

Selemani v Tanzania (provisional measures) (2020) 4 AfCLR 796

Application 042/2019, *Masudi Said Selemani v United Republic of Tanzania*

Order (provisional measures), 20 November 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 had been convicted and sentenced to death for murder, brought this action alleging a violation of his right to equal protection of law, dignity and defence. He subsequently applied for provisional measures to stay execution of the death sentence. The Court granted the application.

Jurisdiction (*prima facie*, 13, 17; effect of withdrawal of Article 34(6) Declaration, 16)

Provisional measures (death penalty, 23)

I. The Parties

1. Mr. Masudi Said Selemani (hereinafter referred to as “the Applicant”), is a national of the United Republic of Tanzania who is incarcerated at Lilungu prison following his conviction and sentence to death for murder, by the High Court of Tanzania at Mtwara.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “Respondent State”) which became 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. Furthermore, on 29 March 2010, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications filed by individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument of withdrawal of the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal comes into effect, one

year after its filing, that is, on 22 November 2020.¹

II. Subject of the Application

3. On 5 October 2020, the Applicant filed a request for provisional measures following the Application on merits filed on 19 August 2019. It emerges from the said Application that on 4 February 2013, the Applicant was charged with murder before the High Court sitting at Mtwara, and on 15 May 2013, he was convicted and sentenced to death by hanging.
4. The Applicant, being dissatisfied with the conviction and sentence by the High Court, appealed to the Court of Appeal sitting at Mtwara in Criminal Appeal No.162 of 2013, which dismissed his appeal in its entirety on 22 November 2014. The Applicant claims that at the time of his conviction, the Respondent State had failed to respect his right to a fair trial and that the “procedure and evidence obtained by the national courts was grossly erroneous”. He further states that “he was not provided with legal representation by counsel of his choice” in violation of his rights protected under the Charter.
5. It is against this background that the Applicant seeks an order to stay the execution of the death penalty imposed upon him until the decision on the merits of his Application has been rendered by the Court.

III. Alleged violations

6. In the Application on the merits, the Applicant alleges:
 - i. Violation of the right to equal protection of the law protected under Article 3(2) of the Charter;
 - ii. Violation of the right to respect of dignity protected under Article 5 of the Charter;
 - iii. Violation of the right to a fair trial protected under Article 7(1) of the Charter; and
 - iv. Violation of the right to be defended by counsel of his choice protected under Article 7(1)(c) of the Charter.

¹ *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67; *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 35-39.

IV. Summary of the Procedure before the Court

7. The Application was filed at the Registry on 19 August 2019 and served on the Respondent State on 21 October 2019 and it was granted sixty (60) days of the receipt thereof to file its Response. The Respondent State has not filed its Response to the Application despite being sent reminders on 7 May 2020 and 5 August 2020.
8. On 6 August 2020, the Court *suo motu* granted the Applicant legal aid under its legal aid scheme. This is because the Applicant was on death row, was self-represented and his Application lacked clarity.
9. The request for provisional measures was filed on 5 October 2020 and served on the Respondent State on 7 October 2020. The Respondent State was granted fifteen (15) days from the date of receipt of the notification to file its Response but the Respondent State only did so on 30 October 2020. In the interest of justice, the Response was deemed to have been filed within the time-limit set by the Court. On 2 November 2020, the Respondent State's Response was served on the Applicant and he filed his Reply on 9 November 2020.

V. *Prima facie* jurisdiction

10. The Applicant submits that the Court has jurisdiction in so far as, on the one hand, the Respondent State has ratified the Charter and the Protocol and made the Declaration provided for under Article 34(6) thereof and, on the other hand, he alleges violations of rights protected by the Charter.
11. The Respondent State submits that the Court has jurisdiction to grant provisional measures as provided under Article 27(2) of the Protocol. Nevertheless, the Respondent State argues that the Applicant must demonstrate a situation of gravity and urgency "as the result of [its] irreparable prejudice."

12. 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".

