

## **CROSPERY GARBIEL AND ERNEST MUTAKYAWA V. UNITED REPUBLIC OF TANZANIA**

**APPLICATION No. 050/2016**

### **JUDGMENT (MERITS AND REPARATIONS)**

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

**Arusha 13 February 2023:** The African Court on Human and Peoples' Rights (the Court or the African Court), today, delivered a Judgment in the case of *Crospery Gabriel and Ernest Mutakyawa v. United Republic of Tanzania*.

Crospery Gabriel and Ernest Mutakyawa (hereinafter referred to as “the Applicants”) are Tanzanian nationals who were tried, convicted and sentenced to death for the offence of murder. At the time of filing this Application, the Applicants were detained at Butimba Central Prison, Mwanza. The Applicants alleged that the Respondent State violated their rights to non-discrimination; equality before the law and equal protection of the law; life; dignity; and a fair trial protected under Articles 2, 3, 4, 5 and 7 of the African Charter on Human and Peoples' Rights (the Charter), respectively, as a result of the manner in which proceedings before domestic courts were 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, preliminarily, determine whether it had jurisdiction to hear the Application. The Court noted that the Respondent State raised an objection to its material jurisdiction arguing that the Court was not vested with jurisdiction to adjudicate on this Application since the Applicants were inviting the it to sit as a trial court or an appellate court.

As regards the argument that the Court was being called to sit as a trial court, the Court reiterated its established position that it is not a court of first instance. At the same time, however, it confirmed that it retains the power to assess the propriety of domestic proceedings, including a domestic court's assessment of evidential issues, as against the standards set out in the Charter and other international human rights instruments ratified by the State concerned. In doing this, the Court stated, it would not be sitting as a trial court. Resultantly, the first limb of the Respondent State's objection was dismissed

As for the second limb of the Respondent State's argument, the Court, while confirming that it is not an appellate court, dismissed the objection. It held 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 as 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 nevertheless examined all aspects of its jurisdiction and affirmed 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 objection raised by the Respondent State alleging the Applicants’ failure to exhaust local remedies.

The Court, while confirming the importance of the rule on exhaustion of domestic remedies, noted that the Applicants’ appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when a judgment was rendered on 20 February 2015. Although the Applicants claimed to have lodged an application for review of this decision, the procedure by which the Court of Appeal upheld their conviction and sentence was the final ordinary judicial remedy that was available to them. The Court, reaffirming its jurisprudence, also held that the review procedure, as well as the constitutional petition procedure, as framed in the Respondent State, constitute extraordinary remedies that the Applicants were not required to exhaust before seizing it.

In relation to the contention that the Applicants were raising some allegations for the first time, the Court reiterated its jurisprudence that the Applicants’ allegations formed part of the “bundle of rights and guarantees” relating to the right to a fair trial that led to their appeal. Thus, there was no need for them to go back to the High Court. Consequently, the Court dismissed the Respondent State’s objection and held that the Applicants had exhausted local remedies.

Although the other admissibility requirements in Article 56 of the Charter were not contested by either of the Parties, the Court nevertheless analysed each of the requirements and confirmed that they were satisfied before concluding that the Application was admissible.

On the merits of the Application, the Court considered whether the Respondent State violated the Applicants’ rights to non-discrimination; equality before the law and equal protection of the law; life; dignity; and a fair trial protected under Articles 2, 3, 4, 5 and 7, respectively.

In relation to the alleged violation of the right to a fair trial, the Court observed that the Applicants were questioning the manner in which the domestic courts assessed the evidence against them. In this regard, the Court recalled that it had previously held that domestic courts enjoy a wide margin of appreciation in evaluating the probative value of evidence before them and that, as an international court, it would be slow to take this role away from them. While confirming that it retains the power to evaluate the manner in which domestic proceedings were conducted, particularly to check

conformity with international human rights standards, in the present Application, the Court observed that the Applicants did not point to any specific evidence, adduced before the domestic courts, that was not properly assessed. In the circumstances, the Court dismissed the Applicants' contention that domestic courts ignored exculpatory evidence in convicting them.

Equally, although the Applicants alleged that no reasons were given by the domestic courts for disregarding their defences leading to their convictions, the Court confirmed that the Applicants' defence of alibi was fully considered and dismissed only upon being found implausible. The Court also found no fault with the manner in which the domestic courts dealt with the identification evidence and the admission into evidence of the post-mortem report. It was the Court's finding, therefore, that the prosecution had proven the case against the Appellants before they were convicted. The Court thus dismissed all the Applicants' allegations of a violation of the right to fair trial.

On the alleged violation of the right to life, the Court found that the mandatory imposition of the death penalty, as provided for under Section 197 of the Respondent State's Penal Code, and as automatically applied by the High Court in the Applicants' case, does not uphold fairness and due process, and that it amounts to an arbitrary deprivation of the right to life. As a result, the Court held that the Respondent State had violated Article 4 of the Charter.

In relation to the Applicants' allegation of a violation of their right to dignity by reason of the method of execution of the death penalty in the Respondent State, that is, by hanging, the Court held that the implementation of the death penalty by hanging is inherently degrading and encroaches upon dignity, thus a violation of Article 5 of the Charter.

Although the Applicants alleged a violation of their right to non-discrimination under Article 2 of the Charter, the Court dismissed this allegation having established that the Applicants made a mere general allegation without substantiating the same. Equally, the Court dismissed the Applicants' allegations of a violation of Article 3 of the Charter for not being substantiated.

On the Applicants' claims for reparations, the Court dismissed the claims for pecuniary reparations, holding that the Applicants failed to prove that they earned the sums they claimed and that they also failed to demonstrate the connection between the violations established and their loss. It also noted that no proof was provided by the Applicants of the claimed monthly earnings to support their assertions.

In respect of moral prejudice, the Court confirmed that moral prejudice is presumed in cases of human rights violations and the quantum of damages is assessed in equity, taking into account the circumstances of the case. Given that the Court found that the Applicants' right to life and right to dignity were violated, the Court held that they had suffered moral prejudice. Taking into account other similar cases involving the Respondent State, the Court awarded each of the Applicants the sum of Three Hundred Thousand Shillings (TZS 300,000) as moral damages.

In connection with non-pecuniary reparations, the Court ordered the Respondent State, within Six (6) months from the date of notification of this Judgment, to take all

necessary constitutional and legislative measures to amend the provisions of its Penal Code and ensure that they are aligned with the provisions of the Charter so as to eliminate the violations identified herein.

As for the Applicants' prayer for release from prison, the Court held that while the Applicants' prayer for release was not warranted, since they were sentenced to death under a regime which did not accord the domestic courts discretion on the sentence, the Respondent State should take all necessary measures for the rehearing of the case on the sentencing of the Applicants through a process that did not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.

Although not specifically prayed for by the Applicants, the Court ordered, given the nature of the allegations at stake in this Application, that the Respondent State should publish the judgment within a period of three (3) months from the date of notification.

The Court also ordered the Respondent State to periodically report on the implementation of this judgment in accordance with Article 30 of the Protocol. The report should detail the steps taken by the Respondent State to remove the impugned provision from its Penal Code.

The Court further held that the Respondent State is 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.

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

In accordance with Article 28(7) of the Protocol and Rules 70(1) and 70(3) of the Rules, the Declarations of Justices Blaise TCHIKAYA and Dumisa B. NTSEBEZA were appended to the Judgment.

### **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/0502016>

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

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