

# ZAMBIA

## Mwamba v Zambia

(2010) AHRLR 32 (HRC 2010)

Communication 1520/2006, *Munguwambuto Kabwe Peter Mwamba v Zambia*

Decided at 98th session, 10 March 2010, CCPR/C/98/D/1520/2006

Death penalty after unfair trial and undue delay of hearing of appeal

**Evidence** (failure of state to respond to allegations, 6.2)

**Life** (death penalty, mandatory, 6.3; appeal, 6.6)

**Cruel, inhuman or degrading treatment** (conditions of detention, 6.4)

**Fair trial** (presumption of innocence, news coverage, 6.5)

1. The author of the communication is Mr Munguwambuto Kabwe Peter Mwamba, a Zambian national, born in 1956, who is currently on death row waiting for his case to be reviewed on appeal by the Supreme Court of Zambia. He claims to be a victim of violations by the state party of the International Covenant on Civil and Political Rights. Although he does not invoke any articles of the Covenant, his communication appears to raise issues under article 6; article 7; article 10, paragraph 1; and article 14 of the Covenant. He is not represented by counsel.

### The facts as presented by the author

2.1 On 24 March 1999, the author, who was a high ranking police officer (superintendent) at the time, was arrested, and detained on suspicion of having murdered the driver of a van carrying 40 tons of copper cathodes and of having stolen the cathodes. He was charged with murder, attempted murder and aggravated robbery. He was taken to the Police Service Headquarters, where he was placed in handcuffs and shackles and subjected to torture and ill-treatment, including an assault by the victim's son with the acquiescence of police officers. He was then transferred to the Chongwe Police Station, where he was secretly detained, in handcuffs and shackles and without food and water for three days.

**2.2** On 28 March 1999, he was sent to the Kabwata Police Station, where he was detained in a cell covered with urine and excrement. He remained in pre-trial detention until his trial on 1 September 1999. He states that on this date the judge also determined the lawfulness of his detention. The police officers investigating the murder and robbery repeatedly asserted through the media that he was the offender. While the author was in detention police officers threatened to kill him, as a result of which the author gave a false confession. However, this confession was not relied upon by the prosecution. The author was also informed by his nephew, who was a paramilitary officer, that there were plans to kill him in the bush. With the help of his lawyer and the officer-in-charge of the prison in which he was detained, he managed to avoid being murdered. This issue was not brought up at trial by the author for fear that the officers in question might seek revenge on the author's nephew.

**2.3** On 1 September 1999, the author's trial began. He was represented by counsel, who was hired privately. On 8 August 2001, he was convicted by the High Court of Zambia of murder and attempted murder and was sentenced to death by hanging, which is a mandatory sentence. He was acquitted on the aggravated robbery charge due to the negligence of the police officers involved, who failed to take any action against third parties who were found in possession of the stolen items. These third parties were neither charged nor summoned to testify during the author's trial, because they bribed the police officers in question to prevent their prosecution. As the three offences were committed at the same time, the judge should also have acquitted him on the two other charges (murder and attempted murder).

**2.4** The author did not have a fair trial. The court was neither independent nor impartial, and the judge and the state prosecutor were bribed. There was no equality between the parties in the proceedings, as the comments and the submissions made by his lawyer were ignored by the judge. Defence witnesses, as well as his lawyer, were intimidated and beaten by police officers. A request by the state prosecution, which was granted by the judge, to exclude the third parties, who were found with the stolen goods, from testifying in Court is a miscarriage of justice. The author's lawyer did not have time to examine a report by the ballistic expert and prepare his defence, as the false report was only produced in Court during the trial. The police officers and the judges involved in his case are corrupt. The Inspector of Police orchestrated his conviction, as the author had previously attempted to have him removed for corruption.<sup>1</sup> In addition, some police officers were bribed to produce false evidence and testimonies, and the judges involved were

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<sup>1</sup> The author provides the names of all of the officers involved.

strongly influenced by the repeated declarations made by the police in the media during the investigation.

