Respondent State, the interest of justice required that they should have been provided with free legal assistance. This obligation persisted regardless of whether or not the Applicants requested for free legal assistance. The Court, therefore, held that the Respondent State had violated Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, due to its failure to accord the Applicants free legal assistance during proceedings before domestic courts

In relation to the Second Applicant's argument that in his appeal before the Court some of his grounds of appeal were not considered thereby amounting to a violation of his Charter rights, the Court noted that, from the record, the Court of Appeal acknowledged that he had filed a memorandum with six (6) grounds of appeal. The Court of Appeal, however, proceeded to summarise these six (6) grounds of appeal into four (4) and then dealt with each of them seriatim. It was only upon its analysis of the individual grounds of appeal that the Court of Appeal dismissed the appeal. Upon reviewing the record of the domestic proceedings, the Court found that the Second Applicant had not made out any grounds necessitating its interference with the findings from the domestic courts. All that the Second Applicant had done was to make a general allegation, without attempting to demonstrate and prove which, of his grounds of appeal, were actually not considered during the consideration of his appeal. In the circumstances, the Court dismissed the Second Applicant's submissions.

Overall, therefore, the Court found that the Respondent State violated both Applicants' right to fair trial by reason of denial of free legal assistance but that it did not violate the Applicants' right to fair trial due to the manner in which the domestic courts treated the evidence against the Second Applicant.

On reparations, the Applicants prayed the Court to grant them reparations for the violations they suffered, including quashing their convictions and sentences and ordering their release. The Respondent State prayed that the Court should dismiss the requests for reparations, since the Applicants were convicted and sentenced in accordance with the law.

In respect of both Applicants, the Court confirmed that they had failed to demonstrate the existence of any exceptional circumstances that would necessitate ordering their release and

therefore, dismissed, their prayers for release. However, the Court having found that the Respondent State violated the Applicants' right to free legal assistance, contrary to Article 7(1)(c) of the Charter, the Court held that there is a presumption that both Applicants suffered moral prejudice. The Court, therefore, in line with its established jurisprudence, awarded each of the Applicants Three Hundred Thousand Tanzanian Shillings (TZS 300,000) for the moral prejudice suffered as a result of a violation of their right to free legal assistance.

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/0152017>

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

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