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

THE MATTER OF

REUBEN JUMA

AND

GAWANI NKENDE

V.

UNITED REPUBLIC OF TANZANIA

CONSOLIDATED APPLICATIONS Nos. 015/2017 and 011/2018

JUDGMENT

5 SEPTEMBER 2023

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The Court composed of: Modibo SACKO, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Dennis D ADJEI – Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"),[1] Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Applications.

Consolidated Applications

Reuben JUMA

Self-represented

and

Gawani NKENDE

Represented by:

Dr Daniel WALYEMERA, Walyemera & Company

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr Boniface Nalija LUHENDE, Solicitor General, Office of the Solicitor General;

[1] Rule 8(2), Rules of Court, 2 June 2010.

ii. Ms Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General;
iii. Ms Caroline Kitana CHIPETA, Director of Legal Unit, Ministry of Foreign Affairs and East African Cooperation;
iv. Ms Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers;
v. Ms Aidah KISUMO, Senior State Attorney, Attorney General's Chambers; and
vi. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Reuben Juma and Gawani Nkende (hereinafter referred to as "the First Applicant" and "the Second Applicant" respectively or "the Applicants" jointly) are both nationals of Tanzania who were convicted and sentenced to thirty (30) years' imprisonment for the offence of rape. They challenge the manner in which their trials were conducted in domestic courts.

2. The Applications are filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It further deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no effect on pending and new cases filed before the entry into force of the said

withdrawal one (1) year after its deposit which, in the present case, is on 22 November 2020.[2]

II. SUBJECT MATTER OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that the First Applicant was charged before the Resident Magistrate's Court sitting at Mwanza with the offences of rape and preventing a schoolgirl from attending school. The rape victim was a seventeen (17)-year old pupil who enrolled at the Nyangulugulu Primary School in the Mwanza Region. After a full trial, the Resident Magistrate, on 30 September 2011, found him guilty on both charges and convicted him accordingly. He was subsequently sentenced to thirty (30) years' imprisonment and six (6) strokes of the cane for the offence of rape and a fine of Thirty Thousand Tanzanian Shillings (TSH 30 000) or in default four (4) months in jail for the offence of preventing a schoolgirl from attending school.

4. He subsequently appealed his conviction and sentence before the High Court sitting at Mwanza which, on 17 May 2013, dismissed the appeal in its entirety. A subsequent appeal to the Court of Appeal was also dismissed on 11 August 2014.

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5. It also emerges from the record that the Second Applicant was charged before the District Court of Shinyanga with the offence of rape. According to the record, the victim of the rape was a seventeen (17)-year old pupil enrolled at the Nunga Primary School in the Shinyanga Region. After a full trial he was, on 22 October 2004, convicted and sentenced to thirty (30)

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 219, § 38.

years' imprisonment, twelve (12) strokes of the cane and also ordered to pay Five Million Tanzanian Shillings (TSH 5 000 000) as compensation to the victim upon completion of his jail term.

6. He subsequently appealed against both his conviction and sentence before the High Court sitting at Tabora, which dismissed his appeal on 27 October 2008. His further appeal to the Court of Appeal was also dismissed on 1 November 2012. On 3 August 2017, the Court of Appeal dismissed the Applicant's motion for review of its earlier decision dismissing his appeal.

B. Alleged violations

7. The First Applicant alleges a violation of Articles 2, 3 and 7 of the Charter due to the manner in which the domestic courts treated the evidence against him. He affirms that they "ended up sustaining conviction basing on planted, fabricated and/or concocted evidence/case to justify their ill-motive."

8. The Second Applicant also alleges a violation of Articles 2, 3 and 7 of the Charter due to the manner in which the proceedings against him were conducted by domestic courts which, according to him, resulted in the procurement of the judgment against him "in great error."

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

9. The First Applicant filed his Application on 2 May 2017 and it was served on the Respondent State on 22 June 2017. The Respondent State filed its Response to the Application on 21 August 2017.

10. The Second Applicant filed his Application on 8 May 2018 and it was served on the Respondent State on 27 June 2018. The Respondent State filed its Response on 28 June 2019.