**2.5** On 22 August 2001, the author lodged an appeal before the Supreme Court. He is still awaiting review of his case. There are 170 convicts in the same prison all awaiting their appeal, which takes between two and fifteen years. The conditions on death row are inhuman and amount to sleeping in a dirty public toilet: cells are 3 by 3 metres; they accommodate several prisoners and have no toilet facilities, so they must avail of small tins to relieve themselves; TB, malaria and HIV/AIDS, are all prevalent in the prison.

**2.6** The author wrote five times to the Chief Justice requesting information on the status of his appeal and asking him to consider a retrial before the High Court during which the third parties found in possession of the stolen goods could testify. In a response from the Chief Justice, he was informed that his appeal had been delayed due to missing transcripts from his hearing, which at that point had been found, and that his appeal would take place soon.<sup>2</sup> The author believes that the transcripts have and/or will be altered, and informs the Committee that his wife was recently informed by public officials that his sentence would be confirmed due to the fact that he has lodged several complaints, including complaints of corruption on the part of the judge and the police officers who dealt with his case.

## The complaint

**3.1** The author claims that the treatment which he was subjected to in pre-trial detention amounts to physical and psychological torture, or to cruel, inhuman or degrading treatment or punishment (paragraphs 2(1) and 2(2)). He also claims that the conditions of detention on death row, the stress and depression he has developed since his detention there, the fear that he might die from TB, malaria or HIV/AIDS, all of which he claims are prevalent in the prison, as well as the fact that he has been waiting for, by now, over 8 years to have his case reviewed, amount to torture, or to cruel, inhuman or degrading treatment or punishment (paragraph 2(5)). He also claims that the method of execution by hanging constitutes cruel, inhuman or degrading treatment. All of these claims appear to raise issues under article 10 and/or article 7 of the Covenant.

**3.2** The author claims that he did not have a fair trial for the reasons set out in paragraph 2(4) above. In addition, he claims that his presumption of innocence (article 14, paragraph 2) was not respected by the police authorities, demonstrated by their declaration through the media that he was guilty. According to the author, the articles in the newspapers, describing him as a criminal, influenced the Court in its decision to convict him.

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<sup>2</sup> Cf the reply by the state party.

**3.3** The author complains that his rights were violated as a result of being compelled by the police to testify against himself under the threat of murder (article 14, paragraph 3(g)).

**3.4** The author claims that the death sentence imposed upon him is mandatory for the crime of murder, which appears to raise issues under article 6 of the Covenant.

**3.5** Finally, the author claims that he was denied the right to have his conviction and sentence reviewed by a higher tribunal since his appeal has been deliberately delayed for 5 years (at the time of submission of his initial communication), which appears to raise issues under article 14, paragraph 3(g) and 5, of the Covenant. In addition, until such time as it is heard, and in the event that it does not succeed, he is not in a position to seek pardon or commutation of his sentence (article 6, paragraph 4).

### **State party's observations**

**4.** On 9 February 2007, the state party informed the Committee that this case had yet not been heard by the Supreme Court due to 'technical reasons' and provided a copy of a letter from the Director of Public Prosecutions, dated 2 February 2007, indicating that the appeal had not been heard as 'the record of proceedings has not been typed' but that 'the Master of the Supreme Court had indicated (to the Director of Public Prosecutions) that the Court would advise on progress towards the case being heard in the next few weeks.' Despite reminders to the state party on 24 July 2007, 23 June 2008, and 2 March 2009, to provide its submission on admissibility and merits no further information has been received from the state party.

## **Issues and proceedings before the Committee**

### **Consideration of admissibility**

**5.1** Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

**5.2** The Committee notes the state party's only submission on this case in 2007, more than five years since the appeal was filed, that the long delay has been merely due to the failure to have the record of proceedings typed. At the time of consideration of this communication, over eight years after the author's conviction, the author is still waiting for his appeal hearing and remains on death row. The state party has provided no further explanation for this delay. Thus, the Committee considers that the delay in the disposal

of the author's appeal amounts to an unreasonably prolonged delay within the meaning of article 5, paragraph 2(b), of the Optional Protocol and therefore declares the communication admissible.

**5.3** The Committee notes that the author's allegations in paragraph 2(4) largely relate to the evaluation of facts and evidence by the state party's courts, which appear to raise issues under article 14 of the Covenant. The Committee refers to its jurisprudence<sup>3</sup> and reiterates that it is generally for the courts of states parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not sufficiently reveal that the conduct of the trial suffered from any such defects. Accordingly, the author has not substantiated these allegations for the purposes of admissibility and these claims are thus considered inadmissible pursuant to article 2 of the Optional Protocol.

