

JUDGMENT SUMMARY

CHARO SAID KIMILU AND MBWANA RUA KUBO

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 045/2016

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 case of *Charo Said Kimilu and Mbwana Rua Kubo v. United Republic of Tanzania*.

Charo Said Kimilu and Mbwana Rua Kubo (the Applicants) are Tanzanian nationals who, at the time of filing of the Application, were incarcerated at Maweni Prison, Tanga after having been tried, convicted and sentenced to twenty (20) years imprisonment for the offence of trafficking in narcotic drugs. The Applicants were also ordered to pay a fine of Ninety-five million one hundred eighty thousand and six hundred and seven Tanzanian Shillings (TSH 95 180 607), to be split evenly between the two of them. The Applicants alleged a violation of their right to a fair trial during domestic proceedings.

According to the Applicants, their right to fair trial was violated due to the following: the Court of Appeal's failure to determine the exact weight of the *Cannabis Sativa* tendered in evidence during their trial; the alleged failure to determine if indeed the Applicants were caught with the *Cannabis Sativa*; the three (3) months delay to send the impounded *Cannabis Sativa* for examination by the government chemist; and the absence of a supreme court in the Respondent State.

The Respondent State raised an objection to the Court's material jurisdiction. According to the Respondent State, "... this Application is calling for the Honourable Court to sit as an appellate Court and deliberate on matters of evidence and procedure already finalised by the Court of Appeal ...". It was the Respondent State's contention, therefore, that it is not part of the mandate and jurisdiction of the Court to sit as an appellate Court.

As regards the contention that the Court would be exercising appellate jurisdiction by examining the evidential basis of the Applicants' conviction, the Court reiterated its established 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. In performing the aforementioned function, the Court does not constitute itself as an appellate court. Based on the above, the Court proceeded to dismiss the Respondent State's objection and held that it had material jurisdiction to hear this Application

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.

In relation to exhaustion of domestic remedies, the Respondent State argued that the Applicants failed to exhaust available domestic remedies before filing this Application. According to the Respondent State, the Applicants could have filed an application for review of the Court of Appeal's decision or they could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act to challenge the alleged violation of their rights, which they did not do.

The Court confirmed that the rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same. It also pointed out that in a number of cases involving the Respondent State it has held that the remedies of filing a constitutional petition in the High Court and use of the review procedure before the Court of Appeal are extraordinary remedies that an Applicant is not required to exhaust prior to seizing this Court. The Court thus held that the Applicants were not obligated to file an application for review of the Court of Appeal's decision or to file a constitutional petition under the Basic Rights and Duties Enforcement Act. In light of the above, the Court dismissed the Respondent State's objection.

On the submission that the Application was not filed within a reasonable time, the Respondent State argued that the Applicants filed this Application ten (10) months after the Court of Appeal's judgment dismissing their appeal. While conceding that neither the African Charter on Human and Peoples' Rights (the Charter) nor the Rules of Court (the Rules) prescribe the period within which an application must be filed, the Respondent State submitted that international human rights jurisprudence has "established that a period of six (6) months is considered reasonable." The Respondent State thus prayed that the Application be dismissed for failing to comply with the rule for filing within a reasonable time.

The Court confirmed that neither Article 56 of the Charter nor Rule 50(2) of the Rules set a time frame within which an Application must be filed. In the present Application, the Court noted that the issue for determination was whether the time taken by the Applicants to seize the Court is reasonable within the meaning of Article 56(6) of the Charter as read together with Rule 50(2)(f) of the Rules. Given that the Court of Appeal delivered its judgment, dismissing the Applicants' appeal, on 16 September 2015 and the present Application was received at the Court's registry on 28 July 2016, it took the Applicants ten (10) months and twelve (12) days before filing the Application. It is this period that the Court assessed for reasonableness under Article 56(6) of the Charter.

The Court reiterated its jurisprudence to the effect that the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis. Regarding the Respondent State's submission that a period of six (6) months is accepted as reasonable time for filing applications in international human rights law,

the Court echoed the open-ended nature of Article 56(6) of the Charter, which is replicated in Rule 50(2)(f) of the Rules, and held that the result is that no pre-fixed time frame applies for determining reasonableness of time for filing an Application before the Court. The Court thus rejected, as being without legal basis, the Respondent State's submission that a period of six (6) months should be applied in determining reasonableness of time for filing Applications.

In considering the Applicants' situation as incarcerated individuals who had to rely on prison authorities to access their court records, and also considering the time at stake herein, ten (10) months and twelve (12) days, the Court held that the time it took the Applicants to file their Application was reasonable within the meaning of Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules. The Court, therefore, dismissed the Respondent State's objection to the admissibility of the Application on the basis that it was not filed within a reasonable time.

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 or insulting language. The Court further established that the Application was not based exclusively on news disseminated through the 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 right to fair trial was violated due to: the alleged failure by the Court of Appeal to determine the exact weight of the *Cannabis Sativa* tendered in evidence during their trial; the alleged failure to determine if indeed the Applicants were caught with the *Cannabis Sativa*; the three (3) months delay to send the impounded *Cannabis Sativa* for examination by the government chemist; and whether the absence of a supreme court in the Respondent State compromised the Applicants' rights.

