

JUDGMENT SUMMARY

**IBRAHIM YUSUF CALIST BONGE AND 2 OTHERS
V.
UNITED REPUBLIC OF TANZANIA
APPLICATION No. 036/2016**

JUDGMENT ON MERITS AND REPARATIONS

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

Algiers, 4 December 2023: The African Court on Human and Peoples' Rights (the Court or the African Court), today, delivered Judgment in the case of *Ibrahim Yusuf Calist Bonge and 2 Others v. United Republic of Tanzania*.

Ibrahim Yusuf Calist Bonge, Rajabu Mohammed Salum Msolongoni and Simba Aloyce Simba Hatibu (the Applicants) are all nationals of the United Republic of Tanzania (the Respondent State). At the time of filing the Application, the Applicants were awaiting execution of their sentence after having been tried, convicted and sentenced to death on two counts of murder. They alleged a violation of their rights as a result of the manner in which their trial before the domestic courts was conducted.

The Court observed, in accordance with 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), that, it had to, first, determine whether it had jurisdiction to hear the Application. The Court noted that the Respondent State raised an objection to the Court's material jurisdiction arguing that the Court lacked jurisdiction to adjudicate on this Application since the Applicants were inviting the Court to sit as an appellate court. While confirming that it is not an appellate court, the Court dismissed the Respondent State's objection by holding that in examining relevant proceedings in the national courts, in order to determine whether they are compatible with the standards set out in the Charter or any other human rights instruments ratified by the State concerned, it does not thereby constitute itself an appellate court but merely checks the compatibility of particular acts as against standards in international law.

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

In terms of the admissibility of the Application, the Court, as empowered by Article 6(2) of the Protocol, had to determine whether the requirements of admissibility, as

provided under Article 56 of the Charter and Rule 50(2) of the Rules of Court (“the Rules”), had been met. In this regard, the Court first considered the objections raised by the Respondent State on non-exhaustion of local remedies and on failure to file the Application within a reasonable time.

In respect of the contention on exhaustion of domestic remedies, the Court noted that the Court of Appeal, the highest court in the Respondent State, dismissed the Applicants’ appeal on 27 March 2014. The Court also recalled that, as per its jurisprudence, in the Respondent State, an Applicant need not pursue an application for review of the Court of Appeal decision or even file a constitutional petition before the High Court since these are extraordinary remedies. With regard to the Respondent State’s contention that the Applicants did not raise the issue of denial of legal aid and bail during domestic proceedings, the Court held that these alleged violations occurred in the course of the domestic judicial proceedings that led to the Applicants’ conviction and sentence and were thus covered under the “bundle of rights and guarantees” relating to the right to a fair trial. It concluded that, in the circumstances, the domestic judicial authorities had ample opportunity to address the allegations even without the Applicants having raised them explicitly. The Court thus held that the Applicants had exhausted local remedies as envisaged under Article 56(5) of the Charter as restated in Rule 50(2)(e) of the Rules.

As for the objection that the Application was not filed within a reasonable time, the Court reiterated that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. It also recalled its jurisprudence 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.” In the instant Application, the Court recalled that the Applicants exhausted local remedies on 27 March 2014, when the Court of Appeal dismissed their appeal. The Applicants subsequently filed their Application on 15 June 2016 which meant they approached the Court two (2) years, two (2) months, and nineteen (19) days after the date of exhaustion of local remedies. On the basis of its jurisprudence, and employing the case by case approach, the Court found that the period of two (2) years, two (2) months and nineteen (19) days was reasonable, within the meaning of Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules. The Respondent State’s objection was thus dismissed.

Although the compliance with other conditions of admissibility was not challenged by the Respondent State, the Court had to ensure that they had been fulfilled. In this regard, the Court held that, the Applicants had been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules. It also held that the allegations by the Applicants sought to protect their rights in line with Article 3(h) of the objectives of the Constitutive Act of the African Union, thus the Application complied with Rule 50(2)(b) of the Rules. Furthermore, the Court found that the language used in the Application was not disparaging or insulting to the Respondent State or its institutions, in fulfilment of Rule 50(2)(c) of the Rules, and that the Application was not based exclusively on news disseminated through the mass media, in fulfilment of Rule 50(2)(d) of the Rules.

The Court was also satisfied that the Application did not raise allegations already settled before another international tribunal, and thus all the conditions of admissibility as set out in Article 56 of the Charter and restated in Rule 50(2) of the Rules had been complied with. The Court, therefore, declared the Application admissible.

On the merits, the Court had to determine whether the Respondent State's conduct had violated the Applicants' rights under the Charter, specifically, the right to non-discrimination - Article 2; the right to equality before the law and equal protection of the law – Article 3; the right to life – Article 4; the right to dignity – Article 5; the right to a fair trial – Article 7; the right to freedom of expression - Article 9; and the general duty to uphold the Charter - Article 1.