11. The Parties filed all their other pleadings within the time prescribed by the Court.

12. By an Order of the Court dated 21 May 2023, Applications No. 015/2017 and 011/2018 were joined.

13. Pleadings were closed on 30 May 2021 in respect of Application No. 011/2018 and on 1 May 2023 in respect of Application No. 015/2017. In both instances the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

14. The First Applicant prays the Court "to restore justice where it was overlooked/violated and order the Respondent state to quash both conviction and sentence imposed and set the applicant at liberty."

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15. In its Response to the First Applicant's prayers, and specifically with respect to jurisdiction and admissibility, the Respondent State prays he Court to find that:

    i. The Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this Application.
    ii. The Application does not meet the admissibility requirements stipulated under Rule 40(5) of the Rules of Court or Article 56 and Article 6(2) of the Protocol.
    iii. The Application does not meet the admissibility requirement stipulated under Rule 40(6) of the Rules of Court or Article 56 and Article 6(2) of the Protocol.
    iv. The Application be declared inadmissible.
    v. The Application be dismissed in accordance with Rule 38 of the Rules of Court.

16. On the merits of the First Applicant's Application, the Respondent State prays the Court to find that it did not violate Articles 2, 3(1), 3(2), 7(1)(a) and 7(2) of the Charter. The Respondent State also prays the Court to dismiss the Application for lack of merit, and that the costs be borne by the First Applicant.

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17. The Second Applicant prays the Court to "restore justice where it was overlooked and quash both conviction and sentence meted on me and set me free from the prison custody." He further prays that "the Court be pleased to grant any other order or legal remedy that the court may deem fit and just to grant in the circumstances of my complaints."

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18. In its Response to the Second Applicant's Application, with respect to jurisdiction and admissibility, the Respondent State prays the Court to find that:

    i. The Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate the Application.
    ii. That, the Application does not meet the admissibility requirements stipulated under Rule 40(5) and 40(6) of the Rules of Court.
    iii. The Application be declared inadmissible and duly dismissed.
    iv. The costs of this Application be borne by the Applicants.

19. On the merits of the Second Applicant's Application, the Respondent State prays the Court to find that:

    i. The Respondent State did not violate the Applicant's rights provided for under Articles 2 and 3(1), (2) and 7(1)(c) of the Charter.
    ii. The Respondent did not violate any of the Applicant's rights provided for under Article 10(2) of the Protocol to the Charter.
    iii. The Application be dismissed for lack of merit.
    iv. The costs of this Application be borne by the Applicant.

V. JURISDICTION

20. The Court recalls that Article 3 of the Protocol provides that:

> 1. 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.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

21. The Court further recalls that pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules."[3]

22. On the basis of the above-cited provisions, the Court must preliminarily, in every Application, establish its jurisdiction and dispose of objections thereto, if any.

23. In both Applications, the Court observes that the Respondent State raises the same objection to the Court's material jurisdiction. The Court will thus, preliminarily, address the objections to its material jurisdiction before considering other aspects of jurisdiction, if necessary.

A. Objection to material jurisdiction

24. The Court notes that Respondent State's objections in both Applications contest the jurisdiction of the Court on the ground that it is neither a court of first instance nor an appellate court.

25. In respect of the contention that the Court is not a court of first instance, the Respondent State argues that by raising fresh allegations before the Court

[3] Rule 39(1), Rules of Court, 2 June 2010.

that were never brought before any domestic court, both Applicants are attempting to constitute the Court as a first instance court, contrary to both the Charter and the Protocol. As for the contention that the Court is not an appellate court, the Respondent State argues, in both Applications, by inviting the Court to reconsider evidential issues already resolved by domestic courts, the Applicants are asking the Court to sit as an appellate court. The Respondent State further argues that, in respect of both Applications, the Court has no jurisdiction to quash convictions rendered by domestic courts or set aside sentences or even to order the release of convicts from prison. In support of its arguments, the Respondent State referred to the Court's jurisprudence as expounded in *Alex Thomas v. Tanzania* and *Ernest Francis Mtingwi v. Malawi.*

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26. In his Reply, the First Applicant contends that the Court has jurisdiction insofar as he alleges violations of "human rights under the Charter to which the Respondent State is committed to respecting and protecting." He further contends that he has presented for the Court's consideration alleged violations of his fundamental rights and "not an appeal as referred to by the Respondent state representatives."

27. The Second Applicant, for his part, submits that the Court has jurisdiction "to hear all cases submitted to it as this application is made under Article 3(1), (2) of the African Charter and article 3 and 27 of the protocol to the charter."

