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JUDGMENT SUMMARY

MAKUNGU MISALABA

APPLICATION NO. 033/2016

V.

UNITED REPUBLIC OF TANZANIA

JUDGMENT ON MERITS AND REPARATIONS

7 NOVEMBER 2023

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

Algiers, 7 November 2023: The African Court on Human and Peoples' Rights (the Court), today, delivered a Judgment in the matter of *Makungu Misalaba v. United Republic of Tanzania*.

Mr. Makungu Misalaba (hereinafter referred to as "the Applicant") is a Tanzanian national who was convicted of murder and sentenced to death. The sentence was later commuted to life imprisonment by a presidential pardon granted in May 2020.

However, the Applicant maintains that his fair trial and other rights were violated during the trial and appellate proceedings before national courts. He specifically contends that the Respondent State infringed upon his right to be tried without undue delay; to a fair trial and due process given the fact that he was convicted on the basis of involuntary confession made without the assistance of counsel and disregarding mitigating circumstances; to freedom from torture as a result of him being on death row; and his right to life contrary to Article 4 of the African Charter on Human and Peoples' Rights (the Charter) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR) by imposing a mandatory death penalty. The Applicant further asserts that his right to dignity, notably, his right not to be subject to inhuman and degrading treatment under Article 5 of the Charter has been violated as the commutation of his sentence resulted in a life imprisonment without the prospect of parole.

The Respondent State raised objections to the jurisdiction of the Court and to the admissibility of the Application.

With respect to jurisdiction, the Respondent State asserted that the Applicant was asking the Court to sit as an appellate court to review matters which had been decided by its supreme judicial body, the Court of Appeal.

In addressing this objection, the Court recalled that by virtue of Article 3(1) 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 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 issues which were determined with finality by its highest court, the Court observed that it does not exercise appellate jurisdiction over the decisions of domestic courts. Notwithstanding this, the Court affirmed its established jurisprudence that it had the power to examine 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 established that it had temporal, personal and territorial jurisdiction to hear the Application. The Court then concluded that it had jurisdiction to hear the Application.

On the issue of admissibility, the Court considered the objections raised by the Respondent State, relating to non-exhaustion of local remedies and failure to file the Application within a reasonable time.

Regarding the first objection, the Court noted that pursuant to Rule 50(2)(e) of the Rules of Court (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 caselaw, the Court emphasised that this requirement seeks to ensure that, as the primary stakeholders, States have the opportunity to address human rights violations happening within their jurisdiction before an international body is called upon to intervene.

The Court noted that the Respondent State's highest Court, the Court of Appeal, dismissed the Applicant's appeal on 27 October 2014. While the Applicant contends that he had lodged an application for review of this decision, the appellate procedure through which the Court of

Appeal upheld the conviction and sentence was the final ordinary judicial remedy accessible to the Applicant in the Respondent State.

With regard to the Respondent State's contention that the Applicant did not raise the credibility of prosecution witnesses during domestic proceedings, the Court held that the alleged violation occurred in the course of the domestic judicial proceedings that led to the Applicant's conviction and sentence. The allegation therefore was 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 had ample opportunity to address this allegation, making it unreasonable to require the Applicant to file a new application before the domestic courts seeking redress for this claim.

Consequently, the Court found that the Applicant had exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2) (e) of the Rules.

With respect to the Respondent State's contention that the Applicant failed to file his Application within a reasonable time, the Court recalled 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 this notwithstanding, the Court has held that the prerequisite to justify reasonableness does not apply in instances where the delay in filing is relatively short and thus, manifestly reasonable.

In the instant case, the Court observes from the record that the Applicant exhausted local remedies on 27 October 2014, when the Court of Appeal upheld his conviction and sentence. Subsequently, he filed an application for review of the same decision on 30 October 2014. The Applicant's Application before this Court was filed on 8 June 2016, that is, after a period of one (1) year and seven (7) months had elapsed from the date of exhaustion of local remedies.

The Court considered that the Applicant was lay in matters of law, incarcerated and before the commutation of his death sentence to life imprisonment, on death row, isolated from the general population with limited access to information and restricted movements. Given these circumstances, the Court found that a delay of one (1) year and seven (7) months to file his Application was reasonable within the meaning of Rule 50(2)(f) 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 Rule 50 (2) of the Rules were met. It held that the identity of the Applicant was disclosed, the Application was

compatible with the Constitutive Act of the AU 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 the mass media and that it did not concern a matter which was already settled within the terms of Article 56 (7) of the Charter. Accordingly, the Court declared the Application admissible.