As for the allegation that the Respondent State failed to determine the exact weight of the *Cannabis Sativa* which had been tendered in evidence during their trial, including the type of bags in which it was contained, the Applicants argued that the documents pertaining to their arrest suggested that the *Cannabis Sativa* weighed Two hundred and ninety kilogrammes (290kgs) while the evidence tendered following examination by the government chemist suggested that the weight was Three hundred seventeen two hundred sixty-eight point sixty nine (317 268.69 grams). They submitted that the evidence did not also clearly establish the type of bags in which the *Cannabis Sativa* was found

From an analysis of the record, however, the Court found that, before the Court of Appeal, the Applicants' first ground of appeal challenged the discrepancies in the weight of the *Cannabis Sativa* which had been tendered into evidence as Exhibit P2. The Court thus found that the Applicants' contention had already been dealt with by the Court of Appeal. The Court also established that, before the Court of Appeal, the Applicants' counsel abandoned the ground of appeal upon being shown proof, by the Court of Appeal, that the ground had no merit. Given that the Court is not mandated to supplant domestic courts, especially in relation to issues revolving around the assessment of evidence, the Court found that the Applicants had merely restated the arguments they made before the Court of Appeal without offering it any basis to determine whether the Court of Appeal erred in its assessment or not. In the circumstances, the Court found that the Applicants had not established any violation of their right to fair trial by reason of the manner in which the Court of Appeal dealt with the question of the weight of the *Cannabis Sativa*. The Court thus dismissed the Applicants' allegations.

The Applicants also contended that the Court of Appeal erred in law by failing to consider if they were indeed caught with the *Cannabis Sativa*. According to the Applicants, no evidence was tendered proving that they had loaded the impounded drugs onto the truck. They submitted, therefore, that this error necessitated their acquittal.

The Court noted that Applicants' contention revolved around their presence at the scene of the crime and whether the *Cannabis Sativa* was found in their possession. From the record, the Court observed that this question was addressed in various parts of the judgment of the Court of Appeal. The Court also established that the Court of Appeal specifically dealt with the identification of the Applicants. In the end, while the Court of Appeal upheld some of the Applicants' objections to their identification, it found that there was cumulative evidence which positively confirmed that the Applicants were arrested while in possession of the *Cannabis Sativa*. The Court thus found no reason to interfere with the findings of the domestic courts and, therefore, dismissed the Applicants' allegations.

The Applicants also submitted that the Court of Appeal failed to consider why it took more than three (3) months for the police to submit the impounded *Cannabis Sativa* to the government chemist. According to the Applicants, this was contrary to the Respondent State's Drugs Act and led to a violation of their rights.

The Court noted that the question of the delay in transportation of the *Cannabis Sativa* to Dar es Salaam arose during proceedings before the Court of Appeal. According to the record, it took a total of three (3) months before the seized *Cannabis Sativa* was sent to the government chemist. The Court of Appeal, after reviewing all the evidence, concluded that no other person(s) had handled the *Cannabis Sativa* "until when it was handed over to PW 8 for transportation to PW9, the Government Chemist..." Overall, the Court of Appeal held that "considering that exhibit P2 was sealed and stored by PW7 before transportation, the three months delay to transport to the Chief Government Chemist could not result into its mixing up ..."

After reviewing the record, the Court found no fault in the manner in which the Court of Appeal dealt with the question of delay in submitting the *Cannabis Sativa* to the government chemist. It also found that the Applicants had not demonstrated that there was any tampering with the exhibits once they had been confiscated by the Respondent State's agents. In the circumstances, the Court dismissed the Applicants' allegations of a violation of their right to fair trial.

The Applicants further submitted that they are suffering due to the repressive judicial system in the Respondent State. According to their submissions, if there was a supreme court in the Respondent State, the deficiencies that they have identified, with the Court of Appeal's process, would have been resolved in their favour.

The Court restated its jurisprudence to the effect that the right to appeal requires that individuals be provided with an opportunity to access competent organs to appeal against decision or acts violating their rights. The duty on States, according to the Court, is to establish mechanisms for such appeal and take necessary action that facilitate the exercise of this right by individuals, including providing them with the judgment or decisions that they wish to appeal against within a reasonable time. The Respondent State's duty, the Court held, is to ensure that there is, at least, a two-tier jurisdiction in respect of all criminal matters i.e. an avenue for appealing all first instance decisions. The right to appeal in criminal matters, the Court found, does not prescribe a particular number of the levels at which an appeal must occur so far as there is an opportunity for appealing a first decision. The essence of the right is that findings of a trial court must be amenable to review by another court.

In the circumstances, the Court found that the absence of a court above the Court of Appeal, in the Respondent State's system, does not amount to a violation of the Applicants' rights. The Court, therefore, found that the Applicants' contention had no merit and accordingly dismissed it.

On reparations, the Applicants prayed the Court to quash their conviction and order their release and that they be awarded reparations in the sum of One hundred twenty-five million and seven hundred thousand Tanzanian Shillings (TSH125 700 000). They also prayed that the Court make any other order or remedy as it may deem fit.

The Respondent State prayed the Court to dismiss all the Applicant's prayers and find that it did not violate the Charter or the Protocol. It also prayed that the Court make any such order as may be just in the circumstances.

The Court, having found no violation by the Respondent State, the Applicants' claims for reparations were all dismissed.

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/0452016>

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

The African Court on Human and Peoples' Rights is a continental court established by African Union Member States to ensure the protection of human and peoples' rights in Africa. The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights and any other relevant human rights instrument ratified by the States concerned. For further information, please consult our website at www.african-court.org.