On the alleged violation of the right to non-discrimination, the Court emphasised that the Article 2 of the Charter prohibits differential treatment of individuals found in the same situation, on the basis of unjustified grounds. It also emphasised that any allegation of differential treatment must be substantiated by the person making the allegation. In the instant Application, the Court found that the Applicants had made a general allegation without offering any evidence in support thereof. The Court thus found the Applicants' allegations unfounded and, accordingly, dismissed them.

On the alleged violation of Article 3 of the Charter, the Court noted that the Applicants faulted the impartiality of the police officers who arrested them but since the burden of proving an allegation always lies with he or she that asserts, the Court found that the Applicants had failed to prove any illegality in the manner in which the police officers had conducted themselves. Additionally, the Court found that the Applicants had not established how the Respondent State treated them in a manner contrary to the guarantees in Article 3 of the Charter. Accordingly, the Court dismissed the Applicants' allegations of a violation of Article 3 of the Charter.

In respect of the alleged violation of Article 4 of the Charter, the Court reiterated its position that the death penalty, as a type of punishment, should, exceptionally, be reserved only for the most heinous of offences committed in seriously aggravating circumstances. While not faulting the findings of the domestic courts in respect of the Applicants' guilt, the Court found that the Respondent State had violated the Applicants' right to life by sentencing them to death under a regime that did not accord the domestic courts any discretion as to the type of sentence to be imposed.

On the alleged violation of the right to dignity, the Court, while dismissing the First Applicant's allegations of a violation of his right to dignity by reason of the time it took to record his caution statement, nevertheless held that the Applicants' rights under Article 5 of the Charter were violated since they were sentenced to suffer the death penalty by hanging. The Court reiterated its established jurisprudence that the implementation of the death penalty by hanging is a violation of the right to dignity.

The Court then noted that the Applicants had made several allegations under the rubric of the right to a fair trial. First the Applicants contended that both the High Court and the Court of Appeal violated their rights by failing to establish corroborative evidence for their caution statements. In this connection, the Court observed, from the record, that both the High Court and the Court of Appeal affirmed the necessity of

ascertaining the reliability of the Applicants' caution statements before relying on them. This Court found that there was no manifest irregularity regarding the findings of either the High Court or Court of Appeal in this regard. Given the Applicant's failure to prove any manifest anomalies that the domestic courts committed in relying on the caution statements the Court dismissed the Applicants' allegations.

Second, the Applicants alleged that their right to a fair trial was violated because their caution statements were illegally obtained. The Court noted from the record that, both the High Court and the Court of Appeal dealt exhaustively with the admissibility of the Applicants' caution statements. The Court concluded that both the High Court and the Court of Appeal, demonstrated sufficient awareness of the possible dangers of simplistically admitting the Applicants' caution statements but in the exercise of discretion vested in them by law decided to admit the statements. The Court, therefore, found that the record did not establish that the domestic courts abused their discretion in admitting the statements. The Court, therefore, dismissed the Applicants' allegations of a violation of the right to a fair trial.

The Court also noted that the Applicants alleged the violation of the right to freedom of expression but did not substantiate it, therefore the Court dismissed this claim. However, given the violations of the Charter that the Court had identified, the Court also found a violation of Article 1 of the Charter.

On pecuniary reparations, the Court dismissed the Applicants' prayer for material damages but it granted each of the Applicants reparations for the moral prejudice in the sum of Tanzania Shillings Three Hundred Thousand (TZS 300,000). It further ordered the Respondent State to pay the sum awarded, free from tax as fair compensation within six (6) months from the date of notification of this Judgment, failing which it would be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment.

In order to guarantee the non-repetition of the violations established, the Court ordered the Respondent State to immediately, and in any event within six (6) months from the date of notification of this Judgment, undertake all necessary measures to repeal the provision for the mandatory death penalty in its Penal Code as well as the prescription for hanging as a method of execution.

Regarding the Applicants' prayer to be released, the Court recalled that it can only make such an order in compelling circumstances. In the present Application, the Court noted that no such exceptional circumstances had been established. The prayer for release was, therefore, dismissed. The Court, however, ordered the Respondent State to take all necessary measures within one (1) year of the notification of this Judgment, for the rehearing of the case on the sentencing of the Applicants through a procedure that does not allow the mandatory imposition of the death sentence.

On implementation and reporting, the Court held that the Respondent State was under an obligation to report on the steps taken to implement this judgment within six (6) months from the date of notification of this judgment and thereafter, every six (6) months until the Court is satisfied that there has been full implementation thereof. The

Court also ordered the publication of this Judgment within a period of three (3) months from the date of notification on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the judgment is accessible for at least one (1) year after the date of publication.

On costs, the Court ordered that each Party shall bear its own costs.

In accordance with Article 28(7) of the Protocol and Rules 70(3) of the Rules, Judge Blaise TCHIKAYA and Judge Dumisa B. NTSEBEZA issued a Declarations relating to the Court's findings on Articles 4 and 5 of the Charter.

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/0362016>

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.