On the merits, the Court first considered whether the Respondent State violated the rights of the Applicant enshrined in Article 7 of the Charter by examining four allegations of the Applicant: (i) his conviction was based on evidence that was not credible, particularly, on unreliable evidence of hearsay and on involuntarily given confession; (ii) he endured an excessively prolonged trial period; (iii) he was denied adequate legal representation; and (iv) his trial lacked impartiality, as assessors exceeding their role, engaged in cross-examination during his trial.

The Court subsequently addressed the Applicant's allegations relating to the right to life and right to dignity guaranteed under Articles 4 and 6 of the Charter.

On the first allegation that the Applicant's conviction and sentence were based on unreliable evidence and involuntary confession, the Court acknowledged that the right to a fair trial requires a conviction on a criminal charge to be based on strong and credible evidence. However, the Court reiterated its position 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. It reaffirmed that the Court could not assume the role of the domestic courts and investigate the details and particulars of evidence used in domestic proceedings.

In the instant case, the Court noted from the records that the domestic courts convicted the Applicant relying on testimony provided by four (4) prosecution witnesses, together with four exhibits, including the Applicant's confession statement. The Court further noted that the statements offered by the prosecution witnesses exhibited a degree of similarity and coherence, substantiating a consistent narrative pertaining to the commission of the crime. Although none of the witnesses were present at the material time when the crime was committed, the Court observed that the domestic courts found that their testimonies significantly matched the confession statement of the Applicant.

As regards the Applicant's contention pertaining to the involuntary nature of his confession, the Court noted from the record that the High Court examined this issue through a trial within a trial and concluded that the Applicant's confession was voluntarily provided, without a threat of force or coercion, and following proper cautioning by the Justice of Peace who recorded his statement. The caution statement included notification that his statements could be used against him during trial and that he had the right to remain silent. Importantly, the Court of

Appeal also upheld this verdict on appeal after a meticulous consideration of all the grounds of appeal and the intricacies relating to the case. The Court observed that overall, it did not see any manifest error or anomaly in the domestic courts' assessment of the evidence relied upon to convict the Applicant, in order to warrant its intervention.

As regards the Applicant's contention that the domestic court's impartiality was compromised by assessors' active involvement in cross-examination during trial, the Court noted that in the Respondent State's legal system, the role of assessors is limited to asking questions to obtain some clarifications and they "are not statutorily mandated to cross-examine witnesses". However, in the instant case, the Court dismissed the Applicant's allegation as he did not adduce evidence demonstrating that the assessors overstepped their role.

On the Applicant's allegation that the Respondent State provided him with an ineffective legal aid counsel, the Court observed that from the record, the Respondent State furnished the Applicant with Counsel at its own expense throughout the proceedings before both the High Court and the Court of Appeal. The Court also noted that there was no information to suggest that the Applicant notified the High Court or the Court of Appeal about any deficiencies in his counsel's handling of his defence. In view of the above, the Court found that the Respondent State did not violate the Applicant's right to effective representation under Article 7(1)(c) of the Charter.

Regarding the Applicant's allegation that he suffered an unreasonably long delay before he was convicted and sentenced, the Court observed that the protracted timeline of events saw an excessive lapse of time from the moment of arrest to the initiation of the trial, during which the Applicant was in pre-trial detention, amounting to ten (10) years, four (4) months, and twenty-seven (27) days. The Court also noted that the Respondent State did not furnish any justification for this delay, nor do the circumstances of the case offer any discernible explanations for this inordinate delay. Based on the aforementioned considerations, the Court concluded that the delay in beginning the trial for a duration exceeding ten (10) years was undeniably unreasonable, thereby constituting a violation of the Applicant's right to a timely trial as guaranteed by Article 7(1)(d) of the Charter.