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28. The Court recalls that by virtue of Article 3(1) of the Protocol it has jurisdiction to examine any application submitted to it provided that the

rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[4]

29. In these consolidated Applications, the Court notes that the Respondent State's objections to its material jurisdiction invoke three issues, first, that the Court is not a first instance court, second, that the Court is not an appellate court and, third, that the Court has no jurisdiction to quash convictions and order release of a convict. The Court will address each of these contentions separately.

30. In relation to the argument that the Court would be sitting as a court of first instance, the Court recalls its established jurisprudence to the effect that, under Article 3 of the Protocol, it has material jurisdiction so long as the Application before it raises allegations of violation of human rights protected under the Charter or any other human rights instrument ratified by the State concerned.[5] Since the present consolidated Applications raise alleged violations of Articles 2, 3 and 7 of the Charter, the Court finds that it would not be sitting as a first instance court in considering these allegations but would only discharging its mandate to interpret and apply the Charter and other human rights instruments. The Court, therefore, dismisses the Respondent State's submissions.

31. As regards the contention that the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's domestic courts, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to the decisions of domestic courts.[6] At the same time, however, and notwithstanding that the Court is not an appellate court vis-à-vis domestic courts, it retains the power to assess the propriety of domestic proceedings against standards

[4] *Kalebi Elisamehe v. United Republic of Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 265, § 18.
[5] *Jibu Amir Mussa and Another v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 629, §§ 18-19.
[6] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14; *Kennedy Ivan v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 26; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

set out in international human rights instruments ratified by the State concerned, which does not make it an appellate court.[7] The Court thus dismisses the Respondent State's submissions on this point.

32. In relation to the contention that the Court lacks jurisdiction to quash convictions, set aside the sentence or order release from prison, the Court recalls that Article 27(1) of the Protocol provides that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation." Clearly, therefore, the Court has jurisdiction to grant various types of reparation, including release from prison, should the facts of a case so dictate. The Respondent State's submissions are thus dismissed.

33. In view of the above, the Court dismisses the Respondent State's objections to its material jurisdiction and holds that it has material jurisdiction to hear these consolidated Applications.

B. Other aspects of jurisdiction

34. The Court notes that the Respondent State does not dispute its personal, temporal and territorial jurisdiction.

35. Having noted that nothing on record indicates that it lacks jurisdiction, the Court holds that it has:

    i. Personal jurisdiction insofar as the Respondent State is a party to the Protocol and has deposited the Declaration. The Court recalls, as it did in paragraph 2 of this judgment, that on 21 November 2019, the Respondent State deposited an instrument withdrawing

[7] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Werema Wangoko Werema and Another v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29 and *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.

its Declaration. In this regard, the Court reiterates its position that the withdrawal of the Declaration has no bearing on cases pending before it took effect. Given that the present consolidated Applications were already pending before the withdrawal, the latter has no bearing thereon.[8]

ii. Temporal jurisdiction insofar as the violations alleged in the consolidated Applications occurred after the Respondent State became a party to the Charter and the Protocol.

iii. Territorial jurisdiction insofar as the violations alleged in the consolidated Applications occurred within the Respondent State's territory.

36. Accordingly, the Court holds that it has jurisdiction to examine the present consolidated Applications.

VI. ADMISSIBILITY

37. In accordance with Article 6(2) of the Protocol "The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter".

38. Pursuant to Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."

39. According to Rule 50(2) of the Rules, which essentially restates Article 56 of the Charter:

[8] *Cheusi v. Tanzania*, *supra*, §§ 35-39.

Applications filed before the Court shall comply with all of the following conditions:

a. Indicate their authors even if the latter request anonymity;
b. Are compatible with the Constitutive Act of the African Union and with the Charter;
c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
d. Are not based exclusively on news disseminated through the mass media;
e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

A. Objections to the admissibility of the consolidated Applications

40. The Court notes, from the record, that the Respondent State raises similar objections to the admissibility of the consolidated Applications. It contends that, in both Applications, the Applicants did not exhaust domestic remedies and that they did not file their Applications within a reasonable time, as decreed by the Charter. These objections will now be dealt with individually, before considering other admissibility requirements, if necessary.

i. Objection alleging non-exhaustion of domestic remedies

41. The Respondent State contends that both Applicants filed their Applications prematurely without first having recourse to the procedure under its Basic Rights and Duties Enforcement Act, as the rights alleged to have been

violated are also protected under its Constitution. According to the Respondent State, both Applicants had the option of instituting a constitutional petition to address their grievances but failed to do so thereby confirming their failure to exhaust domestic remedies.

