

PRESS RELEASE
JUDGMENT SUMMARY

MGOSI MWITA MAKUNGU V. UNITED REPUBLIC OF TANZANIA

APPLICATION NUMBER 006/2016

Judgment on Merits, 7 December 2018

**A JUDGMENT OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS IN
A HUMAN RIGHTS CASE ARISING FROM TANZANIA**

Date of press release: Friday, 7 December 2018

Today, 7 December 2018, the African Court delivered judgment in the case of *Mgosi Mwita Makungu V. United Republic of Tanzania*. The Applicant, Mgosi Mwita Makungu, a national of Tanzania, who is serving a prison term of thirty (30) years after convictions for armed robbery and robbery with violence, alleged violations of the right to appeal, the right to equality before the law and equal protection of the law and the right to non-discrimination as contained in articles 7(1) (a), 3(1) and 3(2) and 2 of the African Charter of Human and Peoples' Rights (the African Charter) respectively.

The Court considered whether the United Republic of Tanzania (the Respondent State) violated these rights, by failing, for over twenty (20) years, to provide the Applicant with the copies of the records of proceedings and judgments in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 heard at the District Court of Bunda in Tanzania. The Court found that this failure prevented the Applicant from exercising his right to appeal because he lacked the documents necessary to pursue his appeals and therefore held that Tanzania violated Article 7(1) (a) of the Charter. The Court found further that the Applicant did not elaborate on how this failure was discriminatory to him or prevented him from enjoying the right to equality before the law and equal protection of the law as provided under articles 2 and 3 of the African Charter respectively. The Court ordered the Respondent State to release the Applicant from prison and provide him with the certified true copies of the records of proceedings and judgments of the two (2) criminal cases, within thirty (30) days of the notification of the Judgment and report to the Court within forty five (45) days on the measures

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taken to implement this Order. The Court also allowed the Applicant thirty (30) days to file submissions on reparations.

In determining this case, the African Court first considered whether it had material, personal, temporal and territorial jurisdiction over the matter. The African Court held that it had material jurisdiction over the case since the Application alleged violations of rights provided for in the African Charter to which the United Republic of Tanzania is a Party. The African Court also found that it had personal jurisdiction over the Parties since on 29 March 2010, Tanzania deposited the Declaration provided for under article 34(6) of the Protocol to the African Charter on the Establishment of the Court and this Declaration allowing individuals such as the Applicant to file the application as per article 5(3) of the Protocol. The African Court further held that it had temporal jurisdiction because the alleged violations were continuous in nature; and lastly, that it had territorial jurisdiction given that the facts of the matter occurred within the territory of Tanzania which is a Party to the Protocol.

The Court also considered the validity of the Respondent State's objection to admissibility of the Application due to the Applicant's failure to exhaust local remedies before filing the Application before it as required by Article 56 of the African Charter and Rule 40 of the Rules of Court. On this point the Respondent State argued that the Applicant had not utilised the local remedy of filing a constitutional petition to the High Court of Tanzania, which is a procedure provided for under the Basic Rights and Duties Enforcement Act of Tanzania for the enforcement of the fundamental rights in the Part III of the Constitution of Tanzania. The Court noted that the requirement of exhaustion of local remedies must be complied with before an application is filed at the Court, but that this condition may be exceptionally dispensed with if local remedies are not available, they are ineffective, insufficient or the procedures to pursue them are unduly prolonged. The Court also observed that the Applicant attempted to use the available remedies, by filing a notice of appeal dated 16 April 1996 in respect of Criminal Case No. 278 of 1995 and a notice of appeal dated 22 June 1996 in respect of Criminal Case No. 244 of 1995. Thereafter, he requested for the certified true copies of the records of proceedings and judgments in respect of these cases in order to file the actual appeals. The Applicant followed up with the Magistrate in Charge of the

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District Court of Bunda and the District Registrar and Presiding Judge of the High Court at Mwanza, in this regard, without any success. He also sought the intervention of the Respondent State's Commission on Human Rights and Good Governance but all his efforts were futile. The Court was satisfied that though local remedies were available, the Applicant could not utilise them because the Respondent State had failed to provide him with the certified true copies of the record of proceedings and judgments he needed to file his appeals. The Court consequently dismissed the Respondent State's objection to the admissibility of the Application for lack of exhaustion of local remedies. Consequently, the Court found that the compliance of the condition of filing of the Application within a reasonable time after the exhaustion of local remedies was no longer an issue. The Court was also satisfied that the record showed that all other conditions of admissibility as set out in Article 56 of the African Charter and Rule 40 of the Rules had been complied with.

In considering the claim on the alleged violation of the right to appeal the Court held that right to appeal requires that individuals are provided with an opportunity to access competent organs, to appeal decisions or acts violating their rights. The right also entails that States should establish mechanisms for such appeal and take necessary action that facilitate the exercise of this right by individuals, including providing them with the judgments or decisions that they wish to appeal from. The Court was satisfied that the Applicant had made numerous attempts to obtain the certified true copies of the records of the proceedings and judgments from the Respondent State to no avail. In the absence of the said documents, the Applicant was not able to appeal his convictions and sentences in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995, to the High Court and subsequently to the Court of Appeal. Accordingly, the African Court found that the Applicant's allegation had merit and held that his right to appeal was violated. The Court found that the Applicant's inability to appeal against his convictions and sentences for over twenty (20) years resulted in a miscarriage of justice and this circumstance was compelling enough to warrant the Court to order the Respondent State to release the Applicant from prison.



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The Court found that the claims that the Applicant's right to equality before the law and equal protection of the law and to non-discrimination had been violated were unfounded since the Applicant failed to demonstrate how the violations were occasioned.

Justice Blaise TCHIKAYA issued a Separate Opinion. He was of the view that the Court should have given more consideration to the consistency of the evidence before it with regard to whether the Applicant proved the allegations of violations of his rights. He is of the view that the demonstration of the efforts the Applicant made to obtain the certified true copies of the record of proceedings is not material evidence with respect to the question for determination, that is, whether the Applicant filed his appeal on time. He is also of the opinion that having filed his notices of appeal, despite not having obtained copies of the records of proceedings and judgments, the Applicant was entitled to appeal based on the general principle of law that a case must be heard.

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 <http://en.african-court.org/index.php/17-pending-cases/170-appl-no-006-2016-mgosi-mwita-makungu-v-united-republic-of-tanzania>. For any other queries, please contact the Registrar by email to registrar@african-court.org.

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