As regards the Applicant's allegation that the Respondent State violated his right to life by imposing the death penalty without considering his mental health issue, the Court observes that there is nothing on record indicating that the Applicant or his Counsel raised his mental health status, at the preliminary hearing, during the trial proceedings or as a ground of appeal before the Court of Appeal. The Court also noted that there is no evidence on record to warrant

faulting the domestic courts regarding the lack of consideration of the Applicant's alleged mental health at the time of trial, conviction and sentence. The Court, therefore, concluded that the Respondent State did not violate Article 4 of the Charter with regard to the Applicant's contention of his conviction without considering his mental health issues.

In respect of the Applicant's allegation that the Respondent State's mandatory death penalty violates Article 6 of the ICCPR and Article 4 of the Charter as well as the UDHR, the Court noted that the mandatory death sentence removes the judge's discretionary power to consider proportionality and the personal circumstances of the convicted individual when determining the sentence, which is essential for ensuring due process in criminal proceedings. The Court also noted that if the domestic courts of the Respondent State were vested with discretion to determine the sentencing of persons found culpable of murder, the High Court, for instance, could have legitimately considered all the factors that the Applicant had raised in possible mitigation of his sentence. The Court therefore held that in line with its established jurisprudence, the mandatory death penalty is inconsistent with the protection of the right to life, including the prohibition against the arbitrary deprivation of human life. The Court found that the Respondent State has violated Article 4 of the Charter and Article 6 of the ICCPR, by subjecting the Applicant to a mandatory death penalty for the crime of murder.

The Court then considered the Applicant's allegations that the Respondent State violated his right to dignity by placing him on death row, incarcerating him under deplorable prison conditions, failing to provide him necessary medical treatment and imposing a sentence of life imprisonment as an alternative to the death sentence. Regarding the first contention, the Court recalled its established position that death row can induce significant psychological distress, particularly when the wait for execution is prolonged. The Court held that detention on death row fundamentally disregards the principles of humanity and infringes upon the dignity of individuals.

On the second contention of prison conditions, the Court considered that the claims made by the Applicant are serious but held that the Applicant did not adduce evidence to prove his allegation. Accordingly, the Court held that the Respondent State did not violate his right to dignity by allegedly placing him in inhuman and degrading prison conditions.

Regarding the third contention, the Court observed that there is no indication on record to suggest that the Applicant was denied medical aid after having requested it. The Court held that the said denial of the medical treatment for the Applicant's injury is not of such level of

severity to constitute a cruel and inhumane treatment as alleged by the Applicant, and therefore dismissed this allegation.

On the fourth contention, the Court noted the Applicant's argument revolved around the commuted sentence of life imprisonment, which he claims offers no possibility of parole, thereby leaving no avenue for potential release upon successful rehabilitation and reform. The Court held that in the current case there was still a possibility for the Applicant to obtain parole through a Presidential pardon, and thus, the Applicant's claim that he had no possibility for release was unfounded.

On the Applicant's 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 material damages, the Court found that the Applicant did not indicate the nature of the material prejudice he suffered and how this was linked to the established violation of his rights and therefore the Court did not grant reparations for material prejudice.

With regards to moral damages, the Court recalled its finding that the Respondent State violated the Applicant's right to life, right to dignity and the right to a fair trial protected under Articles 4, 5 and 7(1)(d) of the Charter. On this basis, exercising its discretion in equity, the Court awarded the Applicant moral damages in the sum of Tanzanian Shillings Five Hundred Thousand (TZS 500,000).

Regarding the prayer to quash the Applicant's conviction and sentence and restoring his liberty, the Court reiterated that it is not an appellate court and as such, in principle, does not entertain requests to vacate or overturn the decisions of domestic courts, and that in any event, the violations established in the instant Application did not affect the conviction of the Applicant. The Court also held that the Applicant's request for an order requiring the Respondent State to conduct resentencing hearings and consider mitigating circumstances was not justified and therefore dismissed the same.

Regarding guarantees of non-repetition, the Court ordered the Respondent State to undertake all necessary measures to repeal the provision for the mandatory death penalty in its Penal Code. On publication, the Court considered that for reasons now firmly established in its practice, and in the peculiar circumstances of this case, publication of this judgment was necessary and ordered publication of the judgment. On implementation and reporting, the Court ordered the Respondent State to submit to it, within six (6) months from the date of

notification of the judgment, a report on the status of implementation of the orders set forth, every six (6) months until the Court considered that there has been full implementation thereof.

On costs, 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 and Justice Dumisa B. NTSEBEZA issued a Joint 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/0332016>

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

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