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ONE OF MANY: THE POWER OF PUBLICATION IN THE HUMAN RIGHTS REGIME

by Amanda Lorenzo*

On September 19, 2011, the High Court of Tanzania found Ghati Mwita guilty of murder for a February 4, 2008 homicide, sentencing her to hang pursuant to Tanzania's mandatory death sentence.¹ The domestic Court of Appeal sitting at Mwanza dismissed Mwita's appeal on March 11, 2013 and rejected her application for review on that decision on March 19, 2015.² Mwita then brought the case to the African Court of Human Rights (the Court) alleging that the conviction and sentencing procedures violated her fundamental rights under the Banjul Charter (the Charter).³

The Charter imposes an affirmative duty on member

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1 Mwita v. Tanzania, No. 012/2019, Decision, African Court on Human and People's Rights [Afr. Ct. H.P.R.], 2-3; 15, (Dec. 1, 2022), <https://www.african-court.org/cpmt/storage/app/uploads/public/639/0ab/573/6390ab5730346379766550.pdf>.

2 *Id.* at 3-4 (specifically, Mwita argued a violation of her right to a fair trial under Article 7 through unduly lengthy pretrial detention and trial proceeding, not affording her the presumption of innocence, convicting without sufficient evidence, not providing effective counsel, and imposing the death penalty without a fair trial; her right to life under Article 4 in imposing the mandatory death sentence outside the "narrow category of 'most serious offences,'" and not taking the personal situation into account in sentencing; and her right to dignity under Article 5 through the imposition of "cruel, inhuman or degrading punishment" by the death sentence and related detention).

3 *Id.* at 2-3.

states to uphold fundamental rights based in its text and other internationally recognized principles of human rights.⁴ As of December 2019, Tanzania has become only the second state to withdraw completely from the African Court, removing the Court's jurisdiction to receive cases from individuals and non-governmental organizations.⁵ The Court has held that this does not destroy its jurisdiction over cases filed before November 22, 2020 — consequently, the withdrawal has resulted in a near monopolization of Tanzanian cases on the Court's published decisions, inherently drawing the focus away from the merits of individual cases to the state of the law in Tanzania through the deliberate publicization of judicial opinions.⁶

The Court routinely disregarded questions of the factual merits of the sentencing and conviction orders of the lower domestic courts, instead criticizing the law being applied, particularly the lack of an opportunity within the regime to mitigate the conviction and

4 African Charter on Human and People's Rights, art. 1, Dec. 28, 1988, 1520 U.N.T.S. 217 (Article 1 provides: "The Member States . . . shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them." A bright line interpretation of "other means" has not been enunciated, but it has been interpreted broadly to impose on states affirmative duties under the Charter.); *Basic Information*, AFRICAN CT. HUM. & PEOPLE'S RTS., <https://www.african-court.org/wpafc/basic-information/> (last visited Mar. 23, 2023).

5 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("Maputo Protocol"), art. 34(6), July 11, 2003, https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf (requiring state parties to the protocol to make a separate declaration in order to allow direct access to individuals and non-governmental organizations to bring cases against them before the Court); *Mwita*, Afr. Ct. H.P.R., at 2; see @UNHumanRights, TWITTER (Dec. 3, 2019, 11:12 AM), <https://twitter.com/UNHumanRights/status/1201896893380530176>, ("We regret decision by Tanzania Govt to block individuals and NGOs from taking cases to African Court on Human & Peoples' Rights. We urge Govt to reconsider. The Court is crucial for justice & accountability in Tanzania.").

6 *Mwita*, Afr. Ct. H.P.R., at 49. See, generally, African Court of Human Rights, African Court Cases | Latest Decisions, <https://www.african-court.org/cpmt/latest-decisions/judgments> (last visited March 14, 2023) (showing the prevalence of cases involving Tanzanian parties).

the inherently degrading nature of the sentencing.⁷ Of the pecuniary relief prayed for, the Court only upheld a modest sum of seven million Tanzanian shillings (about \$3,000 USD) for “reparations for the moral prejudice.”⁸ The Court remanded the case “through a process that does not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.”⁹

Mwita’s case is one of many handed down concerning alleged violations pointing to a systematic problem in the Tanzanian justice system.¹⁰ The Court, otherwise lacking traditional enforcement power, appeals outside of itself through deliberate publication practices: “There is no indication whether measures are being taken for the law to be amended to align with [Tanzania’s] international human rights obligations . . . The Court thus finds it appropriate to order publication of this judgment.”¹¹