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42. In his Reply, the First Applicant argues that by taking his case to the High Court, which dismissed his appeal on 17 May 2003, and the Court of Appeal, which dismissed his appeal on 11 August 2014, before approaching this Court, he fulfilled the requirement for exhaustion of domestic remedies. He contends, therefore, that the Respondent State had the opportunity to redress the alleged wrongs within the framework of its domestic legal system and submits, as a consequence, that he exhausted domestic remedies.

43. The Second Applicant's submissions did not address the objection raised by the Respondent State

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44. The Court reiterates that the requirement of exhaustion of local remedies must be complied with before any Application is admissible before it. However, this condition may, exceptionally, be dispensed with if local remedies are not available, they are ineffective, insufficient or the domestic procedures to pursue them are unduly prolonged. Furthermore, this requirement only demands that a litigant exhaust ordinary judicial remedies.[9]

45. In the present consolidated Applications, the Court observes that the Respondent State's arguments relate particularly to both Applicants' non-recourse to the procedures under the Basic Rights and Duties Enforcement

[9] *Thomas v. Tanzania* (merits), *supra*, § 64 and *Kennedy Owino Onyachi and Another* (merits) (28 September 2017) 2 AfCLR 65, § 56.

Act. In this connection, the Respondent State's contention is that both Applicants could have filed a constitutional petition regarding the alleged violation of their rights before approaching this Court. However, as the Court has consistently held, the remedy of a constitutional petition in the Respondent State's judicial system is an extraordinary remedy that an Applicant is not required to exhaust prior to seizing this Court.[10]

46. Given that there is no contest that both Applicants, after being convicted and sentenced, pursued their appeals all the way to the Court of Appeal, which is the highest judicial body in the Respondent State, with their grievances, the Court finds that both Applicants exhausted domestic remedies and thus dismisses the Respondent State's objection.

ii. Objection alleging failure to file the consolidated Applications within a reasonable time

47. The Respondent State contends that it took the First Applicant three (3) years and ten (10) months after the Court of Appeal's dismissed his appeal for him to file his Application. According to the Respondent State, this lapse of time was unreasonable and should thus make the First Applicant's Application inadmissible. In support of its argument, the Respondent State cites the decision of the African Commission on Human and Peoples' Rights in *Michael Majuru v. Zimbabwe* and submits that a period of no more than six (6) months should be deemed as reasonable for filing applications before the Court.

48. According to the Respondent State, "the [Second] Applicant's case at the local jurisdiction was concluded in 27th day of October 2008. The [Second] Applicant filed this Application on 08th May 2018, which is ten years after the conclusion of his case…" The Respondent State thus submits that

[10] *Mgosi Mwita Makungu v. United Republic of Tanzania* (7 December 2018) 2 AfCLR 550, § 46; *Thomas v. Tanzania* (merits), *supra*, §§ 60-62 and *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70.

although Rule 40[11] does not prescribe the time-limit within which applications must be filed, the Second Applicant's Application should be declared inadmissible for not being filed within a reasonable time.

49. In his Reply, the First Applicant argues that his awareness of the Court came about only in the year 2016. In relation to the six (6) months period invoked by the Respondent State, the First Applicant submits that the Court must have recourse to this period only cautiously without forgetting that the First Applicant was incarcerated and without legal representation. He further submits that the Court should "determine this Application without being tied with technicalities …which may obstruct dispensation of justice."

50. The Second Applicant did not make any submissions on this point.

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51. Pursuant to Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, in order for an application to be admissible, it must be "submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

52. The Court reiterates that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that Applications must be filed "… within reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

53. In relation to these consolidated Applications, the Court considers that domestic remedies were exhausted, by the First Applicant, when the Court

[11] Rule 50(2), Rules of Court, 1 September 2020.

of Appeal dismissed his appeal on 11 August 2014. Given that the First Applicant filed his Application on 2 May 2017, the total time lapse, after exhaustion of domestic remedies, was two (2) years and (8) months. It is this period that the Court must assess for reasonableness under Article 56(6) of the Charter.