**5.4** As to the claim that the author was compelled to confess guilt, the Committee notes that the author himself states that this confession was not relied upon by the prosecution. Thus, the Committee also considers this issue inadmissible for non-substantiation, pursuant to article 2 of the Optional Protocol.

**5.5** The Committee finds that the other claims relating to: the imposition of the death penalty and associated issues; the author's conditions of detention; his right to be presumed innocent until proven guilty; and right to review without delay have all been substantiated for the purposes of admissibility.

## Consideration of the merits

**6.1** The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

**6.2** The Committee notes that the state party's only response to date to the author's allegations is that the appeal has not yet taken place 'due to technical reasons' and it has provided no arguments on the substance of the author's claims. It reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the state party do not always have equal access to the evidence and frequently the state party alone has the relevant information. It is implicit in article 4, paragraph 2 of the Optional Protocol that the state party has the duty to investigate in good faith all allegations of violations of the

<sup>3</sup> See for example: Communication 541/1993, *Errol Simms v Jamaica*, inadmissibility decision adopted on 3 April 1995 and *PK v Canada*, inadmissibility decision of 20 March 2007; communication 1188/2003, *Riedl-Riedenstein et al v Germany*; 886/1999, *Bondarenko v Belarus*; 1138/2002, *Arenz et al v Germany*, admissibility decision. General Comment 32 on article 14.

Covenant made against it and its representatives and to furnish to the Committee the information available to it. In the light of the failure of the state party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

**6.3** The Committee notes that the author was convicted of murder and attempted murder, on the basis of which he received a mandatory death sentence. The state party does not contest that the death sentence is mandatory for the offences of which he was convicted. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.<sup>4</sup> The Committee finds that the imposition of the death penalty itself, in the circumstances, violated the author's right under article 6, paragraph 1, of the Covenant. In light of the finding that the death penalty imposed on the author is in violation of article 6, the Committee considers that it is not necessary to examine issues regarding the method of execution.

**6.4** The Committee notes that the state party has not contested the information provided by the author on his deplorable conditions of pre-trial detention and current detention on death row, including the claims that he was initially detained secretly, assaulted, handcuffed and shackled, denied food and water for three days and is currently incarcerated in a small and filthy cell without adequate toilet facilities. The Committee recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners.<sup>5</sup> It considers, as it has repeatedly found in respect of similar substantiated claims,<sup>6</sup> that the author's conditions of detention, as described, violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived

<sup>4</sup> See for example: Communication 806/1998, *Thompson v St Vincent and the Grenadines*, views adopted on 18 October 2000; 845/1998, *Kennedy v Trinidad and Tobago*, views adopted on 26 March 2002; and 1077/2002, *Carpo v The Philippines*, views adopted on 28 March 2003.

<sup>5</sup> General Comment 21 on article 10, paras 3 and 5; 1134/2002, *Fongum Gorji-Dinka v Cameroon*, views adopted on 17 March 2005, para 5.2.

<sup>6</sup> See for example: Communication 908/2000, *Xavier Evans v Trinidad and Tobago*, views adopted on 21 March 2003; 1173/2003, *Abdelhamid Benhadj v Algeria*, views adopted on 20 July 2007.

of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider any possible claims arising under article 7 in this regard.<sup>7</sup> For these reasons, the Committee finds that the state party has violated article 10, paragraph 1, of the Covenant.

**6.5** As to the claim that the author's right to be presumed innocent until proven guilty was eroded by the police officers' announcements in the media that he was culpable, the Committee recalls its jurisprudence as reflected in its General Comment 32,<sup>8</sup> according to which 'the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle'. The same General Comment, as well as the Committee's jurisprudence,<sup>9</sup> refers to the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused. The media should avoid news coverage undermining the presumption of innocence. Given the author's claims that such public statements were made against the author and the state party's failure to dispute these claims, the Committee considers that the state party has violated article 14, paragraph 2 of the Covenant in this regard.