13. Rule 49(1)² of the Rules provides that “the Court shall ascertain its jurisdiction ... in accordance with the Charter, the Protocol and these Rules”. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but it simply needs to satisfy that it has *prima facie* jurisdiction.³
14. In the instant case, the rights alleged to have been violated are protected under Articles 3(2), 5, 7 and 7(1)(c) of the Charter, an instrument to which the Respondent State is a party.
15. The Court further notes that the Respondent State has ratified the Protocol. It has also made the Declaration by which it accepted the Court’s jurisdiction to receive applications from individuals and Non-Governmental Organisations, in accordance with Articles 34(6) and 5(3) of the Protocol, read jointly.
16. The Court notes, as indicated in paragraph 2 of this Ruling, that on 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration filed on 29 March 2010, in accordance with Article 34(6) of the Protocol. The Court has held that the withdrawal of a Declaration has no retroactive effect and has no bearing on pending cases and new cases filed before the withdrawal comes into effect.⁴ The Court also reiterated this position in its Judgment of *Andrew Ambrose Cheusi v United Republic of Tanzania* and held that the withdrawal of the Declaration, will take effect on 22 November 2020.⁵ Accordingly, the Court concludes that the said withdrawal does not affect its personal jurisdiction in the present case.⁶
17. From the foregoing, the Court holds that it has *prima facie* jurisdiction to hear the Application.

VI. Provisional measures requested

18. The Applicant alleges that having been convicted of murder, he is on death row awaiting the execution of the death sentence. He submits that he is facing imminent danger of being executed

2 Formerly Rule 39(1) of the Rules of Court, 2 June 2010.

3 See *African Commission on Human and Peoples’ Rights v Great Socialist People’s Libyan Arab Jamahiriya* (provisional measures) (15 March 2013) 1 AfCLR 145 §10; *African Commission on Human and Peoples’ Rights v Republic of Kenya* (provisional measures) (15 March 2013) 1 AfCLR 193 § 16.

4 *Umuhoza v Rwanda* (jurisdiction) § 67.

5 *Cheusi v Tanzania* (merits and reparations) §§ 35-39.

6 *Umuhoza v Rwanda* (jurisdiction) § 67.

and therefore the situation is of extreme gravity and irreparable harm to his rights protected under Article 4 of the Charter. He finally argues that the observation of *de facto* moratorium, by the Respondent State, is not a safeguard against the imminent risk he faces, of execution and thus prays the Court to stay the execution of the death penalty against him.

19. The Respondent State argues that the Applicant has not demonstrated a situation of extreme gravity, urgency and irreparable harm to justify the order for provisional measures as it took the Applicant, one (1) year and two (2) months to file the present request. According to the Respondent State, the Applicant was rightfully sentenced to death as per its Penal Code and that the death penalty is “a lawful penalty acknowledged by the ICCPR”.

20. Under Article 27(2) of the Protocol, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity 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.”
21. Rule 59(1)⁷ of the Rules provides:
[p]ursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.
22. It is for the Court to decide in each case if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.
23. In the instant case, the Applicant challenges the conduct of the proceedings and the assessment of evidence in the domestic courts which resulted in his conviction of murder and death sentence. The Court notes that, in a request for provisional measures, what should be demonstrated is that there exists a situation of extreme gravity and urgency with a risk of irreparable harm occurring before the consideration of the merits of the Application. In this

7 Formerly Rule 51 of the Rules, 2 June 2010.

regard, the Court further notes that the implementation of the death penalty, with its irreversible character, could cause the Applicant irreparable harm and render nugatory any finding of the Court on the merits of the Application. The Court thus finds that the situation of extreme gravity and urgency exists, necessitating the adoption of provisional measures to avoid irreparable harm to the Applicant.⁸

24. Consequently, the Court decides to exercise its powers under Article 27(2) of the Protocol and Rule 59(1) of its Rules, to order the Respondent State to stay the execution of the Applicant's death sentence pending the determination of the Application on the merits.
25. For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudge the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

VII. Operative part

26. For these reasons,
The Court,

Unanimously, orders the Respondent State:

- i. To refrain from executing the death penalty against the Applicant pending the determination of the Application on the merits by the Court.
- ii. To report to the Court within thirty (30) days, on the measures taken to implement the order, from the date of notification of this Ruling.