54. In so far as determining reasonableness under Article 56(6) of the Charter is concerned, the Court recalls that it has held "… that the reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[12]

55. Some of the factors that the Court has considered as relevant in assessing reasonableness include the fact that an applicant is incarcerated,[13] being lay in law without the benefit of legal assistance,[14] their indigence, the time taken to pursue the review remedy before the Court of Appeal, or to access the documents on file,[15] intimidation and fear of reprisal,[16] the recent establishment of the Court, the need for time to reflect on the advisability of seizing the Court and determine the complaints to be submitted.[17]

56. However, as the Court has also pointed out it is not enough for applicants to simply plead that they were incarcerated, are lay or indigent, for example, to justify their failure to file their applications within a reasonable period of time.[18] It is also important for all Applicants to demonstrate how their personal situation prevented them from filing their applications within a reasonable period.

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[12] *Norbert Zongo and Others v. Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, § 121.
[13] *Diocles William v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52; and *Thomas v. Tanzania* (merits), *supra*, § 74.
[14] *Thomas v. Tanzania* (merits), *supra*, § 73; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54 and *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[15] *Nguza Viking and Another v. Tanzania* (merits), *supra*, § 61.
[16] *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v. Republic of Mali* (merits) (11 May 2018) 2 AfCLR 380, § 54.
[17] *Zongo and Others v. Burkina Faso* (preliminary objections), § 122.
[18] *Layford Makene v. United Republic of Tanzania*, ACtHPR, Application No. 028/2017, Ruling of 2 December 2021 (admissibility), § 48.

57. In respect of the First Applicant, the Court observes that he was self-represented in proceedings before domestic courts and he has also conducted the litigation before this Court in person. Given his lack of counsel, and also as an incarcerated person, the Court finds that the period of two (2) years and eight (8) months was not unreasonable in the circumstances of his case.

58. In respect of the Second Applicant, the Court notes that he was convicted by the District Court sitting at Shinyanga on 22 October 2004 and that his appeal before the High Court sitting at Tabora was dismissed on 27 October 2008. His appeal to the Court of Appeal was dismissed on 1 November 2012. Notably, however, the Second Applicant filed an application for review of the decision of the Court of Appeal and this was dismissed on 3 August 2017. His Application before the Court was filed on 8 May 2018. The time lapse between the last decision of the domestic courts, and the filing of the Application was, therefore, nine (9) months and five (5) days.

59. The Court recalls that while an applicant, within the Respondent State's legal system, is not obliged, for purposes of determining exhaustion of domestic remedies, to file a petition for review of the Court of Appeal's decision, where one opts to avail himself of this remedy, the Court takes this account in determining whether or not an Application was filed within a reasonable time. In the present case, taking into account the time that lapsed between the decision of the Court of Appeal on the Second Applicant's application for review and the time the Application was filed, the Court finds that the time of nine (9) months and five (5) days is not unreasonable within the meaning of Article 56(6) of the Charter and Rule 40(f) of the Rules.

60. Given the above findings, the Court holds that both Applicants filed their Applications within a reasonable time as construed under Article 56(6) of the Charter and thus dismisses the Respondent State's objection on this point.

B. Other admissibility requirements

61. The Court notes that although no objection has been raised regarding the requirements set out in Rule 50(2)(a), (b), (c), (d), and (g) of the Rules, it must ensure that the consolidated Applications fulfil these requirements.

62. From the record, the Court notes that, both Applicants have been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

63. The Court also notes that the claims made by both Applicants seek to protect their rights guaranteed under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Additionally, the consolidated Applications do not contain any claim or prayer that is incompatible with a provision of the said Act. Therefore, the Court considers that the consolidated Applications are compatible with the Constitutive Act of the African Union and the Charter and holds that the requirement of Rule 50(2)(b) of the Rules is fulfilled.

64. The Court further notes that the consolidated Applications do not contain any disparaging or insulting language with regard to the Respondent State or its institutions, in compliance with the Rule 50(2)(c) of the Rules.

65. The consolidated Applications are also not based exclusively on news disseminated through mass media, rather they are based on documents from the municipal courts of the Respondent State. Thus, the requirements of Rule 50 (2) (d) of the Rules are complied with.

66. The Court also holds that the consolidated Applications do not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union as required under Rule 50(2)(g) of the Rules.

