

Omar v Tanzania (provisional measures) (2021) 5 AfCLR 1

Application 045/2020, *Bashiru Rashid Omar v United Republic of Tanzania*

Order, 26 February 2021. 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 was convicted and sentenced for murder by courts in the Respondent State. He brought this Application alleging that his Charter guaranteed rights to life, dignity and fair trial were violated by the domestic proceedings that led to his conviction. Along with the main Application, he brought an Application for provisional measures to stay execution of the death sentence imposed by the domestic court. The Court granted the order requested.

**Jurisdiction** (*prima facie*, 14,18; effect of withdrawal of article 34(6) declaration, 17)

**Provisional measure** (*proprio motu* exercise of discretion, 24; death penalty demonstrates gravity and urgency, 26, 27, 29; irreparable damage, 28)

## I. The Parties

1. Mr. Bashiru Rashid Omar (hereinafter referred to as “the Applicant”), is a Tanzanian national who is incarcerated at the Zanzibar Prison following his conviction and sentence to death for murder.
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 the deposit, that is, on 22 November 2020.<sup>1</sup>

## II. Subject of the Application

3. It emerges from the main Application dated 20 November 2020 and received at the Registry of the Court on 21 November 2020 that, on 28 September 2016, the Applicant was mandatorily sentenced to death by the High Court of Zanzibar for the murder of his son in Criminal Case No. 03 of 2006.
4. As part of the domestic proceedings, the Applicant challenged his conviction and sentencing before the Court of Appeal of Tanzania in Criminal Case No. 309 of 2017. On 13 December 2018, the Court of Appeal affirmed the judgment of the High Court.
5. The Applicant avers that he was mandatorily sentenced to death based on contradictory evidence, and both the High Court and Court of Appeal did not examine the said evidence nor did they order further examination into his mental situation at the time of the offence. The Applicant claims that his lawyer did not have adequate time and facilities to present his case.
6. These facts form the basis for the present request for provisional measures through which the Applicant seeks an order from this Court that the Respondent State should stay the execution of the death penalty imposed upon him until the matter is determined on the merits.

## III. Alleged violations

7. In the main Application, the Applicant alleges that the Respondent State violated his rights as follows:
  - i. The right to life protected under Article 4 of the Charter;
  - ii. The right to dignity protected under Article 5 of the Charter; and
  - iii. The right to a fair trial guaranteed under Article 7 of the Charter.

## IV. Summary of the Procedure before the Court

8. The Registry received the main Application on 21 November 2020 together with a request for provisional measures and a request for legal aid. On 2 December 2020, the Application was served on the Respondent State, which was granted fifteen (15) days to file

<sup>1</sup> *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction, withdrawal) (3 June 2016) 1 AfCLR 562, § 67; *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

its observations on the request for provisional measures.

9. On 11 December 2020, the Court granted the Applicant legal aid under its legal aid scheme and served the Application on the appointed counsel, Advocate Alphonse VAN of the Côte d'Ivoire Bar.
10. On 8 February 2021, the Registry received the Respondent State's response to the request for provisional measures, which was served on the Applicant on 9 February 2021 for information.

## V. *Prima facie* jurisdiction

11. The Applicant did not make any observation on the jurisdiction of the Court.
12. The Respondent State does not object to the Court having jurisdiction to order provisional measures as provided under Article 27(2) of the Protocol and Rule 59(1) of the Rules.

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13. 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.
14. Rule 49(1) of the Rules<sup>2</sup> provides that “the Court shall preliminarily ascertain its jurisdiction ... in accordance with the Charter, the Protocol and these Rules.” However, in ordering provisional measures, the Court need not ascertain that it has jurisdiction on the merits of the case, but it simply needs to satisfy itself that it has *prima facie* jurisdiction.<sup>3</sup>
15. In the instant matter, the Applicant alleges violation of rights that are protected under Articles 4, 5, and 7 of the Charter, an instrument to which the Respondent State is a party.
16. 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

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.

- 34(6) and 5(3) of the Protocol, read jointly.
17. 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 recalls, in reference to its case-law, that the withdrawal of a Declaration comes into effect within one year of its deposit, has no retroactive effect, and does not have any bearing on pending cases and new cases filed before the withdrawal comes into effect.<sup>4</sup> The Court further recalls, as it has held in the Judgment that it rendered in the matter of *Andrew Ambrose Cheusi v United Republic of Tanzania*, that the withdrawal of the Declaration took effect on 22 November 2020 with respect to the Respondent State.<sup>5</sup> Noting that, in the present matter, the main Application, together with a request for provisional measures, was filed on 21 November 2020, the Court finds that the said withdrawal does not affect its personal jurisdiction.<sup>6</sup>
  18. In light of the foregoing, the Court holds that it has *prima facie* jurisdiction to hear this Application.

