


<b>AFRICAN UNION</b>		<b>UNION AFRICAINE</b>
<b>الاتحاد الأفريقي</b>		<b>UNIÃO AFRICANA</b>
<b>AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES</b>		

**THE MATTER OF  
MISOZI CHARLES CHANTHUNYA**

**V.**

**REPUBLIC OF MALAWI**

**APPLICATION No. 001/2022**

**RULING  
(PROVISIONAL MEASURES)**

**24 JANUARY 2024**



**The Court composed of:** Imani D. ABOUD, President; Modibo SACKO, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, and Dennis D. ADJEI – Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Tujilane R. CHIZUMILA, member of the court and a national of Malawi, did not hear the Application.

In the Matter of:

Misozi Charles CHANTHUNYA

*Represented by:*

Advocate Michael Goba CHIPETA,  
Gobz & Rechtswissenschaft, Malawi

Versus

REPUBLIC OF MALAWI

Not represented

*After deliberation,*

Delivers this Ruling:

## **I. THE PARTIES**

1. Mr. Misozi Charles Chanthunya (hereinafter referred to as “the Applicant”) is a national of Malawi who, at the time of filing this Application, was imprisoned at Zomba Central Prison after having been convicted and sentenced as follows: life imprisonment for murder, two years imprisonment for hindering the burial of a dead body and two years’ imprisonment with hard labour for perjury.
2. The Application is filed against the Republic of Malawi (hereinafter referred to as “the Respondent State”), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as “the Charter”) on 23 February 1990 and to the Protocol on 9 October 2008. On 9 October 2008, the Respondent State deposited the Declaration provided for under Article 34(6) of the Protocol by which it accepts the jurisdiction of the Court to receive cases directly from individuals and non-governmental organisations (hereinafter referred to as “the Declaration”).

## **II. SUBJECT OF THE APPLICATION**

### **A. Facts of the matter**

3. The Applicant alleges that on 1 March 2018, he was extradited from South Africa to the Respondent State. On d 4 June 2018, he was arraigned before the High Court of Malawi, Zomba District charged with the murder of Ms Linda Gaza. The said murder allegedly occurred on or about 4 August 2010 at Monkey Bay in Mangochi district.
4. On 9 January 2020, the Applicant filed a notice of motion before the High Court on preliminary issues seeking a declaration that his rights accruing from statutory and constitutional provisions had been violated. By a Ruling dated 23 January 2020, the High Court dismissed the Applicant’s aforesaid motion and

allowed leave to appeal. The Applicant filed a notice of appeal against the ruling on preliminary issues on 27 January 2020.

5. The Applicant further filed an application for stay of the High Court's proceedings pending determination of his appeal, which was refused by the High Court on 27 January 2020 and by the Supreme Court of Appeal on 22 July 2020.
6. The Applicant alleges that some actions of the Respondent State's judicial authorities led to his appeal not being heard, including the refusal by the High Court and the Supreme Court of Appeal to grant a stay of the High Court's proceedings pending determination of the Applicant's appeal at the Supreme Court of Appeal; the High Court's decision to proceed with his trial, notwithstanding his notice of appeal, and; the failure of the Registrar of the High Court to systematically prepare the records of appeal and to send same to the Supreme Court of Appeal.
7. The Applicant further asserts that, on 31 January 2020, before close of the hearing relating to the murder charge, the Prosecution made an application to amend the original charge by adding two counts of hindering the burial of a dead body contrary to section 131 of the Penal Code, and perjury contrary to section 101 of the Penal Code. On 2 March 2020, the High Court allowed the amendment regardless of the Applicant's objections. He pleaded not guilty to all the charges and, upon close of the Prosecutions' case, he exercised his right to remain silent.
8. On 28 August 2020, the High Court found the Applicant guilty of all the charges and on 4 September 2020, sentenced him to life imprisonment for the offence of murder, and two (2) years imprisonment for the offence of hindering burial of dead body and two years' imprisonment with hard labour for perjury, the sentences running concurrently.

9. The Applicant avers that on 25 September 2020, he filed an appeal against the High Court's judgment to the Supreme Court of Appeal, the highest appellate court in the Respondent State, which on 14 July 2021 dismissed the appeal and upheld both his conviction and sentence. The Applicant claims that the Supreme Court of Appeal has, till the date of filing of the instant Application, never given any reasons for its judgment.
10. In addition, the Applicant contends that his conviction and sentence by the High Court and upheld by the Supreme Court of Appeal were not based on strong and credible evidence and he was not given adequate opportunity to challenge the evidence as the prosecution failed and/or neglected to bring key and material witnesses as required by the principle of a fair trial. In this regard, he alleges that the conviction was not based solely on evidence presented but rather, the High Court judge relied on facts that were not adduced by witnesses.
11. The Applicant maintains that the said judgment was also based on fraudulent documents presented in court by the Prosecution as "Call logs" but which, in fact, were not call logs and, therefore, not evidence. The Applicant further alleges that the evidence used by the Prosecution against him, on the basis of which the High Court found him guilty, was not admissible since it was obtained through violation of provisions of statutory law, the Constitution of the Respondent State and the principles of rule of law.

