

Mwita v Tanzania (provisional measures) (2020) 4 AfCLR 112

Application 012/2019, *Ghati Mwita v United Republic of Tanzania*

Order (provisional measures), 9 April 2020. Done in English and French, the English text being authoritative.

Judges: ORÉ, KIOKO BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, and ANUKAM

Recused under Article 22: ABOUD

The Applicant, who was convicted and sentenced to death for murder, brought this action alleging that the domestic courts based her conviction on insufficient and unreliable evidence therefore, the Respondent State had violated her rights in articles 4, 7 and 20 of the African Charter. The Applicant requested for provisional measures to prevent her execution pending determination of her case. The Court granted the provisional measures requested.

Jurisdiction (withdrawal of Article 34(6) Declaration has no retroactive effect, 4, *prima facie* jurisdiction, 14)

Provisional measures (discretionary remedy, 20; extreme gravity, urgency and irreparable harm, 21)

I. The Parties

1. Ghati Mwita (hereinafter referred to as “the Applicant”) is a national of the United Republic of Tanzania (hereinafter referred to as “the Respondent State”). She is currently imprisoned at Butimba Central Prison, Mwanza, within the Respondent State.
2. The Respondent State became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases directly from individuals and non-governmental organisations.
3. On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing its Declaration under Article 34(6) of the Protocol.

II. Effect of Respondent State’s withdrawal of the Article 34(6) Declaration

4. The Court recalls that in *Ingabire Victoire Umuhoza v Rwanda*,¹ it held that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, as is the case of the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the instrument of withdrawal is deposited.
5. In respect of the Respondent State, therefore, having deposited its instrument of withdrawal on 21 November 2019, its withdrawal of the Article 34(6) Declaration will take effect on 22 November 2020.

III. Subject of the Application

6. On 24 April 2019 the Applicant, acting in person, filed an Application in which she alleges that the Respondent State has violated her rights under Articles 4, 7 and 20 of the Charter. Specifically, the Applicant alleges that the Respondent State’s courts erred in basing her conviction on insufficient and unreliable evidence.
7. It emerges from the Application that on 19 September 2011, the High Court of Tanzania sitting at Mwanza convicted the Applicant of murder and sentenced her to death. On 11 March 2013, the Court of Appeal, sitting at Mwanza, upheld the sentence of the High Court. On 19 March 2015, the Court of Appeal dismissed the Applicant’s application for review of its earlier decision.
8. On 29 October 2019, the Applicant, through her Court appointed counsel, filed a Request for Provisional Measures in which she prays the Court:
 - a. To order that the Respondent State shall not carry out the execution of the Applicant while her application remains pending before the Court;
 - b. An order that the Respondent shall report to the Court within thirty (30) days of the interim order on the measures taken for its implementation.”

1 (2016) 1 AfCLR 562 § 67.

IV. Summary of the Procedure before the Court

9. On 10 May 2019, the Registry requested the Applicant to file further pertinent documents or information in support of her Application.
10. On 16 August 2019, the Applicant filed further documents in support of her Application.
11. On 30 September 2019, the Court, suo motu, granted the Applicant legal aid under its Legal Aid Scheme.
12. The request for provisional measures, which was filed on 29 October 2019, was served on the Respondent State on 23 January 2020. The Respondent State was given fourteen (14) days within which to file its Response but it did not file any Response.

V. Jurisdiction

13. In dealing with any Application filed before it, the Court must conduct a preliminary examination of its jurisdiction, pursuant to Articles 3 and 5 of the Protocol.
14. Nevertheless, for the purpose of issuing an Order for Provisional Measures, the Court need not establish that it has jurisdiction on the merits of the Application, but must simply satisfy itself that it has *prima facie* jurisdiction.²
15. Article 3(1) of the Protocol stipulates 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. The Court notes that the alleged violations, subject of the present Application, are in respect of the rights protected under Articles 4, 7 and 20 of the Charter, an instrument to which the Respondent State is a party. The Court, therefore, holds that it has material jurisdiction to hear the Application.
17. In light of the foregoing, the Court is satisfied that it has *prima facie* jurisdiction to hear the Request.

2 See, Application 002/2013. Order of 15/03/2013 (Provisional Measures), *African Commission on Human and Peoples’ Rights v Libya* § 10; Application 006/2012. Order of 15/03/2013 (Provisional Measures), *African Commission on Human and Peoples’ Rights v Kenya* § 16, and Application 020/2019. Order of 2/12/2019, *Komi Koutche v Republic of Benin* § 14.

VI. On the provisional measures requested

18. The Applicant submits that she is on death row and there exists a situation of extreme gravity as well as irreparable harm if the death penalty is implemented. The Applicant further submits that even though the Respondent State has observed a moratorium on the death penalty since 1994, there is nothing stopping it from recommencing executions of persons sentenced to death. The Applicant thus submits that the moratorium “does not take away the gravity of the matter at hand and irreparable harm may be occasioned to the Applicant in case the Respondent State reverses its moratorium on the death penalty.”

19. The Court recalls that in accordance with Article 27(2) of the Protocol and Rule 51(1) of the Rules, it is empowered to order provisional measures “in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons”, and “which it deems necessary to adopt in the interest of the parties or of justice.”
20. Notably, it lies with the court to decide in each case whether, in light of the particular circumstances, it must exercise the jurisdiction conferred upon it by the afore-cited provisions.³
21. In the present case, the Court notes that the implementation of the death penalty, with its irreversible character, could cause the Applicant irreparable harm and render nugatory any finding by the Court on the merits of the Application. The Court thus finds that a situation of extreme gravity and urgency exists necessitating the adoption of provisional measures to avoid irreparable harm to the Applicant.
22. The Court, therefore, decides to exercise its powers under Article 27(2) of the Protocol, and also Rule 51(1) of the Rules, to order the Respondent State to stay the execution of the Applicant’s death sentence pending its determination of the Application on the merits.

3 *Armand Guehi v United Republic of Tanzania* (Provisional Measures) (2016) 1 AfCLR 587 § 17.

- 23.** For the avoidance of doubt, this Order is necessarily provisional in nature and in no way prejudices the findings the Court might make as regards its jurisdiction, admissibility of the Application, and the merits of the Application.

VII. Operative part

- 24.** For these reasons:

The Court,

Unanimously, orders the Respondent State to:

- i. Stay execution of the death sentence handed down against the Applicant, pending the Court's determination of the Application on merits; and
- ii. Report to the Court within Sixty (60) days of receipt of this Order, on the measures taken to implement it.