## VI. Provisional measures requested

19. The Applicant requests the Court to order that his execution should be halted until the matter is determined on the merits. He did not make any submissions in support of the request.
20. The Respondent State avers that the Applicant has merely made a request without advancing sufficient reasons to demonstrate gravity, urgency and irreparable harm that could justify the issuance of provisional measures.
21. The Respondent State further submits that the Applicant is serving a lawful sentence given that the provision in its Penal Code for death penalty in cases of murder was declared constitutional by the Court of Appeal of Tanzania.
22. It is also the Respondent State's submission that the Applicant's sentencing was lawful as it was handed down in accordance with the International Covenant on Civil and Political Rights (ICCPR).

4 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction), § 67.

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

6 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction), § 67.

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23. The Court recalls that [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.<sup>7</sup>
24. It follows from the foregoing that the Court has discretion and is empowered to decide *proprio motu* in each case whether, in the light of the particular circumstances, it should make use of the power vested in it by the aforementioned provisions.<sup>8</sup>
25. The Court recalls that, in examining whether a request for provisional measures should be granted, it is required to establish both urgency and irreparable harm. In the present case, the Applicant challenges the mandatory death penalty meted against him by domestic courts.
26. Regarding gravity and urgency, the Court notes that the Respondent objects to the granting of the order on the ground that the Applicant did not demonstrate gravity and urgency. In this respect, the Court considers that, in the present case which involves execution of the death penalty, it is empowered to issue provisional measures *suo motu* as doing so is necessary and in the interest of justice.<sup>9</sup>
27. In examining gravity and urgency, the Court is also cognisant of the fact that the Respondent State has been implementing a general moratorium and has not carried out any death sentence since 1994. However, and relying on its case-law, the Court does not deem such commitment sufficient in the face of such a serious risk as the execution of the Applicant.<sup>10</sup> As a matter of fact, despite the moratorium and the lack of execution in a long time, the

7 Emphasis of the Court.

8 See *Charles Kajoloweka v Republic of Malawi*, ACtHPR, Application No. 055/2019, Ruling of 27 March 2020 (provisional measures), § 17.

9 See for instance, *John Lazaro v United Republic of Tanzania* (provisional measures) (18 March 2016) 1 AfCLR 593, §§ 12-19; *Marthine Christian Msuguri v United Republic of Tanzania* (provisional measures) (18 November 2016) 1 AfCLR 711, §§ 13-19.

10 *Armand Guehi v United Republic of Tanzania* (provisional measures) (18 March 2016) 1 AfCLR 587, §§ 18-21; *Ally Rajabu & Others v United Republic of Tanzania* (provisional measures) (18 March 2016) 1 AfCLR 590, §§ 18-20; *Joseph Mukwano v United Republic of Tanzania* (provisional measures) (3 June 2016) 1 AfCLR 655, §§ 15-18.

Respondent State may at any time carry out the death penalty. As a consequence, the Court finds that urgency is established.

28. With respect to irreparable harm, the Court recalls that it is established in instances where the impugned acts are capable of seriously compromising the rights whose violation is alleged in a way that prejudice would be caused prior to the Court makes a determination on the merits of the matter.<sup>11</sup> In the present case, the Applicant seeks to prevent the execution of the death sentence meted against him which, if carried out, would be irreversible. The condition of irreparable harm is therefore met.
29. In light of the above, the Court finds that the circumstances in the present Application are of such an extreme gravity and urgency that they warrant the adoption of provisional measures to avoid irreparable harm to the Applicant<sup>12</sup> pending determination on the merits of the matter.
30. 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.
31. For the avoidance of doubt, this Ruling is provisional in nature and does not in any manner prejudice the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

## VII. Operative part

32. For these reasons,  
The Court,

*Unanimously*, orders the Respondent State to:

- i. Stay the execution of the death penalty against the Applicant pending the determination of the present Application on the merits.
- ii. Report to the Court within thirty (30) days, from the date of notification of this Ruling, on the measures taken to implement the order.

11 *Harouna Dicko and Others v Burkina Faso*, ACtHPR, Application No. 037/2020, Ruling of 20 November 2020 (provisional measures), § 29; *Guillaume Kigbafori Soro and Others v Côte d'Ivoire*, ACtHPR, Application No. 012/2020, Ruling of 15 September 2020 (provisional measures), § 29.

12 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application No. 012/2019, Judgment of 9 April 2020, § 21; *Tembo Hussein v United Republic of Tanzania*, ACtHPR, Application No. 001/2018, Judgment of 11 February 2019, § 21.