**6.6** The Committee recalls its jurisprudence<sup>10</sup> as reflected in its General Comment 32<sup>11</sup> that the rights contained in article 14, paragraphs 3(c), and 5, read together, confer a right to review of a decision at trial without delay and that the right of appeal is of particular importance in death penalty cases. It notes that nearly six years after conviction, the only reply by the state party to the Committee is that the failure to hear the author's appeal was due to technical reasons, *viz* the failure to have the record of proceedings typed. Given the fact that the author's appeal has still not been heard, now over eight years since his conviction, at the time of examination of the present communication, which remains uncontested by the state party, the Committee considers that the delay in the instant case violates the author's right to review without

<sup>7</sup> Communication 818/1998, *Sextus v Trinidad and Tobago*, views adopted on 16 July 2001.

<sup>8</sup> General Comment 32 on article 14.

<sup>9</sup> See for example: Communication 770/1997, *Gridin v Russian Federation*, views adopted on 20 July 2000.

<sup>10</sup> See for example: Communication 390/1990, *Lubuto v Zambia*, views adopted on 31 October 1995; 523/1992, *Neptune v Trinidad and Tobago*, views adopted on 16 July 1996; 614/95, *Sam Thomas v Jamaica*, views adopted on 31 March 1999; 702/1996, *Clifford McLawrence v Jamaica*, views adopted on 18 July 1997; and 588/1994, *Johnson v Jamaica*, views adopted on 22 March 1996.

<sup>11</sup> General Comment 32 [90] on article 14.

delay and consequently finds a violation of article 14, paragraphs 3(c), and 5 of the Covenant. In light of the finding that the author's right to a review has been unduly delayed, the Committee considers that it is not necessary to address the author's claim relating to his inability to apply for a pardon or commutation of his sentence.

**6.7** The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.<sup>12</sup> In the present case, the author's death sentence was imposed, in violation of the right to a fair trial, as guaranteed by article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

**6.8** The Committee considers that the author's claim that his detention on death row, where he has been waiting for over eight years for the hearing of his appeal at the time of consideration of his communication, has affected his physical and mental health raises, issues under article 7. In this regard, it notes the author's description of the conditions of detention in paragraph 2(5) above. It reiterates its jurisprudence<sup>13</sup> that to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. Indeed, as the Committee has previously observed,<sup>14</sup> the imposition of any death sentence that cannot be justified under article 6 would automatically entail a violation of article 7.<sup>15</sup> The Committee therefore concludes that the imposition of the death sentence on the author after the conclusion of proceedings which did not meet the requirements of article 14 of the Covenant amounts to inhuman treatment, in violation of article 7.

**7.** The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the state party has violated article 6, paragraph 1 due to the mandatory nature of the death penalty; article 10, paragraph 1; article 14, paragraph 2;

<sup>12</sup> See for example: Communication 719/1996, *Conroy Levy v Jamaica*, views adopted on 3 November 1998; 730/1996, *Clarence Marshall v Jamaica*, views adopted on 3 November 1998; and 1096/2002, *Kurbanov v Tajikistan*, views adopted on 6 November 2003.

<sup>13</sup> See for example: Communication 1421/2005, *Francisco Juan Larrañaga v the Philippines*, views adopted on 24 July 2006. European Court of Human Rights, *Ócalan v Turkey*, application 46221/99, 12 May 2005, paras 167-175.

<sup>14</sup> See for example: Communication 588/1994, *Errol Johnson v Jamaica*, views adopted on 22 March 1996.

<sup>15</sup> See for example: Communication 1421/2005, *Francisco Juan Larrañaga v the Philippines*, views adopted on 24 July 2006.



article 14, paragraph 3(c); article 14, paragraph 5; article 6, as the death penalty was passed in violation of the right to a fair trial; and article 7 for the inhuman treatment caused by the failure to meet the fair trial guarantees of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3(a), of the Covenant, the state party is under an obligation to provide the author with an effective remedy, which should include a review of his conviction with the guarantees enshrined in the Covenant, as well as adequate reparation, including compensation. The state party is under an obligation to avoid similar violations in the future.

9. Bearing in mind that, by becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2, of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, the Committee wishes to receive from the state party, within 180 days, information about the measures taken to give effect to its views. The state party is also requested to publish the Committee's views.