Thomas v Tanzania (interpretation) (2017) 2 AfCLR 126

Application 001/2017, *Alex Thomas v United Republic of Tanzania*

Judgment, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

Rule 66(4) applied in respect of Judges THOMPSON and TAMBALA

Interpretation of judgment delivered by the Court in 2015 requested by Tanzania on the meaning of "all necessary measures" and "precluding reopening and retrial" in reparation of fair trial rights violations. The Court ruled that Tanzania should take measures to eliminate the effects of the violation which could include release of the imprisoned person, but should not include retrial.

Reparations (fair trial, re-opening of domestic proceedings, 34, 42; eliminate effects of violation, 35, 39, 40)

I. Procedure

1. The United Republic of Tanzania filed, pursuant to Article 28(4) 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 66(1) of the Rules an Application dated 24 January 2017 and received at the Registry of the Court on 30 January 2017, for interpretation of the Judgment rendered on 20 November 2015 in the above-mentioned matter. The United Republic of Tanzania also filed, pursuant to Practice Direction No. 38 of the Practice Directions of the Court, an application for extension of time to file the Application for interpretation of the Judgment.

2. By a notice dated 3 February 2017, the Registry transmitted a copy of the Application for extension of time to file the Application for Interpretation of Judgment to Mr Alex Thomas, who was invited to file observations within fifteen (15) days of receipt. He filed the observations on 17 February 2017 and these were transmitted to the United Republic of Tanzania, for information, by a letter dated 21 February 2017. In the said observations, Mr Thomas opposed the granting of the extension of time to file the application, maintaining that, the time limit for doing so had expired by 10 months and that there are measures that the United Republic of Tanzania can take to implement the judgment.

3. On 14 March 2017, during the Court's 44th Ordinary Session held from 6 to 24 March 2017, the Court decided to grant, in the interest of justice, the United Republic of Tanzania's request to file the Application for Interpretation of Judgment out of time.

4. The Application for interpretation of Judgment was served on Mr. Thomas by a notice dated 14 March 2017. By the same notice, and pursuant to the provisions of Rule 66(3) of the Rules, Mr. Thomas was invited to submit written observations within 30 days from receipt thereof, which he filed on 18 April 2017.

5. At its 45th Ordinary Session held from 8 to 26 May 2017, the Court, pursuant to Rule 59(1) of the Rules decided to close the proceedings in the matter. In accordance with Rule 66(3) of the Rules, the Court decided not to hold a public hearing in the matter.

II. The request for interpretation

6. As indicated above, the instant Application concerns the Judgment rendered by the Court on 20 November 2015 (the Matter of *Alex Thomas v The United Republic of Tanzania* (Application 005/2013), the relevant paragraphs of which are worded as follows in the operative provisions:

> "For these reasons,
>
> 161. The Court,
>
> holds,
>
> …
>
> vii. Unanimously, that there has been a violation of Articles 1 and 7(1) (a), (c) and (d) of the Charter and Article 14(3)(d) of the ICCPR.
>
> viii. By a vote of six (6) to two (2), Judge Elsie N. THOMPSON, Vice-President and Judge Rafâa BEN ACHOUR dissenting, that the Applicant's prayer for release from prison is denied.
>
> ix. Unanimously, that the Respondent is directed to take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the Applicant, and to inform the Court, within six (6) months, from the date of this judgment of the measures taken."

7. Referring to Rule 66(1) of the Rules, the United Republic of Tanzania, avers that it is encountering difficulties in the implementation of the judgment due to varied interpretations by the actors involved in the administration of criminal justice at the national level, who are required to implement the judgment.

8. Consequently, the United Republic of Tanzania prays the Court to clarify the meaning of the expression "all necessary measures" used in point ix of the operative provisions of the Judgment. More specifically, the United Republic of Tanzania requests clarification on the measures

it is required to implement and what the benchmarks for "all" and for "necessary" are, to enable it take tangible and definitive action.

9. The United Republic of Tanzania asserts that the "violations found" have not been highlighted in the operative provisions of the Judgment therefore they are seeking guidance on whether they relate to what is stated in the text of the judgment or whether the violation to be remedied should be on the aspect of "specifically precluding the reopening of the defence case and the retrial of the Applicant". The United Republic of Tanzania also seeks to understand how to remedy the violation.

10. The United Republic of Tanzania is seeking an interpretation of the word "precluding", stating that it had initially interpreted the word "precluding" to mean excluding but that discussions with stakeholders have brought to light another interpretation to mean "to perform or to include". In this regard, the United Republic of Tanzania wishes to have clarification on whether the order of the Court is "to re-open" the trial and if so, the Court should clarify at what stage the trial should be reopened, whether from the beginning or for the defence's case only.