## **B. Alleged violations**

12. In the main Application, the Applicant alleges that the Respondent State violated his right to a fair trial, protected by Article 7(1) of the Charter together with Part A, Article 2(e), (h), (i), and (j); Part C, Article (b)(i), Part N, Article 1 (a) and 6 (e) of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article 14(1) and (3) (a) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"), Article 8 of

the Universal Declaration on Human Rights (hereinafter referred to as “the UDHR”) and Article 4(1) of the African Charter on Democracy, Elections and Governance (hereinafter referred to as the “ACDEG”).

### **III. SUMMARY OF THE PROCEDURE BEFORE THE COURT**

13. The Application together with a request for provisional measures, dated 13 December 2021, was received at the Registry on 23 December 2021 and served on the Respondent State on 5 January 2022 for its response within 15 days for the request on provisional measures and 90 days for the main Application.
14. The Respondent State neither responded to the request for provisional measures nor to the main Application.

### **IV. PRIMA FACIE JURISDICTION**

15. Article 3(1) of the Protocol provides that “the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.”
16. Under Rule 49(1) of the Rules of Court<sup>1</sup> “the Court shall conduct preliminarily examination of its jurisdiction ...”. However, with respect to provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, only that it has *prima facie* jurisdiction.<sup>2</sup>

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<sup>1</sup> Rules of 25 September 2020.

<sup>2</sup> *Komi Koutche v. Republic of Benin* (provisional measures) (2 December 2019) 3 AfCLR 725, § 11.

17. In the instant case, the rights and obligations allegedly violated by the Respondent State are all protected by the Charter, the ICCPR and the ACDEG to which the Respondent State is a party.<sup>3</sup> The Court further notes that the Respondent State is a party to the Protocol and deposited the Declaration under Article 34(6) of the Protocol.
18. The Court finds, therefore, that it has *prima facie* jurisdiction to hear the request for provisional measures.

## V. PROVISIONAL MEASURES REQUESTED

19. The Applicant prays for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 59(1) of the Rules, to stay execution of the sentences meted out against him by the High Court of Malawi and upheld by the Malawi Supreme Court of Appeal, pending determination of the main Application.
20. The Respondent State did not file any submissions.

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21. The Court notes that Article 27(2) of the Protocol provides that “In cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.”
22. The Court has however also consistently held that “it is only required to ascertain the existence of these basic conditions if it is established that the measures sought do not prejudice the merits of the Application(s)”.<sup>4</sup> As the Court has held, “a request for provisional measures prejudices the merits of the

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<sup>3</sup> The Respondent State ratified the ACDEG on 24 October 2012.

<sup>4</sup> *Elie Sandiwidi and Mouvement Burkinabe des droits de l'homme et des peuples v. Republic of Benin*, ACtHPR, Application No. 014 and 017/2020, Ruling of 25 September 2020 (provisional measures), § 65.

Application when it is identical to it, when it seeks to achieve the same result or, in any event, when it touches on an issue on which the Court will necessarily have to rule on, when it addresses the merits of the case”.<sup>5</sup>

23. In the instant matter, the Court notes that, in the main Application, the Applicant prays the Court to find that the Respondent State violated his right to a fair trial protected under Article 7(1) of the Charter as a result of his conviction and sentencing. The Applicant further prays the Court to order restitution by way of restoration of his liberty and/or release from prison.
24. The Court also notes, in respect of the provisional measures sought, that the Applicant is praying for an interim order staying execution of the sentences by the High Court and Supreme Court of Appeal of the Respondent State pending determination of his application, which would have the effect of restoring his liberty and/or releasing him from prison pending appeal.
25. The Court considers that the measures prayed by the Applicant in respect of the merits of the main Application are to the same effect as the provisional measures sought in the present request. As such, the Court cannot grant the measures sought without prejudging the merits of the main Application.
26. As a consequence, the Court finds that the provisional measures sought are not justified and therefore, dismisses same.
27. For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudice the findings of the Court on its jurisdiction, the admissibility of the Application and the merits thereof.

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<sup>5</sup> *Sandiwidi and Another, ibid*, § 66; See also *Jean de Dieu Ngajigimana v. United Republic of Tanzania* (provisional measures) (26 September 2019) 3 AfCLR 522, § 25.



## VI. OPERATIVE PART

28. For these reasons,

THE COURT,

*Unanimously,*

*Dismisses* the request for provisional measures.

**Signed by:**

Imani D. ABOUD, President;



And Robert ENO, Registrar.



Done at Arusha, this Twenty-Fourth Day of January in the year Two Thousand and Twenty-Four, in English and French, the English version being authoritative.