67. As a consequence of the foregoing, the Court holds that the consolidated Applications fulfil all the requirements set out under Article 56 of the Charter as restated in Rule 50(2) of the Rules and accordingly finds the Applications admissible.

VII. MERITS

68. Both Applicants allege a violation of their rights under Articles 2, 3 and 7 of the Charter by reason of the manner in which their trials before the domestic courts were conducted.

A. Alleged violation of the right to non-discrimination and equality before the law

69. The First Applicant makes two arguments in respect of the alleged violation of the right to non-discrimination and equality before the law. First, that the evidence against him was fabricated and that the domestic courts unfairly relied on this to prove the case against him thus resulting in an unfair determination of his case which, according to him, also infringed his right to equality before the law. Second, that the offence of rape, as provided for under the Respondent State's Penal Code, contravenes the Articles 2 and 3 of the Charter on the basis of its "sexism".

70. As for the Second Applicant, although, in his Application, he referred to Articles 2 and 3 of the Charter, he did not make any submissions specifically outlining how his rights under the aforementioned provisions were violated.

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71. In its Response, the Respondent State disputes all the averments by the First Applicant and puts him to strict proof. The Respondent State argues that the First Applicant was not discriminated against in the domestic proceedings and he was permitted to access all legal avenues to pursue redress. As to the evidential issues raised by the First Applicant, the

Respondent State submits that issues of inconsistency of prosecution witnesses and their credibility were all dealt with by the Court of Appeal as reflected on pages 5 to 7 of its judgment. It thus submits that the evidence relied upon to convict the First Applicant was reliable and sufficient to sustain the conviction.

72. As to the status of the offence of rape under its Penal Code, the Respondent State disputes the First Applicant's allegations and argues that he has not illustrated how the Penal Code provisions contravene Articles 2 and 3 of the Charter. In so far as the whole Chapter on offences against morality is concerned, the Respondent State submits that this Chapter proscribes offences committed by both males and females for purposes of preserving rights and morals of its society and can thus not be said to infringe the Charter.

73. In connection with the Second Applicant, the Respondent State submits, generally, that it did not violate his rights under Articles 2 and 3 of the Charter without offering any substantiation.

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74. The Court recalls that Article 2 of the Charter provides as follows:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

75. The Court also recalls that Article 3 of the Charter provides thus

> 1. Every individual shall be equal before the law.
> 2. Every individual shall be entitled to equal protection of the law.

76. As to the purport of Articles 2 and 3 of the Charter, the Court observes that in *African Commission on Human and Peoples' Rights v. Kenya* it stated thus:[19]

> Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.
>
> The right not to be discriminated against is related to the right to equality before the law and equal protection of the law as guaranteed by Article 3 of the Charter. The scope of the right to non-discrimination extends beyond the right to equal treatment by the law and also has practical dimension in that individuals should in fact be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status. The expression 'any other status' under Article 2 encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter. In determining whether a ground falls under this category, the Court shall take into account the general spirit of the Charter.

77. In so far as proving a violation of Articles 2 and 3 of the Charter is concerned, the Court observes that in *George Maili Kemboge v. United Republic of Tanzania*, it reiterated that "[g]eneral statements to the effect that [a] right has been violated are not enough. More substantiation is required."[20] Any alleged violation of Articles 2 and 3 of the Charter, therefore, must be accompanied by adequate evidence to substantiate the allegation.[21]

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[19] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 137-138.
[20] (merits) (11 May 2018) 2 AfCLR 369, § 51.
[21] *Minani Evarist v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 75.

78. In the present case, although the First Applicant has asserted that his rights under Articles 2 and 3 of the Charter were violated due to fabrication of evidence which in turn led to his unfair treatment, the Court has not been presented with any evidence to justify this allegation. The Court's perusal of the record does not also show the particular manner in which the Second Applicant was treated differently from other accused persons, facing similar charges to the First Applicant, before the Respondent State's courts.

79. In so far as the First Applicant's case is grounded on the alleged fabrication of evidence before domestic courts, the Court reiterates its established position that it does not, generally, interfere with evidential findings made by trial courts unless a grave injustice is manifest.[22] In the present case, the Court finds that the First Applicant has not raised any justification to invite the Court to interfere with the evidential findings by the domestic courts.