III. Observations of Mr Alex Thomas

11. Mr Thomas notes that the Application for interpretation of Judgment has been filed out of time without any explanation and also that it has failed to meet the provisions of Rule 66 of the Rules. He maintains that the United Republic of Tanzania has continuously failed to implement the Court's Orders by not reporting on the measures taken to remedy his situation within six (6) months of the Judgment and by failing to respond to his submissions on reparations.

12. Mr Thomas emphasises that the Application for interpretation of Judgment should have preceded the filing of the report on implementation of the Judgment, which he notes has been filed almost eight (8) months out of time. He urges the Court, when considering the admissibility of the Application, to take into consideration the prejudice occasioned to him by the United Republic of Tanzania's failure to adhere to the Court's Orders and the filing of the Application for interpretation.

13. Mr Thomas states that the United Republic of Tanzania has misinterpreted the meaning of the word "precluding" to mean that the Court ordered a re-opening of the defence case and a retrial at the same time.

14. He also contends that there are various options, either taken alone or in combination, which the United Republic of Tanzania can effect in compliance with the Court's Order to *"*take all appropriate measures within a reasonable time frame, to remedy all the violations established*"*; that the United Republic of Tanzania's legislation

provides for many possible remedies for wrongfully convicted persons such as himself; that these remedies include, but are not limited to, the following:

> "a. Remission of sentence, provided for under the Penal Code Chapter 16, which at Section 27 (2) provides for the remission of a prison sentence in respect of which the United Republic of Tanzania could have filed an application at the Court of Appeal for the remission of the Applicant's thirty (30) years prison sentence.
>
> b. Outright or conditional discharge provided for under Section 38 of the Penal Code which confers powers on the Court which convicted an offender to order his absolute or conditional discharge, provided that the offender does not commit another offence during the period of conditional discharge, and such period must not exceed 12 months. In this regard, since the Applicant has served twenty (20) years of his thirty (30) years' sentence and considering the favourable Judgment of this Court and his conduct during his imprisonment, the United Republic of Tanzania could have taken this measure.
>
> c. Presidential pardon, provided for under Section 45 of the Constitution of the United Republic of Tanzania, pursuant to which the President of the United Republic of Tanzania may grant pardon, with or without condition, to any person convicted of an offence by a court."

15. Mr Thomas submits that the delay in implementing the Court's Orders and in submitting the relevant report on compliance thereof has aggravated and unduly prolonged the violation of his rights and in light of this, the Court should set him free to ensure there are no further infringements of his rights.

16. Mr Thomas prays for:

> "1. A Declaration that the Respondent is in default of this Honourable Court's Orders by failing to file a Report within six months of delivery of Judgment.
>
> 2. A Declaration that the Respondent is in further default of Orders by failing to file a Response to the Applicant's Submissions on Reparations on time or at all.
>
> 3. A Declaration that the instant Application is, in any case, frivolous, vexatious and an abuse of the process of this Honourable Court.
>
> 4. An Order to set the Applicant free pending the Judgment on reparations."

IV. Jurisdiction of the Court

17. The instant Application for interpretation concerns the Judgment rendered by the Court on 20 November 2015.
18. In terms of Article 28(4) of the Protocol "… the Court may interpret its own decision.''
19. The Court consequently finds that it has jurisdiction to interpret the said Judgment.

V. Admissibility of the Application

20. Rule 66(1) and (2) of the Rules provide as follows:

"1. Pursuant to Article 28(4) of the Protocol, any party may, for the purpose of executing a judgment, apply to the Court for interpretation of the judgment within twelve months from the date the judgment was delivered unless the Court, in the interest of justice, decides otherwise".

2. The application shall be filed in the Registry. It shall state clearly the point or points in the operative provisions of the judgment on which interpretation is required."

21. It is clear from these provisions that an Application for interpretation of a Judgment can be declared admissible only when it fulfills three conditions:

"a. its objective must be to facilitate the execution of the Judgment;

b. it must be filed within twelve (12) months following the date of the delivery of the Judgment unless the Court, "in the interest of justice' decides otherwise"; and

c. it must clearly state the point or points of the operative provision of the Judgment on which interpretation is required."

22. As regards the purpose of the instant Application, the Court wishes to clarify an aspect of the operative part of the judgment in order to facilitate the execution of the Judgment rendered by the Court on 20 November 2015.
23. The Court notes that the instant Application actually aims to clarify a point in the operative provisions of the Judgment rendered by the Court on 20 November 2015 and thus facilitate its execution.
24. Consequently, it finds that the Application fulfills the first condition provided under Rule 66(1) of the Rules.
25. With regard to the time limit within which such an Application should be filed, the Court notes that the Judgment in respect of which interpretation is requested was rendered on 20 November 2015 and that

the United Republic of Tanzania filed its Application for interpretation on 30 January 2017, just over two (2) months after the twelve (12) month period provided under Rule 66(1) of the Rules. However, Rule 66(1) allows the Court to accept such applications even after the twelve (12) month period specified, if this is in the interest of justice. The Court considered the circumstances of the matter and decided to allow the application on this basis.