⁷ *Mwita*, Afr. Ct. H.P.R., at 30 (finding that State did not violate the Charter by reason of the time it took to conclude the trial at the High Court); *id.* at 31-32 (finding Mwita had a properly impartial tribunal); *id.* at 34 (holding state did not violate Mwita’s right to a fair trial); *id.* at p. 37, ¶129 (did not violate the right to effective representation); *id.* at 20, 23; *id.* at 25 (quoting *Ally Rajabu and Others v. Tanzania*); *id.* at 26-27 (holding that death via hanging and prolonged detention “encroaches upon dignity in respect of the prohibition of [. . .] cruel, inhumane and degrading treatment.”).

⁸ *Mwita*, Afr. Ct. H.P.R., at 52.

⁹ *Id.* at 48.

¹⁰ *As African Court Releases New Judgments, Tanzania Withdraws Individual Access*, INT’L JUST. RES. CTR., (Dec. 5, 2019), <https://ijrcenter.org/2019/12/05/as-african-court-releases-new-judgments-tanzania-withdraws-individual-access/>; *see also, Tanzania: Withdrawal from individual rights to African Court will deepen repression*, AMNESTY INT’L (Dec. 2, 2019), <https://www.amnesty.org/en/latest/press-release/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/> (noting that Tanzania is the state with the most African Court of Human Rights judgments entered against it: “Of the 76 finalized AfCHPR cases published on the Court’s website, 33 (or 40 percent) are against Tanzania”). *See generally 2020 Country Reports on Human Rights Practices: Tanzania*, U.S. DEPT. OF STATE, <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/tanzania/> (last visited March 14, 2020) (indicating alleged systemic problems in the Tanzanian justice system).

¹¹ *Basic Information*, AFRICAN CT. HUM. & PEOPLE’S RTS., <https://www.african-court.org/wpafc/basic-information/> (last visited Mar. 23, 2023) (explaining that the enforcement power imbued to the Court is “delivery of judgments”); *see Mwita*, Afr. Ct. H.P.R., at p. 50; ¶ 180, p. 49; ¶ 176 (noting that Tanzania has

The network of voluntarily joined regional human rights courts are the result of and are illustrative of a tumultuous history of compromise and uneasy acknowledgement of international governing bodies. The newest, the African Court of Human and Peoples’ Rights, is no different.¹² With no inherent enforcement power, courts in their infancy appeal to other international organizations and the public conscience to supplement a quasi-enforcement power through “soft power” as a means to effectuate the pillars of the fundamental rights of the so-called human rights regime.¹³ Following Tanzania’s explicit withdrawal from an already controversial court, the explicit denouncing of systematic violations of due process rights by the Court in the words and themes of a burgeoning international human rights regime calls upon those instruments to prove their sustainability — if it so exists in its current formulation — on both a continental and global stage.

not implemented the orders in “any of the earlier referred to cases where it was ordered to repeal the mandatory death penalty”).

¹² *See, generally*, Andreas Zimmerman & Jelena Bäumler, *Current Challenges Facing the African Court on Human and People’s Rights*, KAS INT’L REPORTS (Jan. 1, 2010), at 39. <http://www.jstor.org/stable/resrep09939>. (“The African Charter on Human and People’s Rights . . . was not signed until the [Organization of African Unity] summit in 1981. This did not, however, establish a court with jurisdiction in respect to any of the contraventions of the Charter. *On the contrary, the contracting parties were able to agree only on the creation of a Commission on Human rights . . .*” (emphasis added)).

¹³ *Cf. Msuguri v. Tanzania, Mwita v. Tanzania, Iguna v. Tanzania*, ¶ 7 (1 December 2022) (Separate Opinion of Tchikaya, J.) (“[The Court in this judgment] invalidates Tanzania’s mandatory death penalty provisions but allows the death penalty to persist in the Respondent state’s system. It should have taken the opportunity to strengthen international law on this issue . . . The Court, a human rights court, should keep pace with the evolution of international law.”), <https://www.african-court.org/cpmt/storage/app/uploads/public/63e/360/3a0/63e3603a0fce1864412002.pdf>. *See generally* Elizabeth Schéré, *Critical Intersections in Foreign Policy: Theoretical (Re)Applications: Soft Power -- The Underestimated Strategy for Global Influence*, 45 FLETCHER F. WORLD AFF. 41, 44 (2021).