8 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application 012/2019, Judgment of 9 April 2020 § 21; *Tembo Hussein v United Republic of Tanzania*, ACtHPR, Application 001/2018, Judgment of 11 February 2018 § 21.

Selemani v Tanzania (amendment of pleadings) (2020) 4 AfCLR 802

Application 042/2019, *Masudi Said Selemani v United Republic of Tanzania*

Order (Amendment of Pleadings), 20 November 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 had been convicted and sentenced to death for murder, brought this action alleging a violation of his right to equal protection of law, dignity and defence. The application for leave to amend pleadings followed the grant of legal aid to the Applicant. The Court granted the leave requested.

Procedure (conditions for amendment of pleadings, 11-12)

I. The Parties

1. Mr. Masudi Said Selemani (hereinafter referred to as “the Applicant”), is a national of Tanzania (hereinafter referred to as “Respondent State”) who is incarcerated at Lilungu prison following his conviction and sentence to death for murder by the High Court at Mtwara.
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 to the African Charter on Human and Peoples’ Rights on the Establishment an African Court on Human and Peoples’ Rights on 10 February 2006. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 29 March 2010. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal will have no bearing on pending cases and new cases filed before the withdrawal comes into effect, one year after its filing, that is, on 22 November 2020.¹

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 35-39.

II. Subject matter of the Request

3. The Application, filed on 19 August 2019, is based on the Respondent State's alleged violations of the Applicant's:
 - i. Right to equal protection of the law protected under Article 3(2) of the Charter;
 - ii. Right to respect of dignity protected under Article 5 of the Charter; and
 - iii. Right to defence protected under Article 7(1)(c) of the Charter.
4. Following the grant of legal aid by the Court to the Applicant, his Counsel, on 5 October, sought leave to amend the pleadings pursuant to Rule 47 of the Rules so as to provide facts and evidence in support of his claims.

III. Summary of the Procedure before the Court

5. The Application was filed on 19 August 2019.
6. The Application was served on the Respondent State on 21 October 2019 and it was requested to file its Response within sixty (60) days of receipt but has not done so even after two reminders sent on 7 May 2020 and 5 August 2020.
7. On 5 October 2020, the Applicant filed a request to amend the Application and this request was transmitted to the Respondent State on 7 October 2020, for its observations, if any, within fifteen (15) days of receipt.
8. On 30 October 2020, the Respondent State filed its observations on the Applicant's request for leave to amend pleadings and these were accepted in the interests of justice. On 2 November 2020, the Respondent State's Response was transmitted to the Applicant and he filed his Reply on 9 November 2020.

IV. On the request for leave to amend pleadings

9. The request for leave to amend the pleadings is on the basis that, as the Applicant is now represented by Counsel, he seeks to substantiate his pleadings by corroborating it with "facts and evidence".
10. The Respondent State avers that the request for leave to amend the pleadings "is an after-thought and has no basis."

- 11.** The Court observes that Rule 47 of the Rules provides as follows:
 1. A party may, subject to the approval of the Court, amend its pleadings before the close of pleadings.
 2. A request for amendment of pleadings shall be made by a written notice explaining the specific part of the pleadings to be amended. The request shall also state the reasons thereof.
 3. If the request is made after the close of pleadings, the Court may grant leave on exceptional basis.
- 12.** The Court notes that the Applicant's request has been filed before the close of pleadings and it also specifies the part of the pleadings sought to be amended. The Court concludes, therefore, that the Applicant's request complies with Rules 47(1) and 47(2) of the Rules.
- 13.** In the circumstances, the Court grants the Applicant's request for leave to amend the pleadings.

V. Operative part

14. For these reasons:

The Court,

Unanimously,

- i. *Grants* the request by the Applicant for leave to amend the pleadings.
- ii. The Applicant's amended pleadings be deemed as duly filed and be served on the Respondent State.