

AFRICAN UNION  
الاتحاد الأفريقي

050/2016  
18/11/2016  
(000293-000296)

UNION AFRICAINE  
UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS  
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

000293

IN THE MATTER OF

1. CROSPERY GABRIEL
2. ERNEST MUTAKYAWA

v.

THE UNITED REPUBLIC OF TANZANIA

APPLICATION NO.050/2016

ORDER FOR PROVISIONAL MEASURES

18 NOVEMBER 2016



**The Court Composed of;** Sylvain ORÉ, President, Ben KIOKO, Vice President, Gérard NIYUNGEKO, El Hadji GUISSÉ, Rafâa BEN ACHOUR, Solomy B. BOSSA, Angelo V. MATUSSE, Ntyam O. MENGUE, Marie-Thérèse MUKAMULISA- Judges; and Robert ENO-Registrar

**000292**

In the matter of:

- 1. CROSPERY GABRIEL**
- 2. ERNEST MUTAKYAWA**

**V.**

**THE UNITED REPUBLIC OF TANZANIA**

After having deliberated,

Makes the following Order,

**I. Subject of the Application**

1. The Court received, on 1 September 2016, an Application from Crospery Gabriel and Ernest Mutakyawa (hereinafter referred to as "the Applicants"), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as "the Respondent"), for alleged violations of human rights.
2. The Applicants, who are currently detained at Butimba Central Prison, were sentenced to death by the High Court of Tanzania at

Bukoba on 3 July 2014. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 20 February 2015.

000291

3. The Applicants allege, *inter alia*, that:

- a) The Trial Court and the Court of Appeal did not take into consideration the Applicants' evidence and neither did the Courts give reasons for this.
- b) Both Courts were in contravention of Section 240 of the Criminal Procedure Act, Cap 20 Revised Edition 2002, as the postmortem of the deceased was improperly admitted as evidence.
- c) The High Court and the Court of Appeal erred when they convicted the Applicants based on inconsistent and contradictory testimonies of Abdallah Twaha (PW3) and Safina Twaha (PW4) who were witnesses whose credibility was in question.
- d) The Prosecution failed to prove its case beyond reasonable doubt.
- e) The sentence they have been subjected to violates their right to life which is enshrined in the Universal Declaration of Human Rights, as well as Articles 13(6) (d) and 14 of the Constitution of Tanzania.

## II. Procedure before the Court

000290

4. The Application was received at the Registry of the Court on 1 September 2016.
5. Pursuant to Rule 35 of the Rules of Court, by a notice dated 15 November 2016, the Registry served the Application on the Respondent.

## III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.
7. However, in ordering Provisional Measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.<sup>1</sup>
8. 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

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<sup>1</sup> See Application 002/2013 African Commission on Human and Peoples’ Rights v Libya (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 African Commission on Human and Peoples’ Rights v Kenya (Order for Provisional Measures dated 15 March 2013); Application 004/2011 African Commission on Human and Peoples’ Rights v Libya (Order for Provisional Measures dated 25 March 2011).

Protocol and any other relevant Human Rights instrument ratified by the States concerned”.

000289

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.
10. The alleged violations the Applicants are complaining about are guaranteed under Articles 3(2), 4 and 7(1)(c) of the Charter, and the Court therefore has jurisdiction *ratione materiae* over the Application.
11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

#### **IV. On the Provisional Measures**

12. In their Application, the Applicants did not request the Court to order Provisional Measures.
13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, 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”.

000288

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.
15. The Applicants are on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicants.
16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Articles 3(2), 4 and 7(1)(c) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.
17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicants as protected by Articles 3(2), 4 and 7(1)(c) of the Charter, if the death sentence were to be carried out.
18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

**For these reasons,**

**000287**

20. The Court, unanimously, orders the Respondent to:

a) refrain from executing the death penalty against the Applicants pending the determination of the Application.

b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

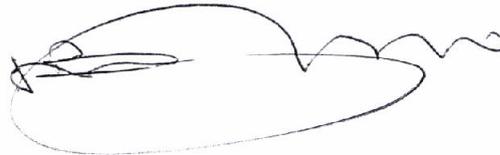
Done at Arusha, this 18<sup>th</sup> day of November in the year 2016, in English and French, the English version being authoritative.

**Signed:**

Sylvain ORÉ, President



Ben KIOKO, Vice President



Gérard NIYUNGEKO, Judge



Ei Hadji GUISSÉ, Judge



Rafâa BEN ACHOUR, Judge

Solomy B. BOSSA, Judge

000286

Angelo V. MATUSSE, Judge

Ntyam O. MENGUE, Judge

Marie-Thérèse MUKAMULISA- Judge; and

Robert ENO-Registrar