80. The Court also finds that the Second Applicant, having made no submissions to demonstrate how his rights under Articles 2 and 3 of the Charter were violated, has failed to prove his allegations.

81. In the circumstances, the Court finds that there is no basis for it to hold that the Applicants' rights under Articles 2 and 3 of the Charter were violated.

82. As for the First Applicant's allegation that the offence of rape under the Respondent State's Penal Code contravenes the Charter on the ground of "sexism", the Court finds that the First Applicant has just made the averment without substantiating the same. The Court cannot, therefore, uphold this submission.

83. In light of all the above, therefore, the Court dismisses both Applicants' allegations of a violation of Articles 2 and 3 of the Charter.

[22] *Oscar Josiah v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 83, §§ 52-53.

B. Alleged violation of the right to fair trial

84. Both Applicants alleged a violation of their right to fair trial through the denial of free legal assistance during domestic proceedings. Additionally, the Second Applicant alleges a violation of his right to fair trial through the manner in which the domestic courts treated the evidence preferred against him.

i. Alleged violation of the right to free legal assistance

85. Both Applicants submit that during proceedings before the Respondent State's courts, they were without the benefit of legal counsel as the Respondent State failed to accord them free legal assistance. They submit, therefore, that this is a violation of Article 7(1)(c) of the Charter as well as of the Respondent State's own Constitution.

*

86. The Respondent State submits that under section 310 of its Criminal Procedure Act the right to be represented or defended is not mandatory. It further submits that, in its legal system, "… legal aid at the district court, court of resident magistrate, High Court and the Court of Appeal, it is not compulsory. Conditions must be met to qualify for free representation by the State … that the Applicant was not represented by a counsel does not mean that he was disadvantaged in any way."

87. Specifically in relation to the Second Applicant, the Respondent State argues that he was afforded the right to be heard during his trial and he was even able to call one witness in his defence. According to the Respondent State, therefore, the Second Applicant was not denied the right to be heard.

88. The Respondent State further argues that at the time of the Second Applicant's trial, the right to legal representation was not absolute in its jurisdiction but required that one should make an application and that

depending on availability of resources legal representation could be accorded. It is the Respondent State's submission, therefore, that the fact that the Second Applicant had no legal representation, by itself, could not vitiate the domestic proceedings.

89. The Respondent State thus prays the Court to dismiss both Applicants' allegations for being baseless and void of merit.

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90. The Court observes that Article 7(1)(c) of the Charter provides that: "Every individual shall have the right to have his cause heard. This comprises: … c) the right to defence, including the right to be defended by Counsel of his choice".

91. The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance. Nevertheless, the Court has held that Article 7(1)(c) of the Charter can be read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR"),[23] to establish the right to free legal assistance as a part of the general right to fair trial. The right to free legal assistance arises where a person cannot afford to pay for legal representation and where the interest of justice so require.[24] The interest of justice require the provision of free legal assistance where, among others, the Applicant is indigent, the offence he/she is facing is serious and the penalty provided by the law is severe.[25]

92. The Court confirms, from the record, that both Applicants were not afforded free legal assistance throughout the proceedings in the national courts. The Court notes, in this connection, that the Respondent State's argument has been to assert that legal assistance is not mandatory and that the

[23] The Respondent State became a party to the International Covenant on Civil and Political Rights on 11 June 1976.
[24] *Thomas v. Tanzania* (merits), *supra*, § 114.
[25] *Ibid*, § 123. See also *Abubakari v. Tanzania* (merits), *supra*, §§ 138-139; *Evarist v. Tanzania* (merits), *supra*, § 68; *William v. Tanzania* (merits), *supra*, § 85; *Anaclet Paulo v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 92.

Applicants did not suffer any disadvantage by conducting their own defence.

93. It is the Court's finding, however, given that both Applicants were charged with a serious offence, to wit rape, which carries a minimum sentence of thirty (30) years imprisonment, and that their indigence has not been questioned by the Respondent State, the interests of justice required that they should have been provided with free legal assistance. This obligation persisted regardless of whether or not the Applicants requested for free legal assistance.

94. The Court, therefore, finds that the Respondent State has violated Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, due to its failure to accord the Applicants free legal assistance during proceedings before domestic courts.

ii. Alleged violation of the right to have one's cause heard

95. The Second Applicant argues that in his appeal before the Court of Appeal he submitted a memorandum with several grounds of appeal but that some of the grounds of appeal were not considered. It is this alleged failure to consider his grounds of appeal that he submits amounts to a violation of his Charter rights.