26. Lastly, the Court notes that the United Republic of Tanzania clearly stated the points in the operative provisions of the Judgment on which interpretation is required, namely, the terms and expressions used in point (ix) of the operative provisions of the Judgment.

27. In view of the aforesaid, the Court finds that the instant Application for interpretation fulfills all the conditions of admissibility.

VI. Interpretation of the judgment

28. In its judgment of 20 November 2015, the Court ordered the United Republic of Tanzania to take all necessary measures to remedy the violations found.

29. On the first question, the United Republic of Tanzania prays the Court to interpret the expression "all necessary measures" used in point ix of the operative provisions of the Judgment.

30. The Court notes that in examining an Application for interpretation, it does not complete or modify the decision it rendered it being a final decision with the effect of res judicata – but clarifies the meaning and scope thereof.

31. Court wishes to recall the principle generally applied by international jurisdictions that reparation should, as far as possible, erase the consequences of an unlawful act and restore the state which would have presumably existed if the act had not been committed.

32. In this regard, Article 27(1) of the Protocol provides that: "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation for reparation".

33. As has been stated above the most appropriate form of remedy for violation of the right to a fair trial is to act in such a way that the victim finds himself or herself in the situation that he or she would have been had the violation found not been committed. To attain this objective, the United Republic of Tanzania has two alternatives: it should either reopen the case in compliance with the rules of a fair trial or take all appropriate measures to ensure that the Applicant finds himself in the situation preceding the violations.

34. As regards the first option, the Court is of the view that reopening the case would not be a just measure, in as much as the Applicant has

already spent twenty one (21) years in prison, more than half of the prison sentence, and given that a fresh judicial procedure could be long.[1] Accordingly, the Court has excluded such a measure.

35. Concerning second option, the Court intended to offer the United Republic of Tanzania State room for evaluation to enable it to identify and activate all the measures that would enable it eliminate the effects of the violations established by the Court.

36. The Court specifies at this juncture that in its Judgment of 20 November 2015, it did not state that the Applicant's request was unfounded. It merely indicated that it could order such a measure directly, only in specific and compelling circumstances which have not been established in the instant case.

37. The second question for which the United Republic of Tanzania is seeking clarification is, on whether the violations found are what is stated in the text of the judgment or whether the violation to be remedied should be on the aspect of "specifically precluding the reopening of the defence case and the retrial of the Applicant". The United Republic of Tanzania also seeks to understand how to remedy the violation.

38. The Court notes that point vii of the operative provisions of the Judgment specified the provisions that the United Republic of Tanzania was found to have violated, that is, Articles 1 and 7(1)(a), (c) and (d) of the African Charter on Human and Peoples' Rights and Article 14(3)(d) of the International Covenant on Civil and Political Rights and consequently it should take all necessary measures to remedy these violations.

39. The Court clarifies that the expression "all necessary measures" includes the release of the Applicant and any other measure that would help erase the consequences of the violations established and restore the pre-existing situation and re-establish the rights of the Applicant.

40. The Court further clarifies that the expression "remedy all violations found" should therefore mean to "erase the effects of the violations established" through adoption of the measures indicated in the preceding paragraph.

41. The third question for which the United Republic of Tanzania is seeking an interpretation is on the word "precluding".

42. The word precluding means "preventing, banning or forbidding". It is therefore clear that the Court is prohibiting certain action, specifically that the United Republic of Tanzania should not retry the Applicant or re-open the defence case. As mentioned before, this is because doing so would result in prejudice to the Applicant who has already served

1 Application No. 005/2013 *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 para 158.

twenty one (21) years of his thirty (30) years prison sentence.

VII. Costs

43. In terms of Rule 30 of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs".
44. Taking into account the circumstances of this matter the Court decides that each party should bear its own costs.
45. For these reasons,
The Court,
Unanimously:
i. *Declares* that it has jurisdiction to hear the instant Application;
ii. *Declares* that the Application is admissible;
iii. *Rules* that by the expression "all necessary measures", the Court was referring to the release of the Applicant or any other measure that would help erase the consequences of the violations established, restore the pre-existing situation and re-establish the rights of the Applicant;
iv. *Rules* that the expression "remedy the violations found" means "erase the effects of the violations found" through the adoption of the measures indicated in point iii above;
v. *Rules* that the term "precluding" means, "rule out or prohibit", which, when read togeSther with the expression "reopening of the defence case and the retrial of the Applicant" means that the reopening of the defence case and the retrial of the Applicant is ruled out;
vi. *Rules* that each Party shall bear its own costs.