*

96. The Respondent State submits that the Second Applicant's allegation on this point is baseless and lacks merit since he has failed to point out which grounds of appeal, the Court of Appeal failed to consider. It further argues that the Second Applicant raised six (6) grounds of appeal before the Court of Appeal which nevertheless, upon assessment, decided to consolidate them into four (4) grounds of appeal. According to the Respondent State, consolidation of grounds of appeal is a normal practice which happens when an applicant has raised many issues which are interrelated. It is the Respondent State's submission, therefore, that the Second Applicant did not suffer any prejudice due to the consolidation of the grounds of appeal

as he was still given the right to argue his own case and all his arguments were considered by the Court of Appeal.

97. The Respondent State also submits that the Second Applicant raised the same grievance during his application for review of the Court of Appeal's decision and this was considered and dismissed by the Court of Appeal.

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98. The Court recalls that Article 7(1)(a) of the Charter provides as follows:

> 1. Every individual shall have the right to have his cause heard. This comprises:
>
> a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;

99. In relation to the right under Article 7(1)(a) of the Charter, the Court has held that this:[26]

> … requires that individuals are provided with an opportunity to access competent organs, to appeal against decisions or acts violating their rights. It 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 judgments or decisions that they wish to appeal against within a reasonable time.

100. The Court notes that the Second Applicant's grievance is centrally about how some of his grounds of appeal were, allegedly, not considered by the Court of Appeal. In this regard, the Court further notes, from the record, that the Court of Appeal in its judgment, at page 4, acknowledged that the Second Applicant had filed a memorandum with six (6) grounds of appeal.

[26] *Benedicto Mallya v. United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 482, § 43.

The Court of Appeal, however, proceeded to summarise these six (6) grounds of appeal into four (4) and then dealt with each of them seriatim. It was only upon its analysis of the individual grounds of appeal that the Court of Appeal concluded, at page 13 of its judgment, that "our objective evaluation of the evidence on record leaves us with no reasonable doubt on the guilt of the appellant. He was rightly convicted as charged."

101. The Court also notes, from the record (pages 2 and 7 of the Ruling on Review), that during the application for review of the Court of Appeal's decision, the Second Applicant raised four (4) grounds in support of his application. The first of these grounds was that the decision of the Court of Appeal was based on manifest error on the face of the record which had resulted in a miscarriage of justice. In his submissions in support of the application for review, the Second Applicant argued that the matters raised in his notice of motion and accompanying affidavit were not considered by the Court of Appeal at the time his appeal was heard and had the court considered them it would not have dismissed his appeal.

102. In relation to the Second Applicant's contentions, the Court of Appeal held that "the allegation that the decision of the Court was based on a manifest error on the face of the record resulting in the miscarriage of justice without any elaboration [to be] baseless."

103. Upon reviewing the record of the domestic proceedings, the Court finds that the Second Applicant has not made out any grounds necessitating this Court's interference with the findings from the domestic courts. All that the Second Applicant has done is to make a general allegation, without attempting to demonstrate and prove which, of his grounds of appeal, were actually not considered during the consideration of his appeal. In the circumstances the Court finds the Second Applicant's allegations without merit and accordingly dismisses them.

104. Overall, therefore, the Court finds that the Respondent State violated both Applicants' right to fair trial by reason of denial of free legal assistance but

that it did not violate the Applicants' right to fair trial due to the manner in which the domestic courts treated the evidence against the Second Applicant.

VIII. REPARATIONS

105. In respect of reparations, the First Applicant prays that the Court should order his release from prison and that he be paid compensation amounting to United States Dollar Five Hundred Thousand ($500 000) to cover the damages he has suffered due to "a fabricated case triggered by artificial evidence case of the respondent." He also prays that the Court should order compensation for his dependents.

106. In his submissions on reparations, the Second Applicant pleads as follows:

    i. The Applicant prays that this Court restores justice where it was overlooked and quash the conviction against him, sets aside the sentence and let him at liberty.
    ii. Award of reparations
    iii. Award of costs
    iv. Award of legal fees in the domestic courts and this Honourable Court.
    v. Damages.
    vi. The Applicant therefore prays for this Honourable Court to grant any other Order(s) or Relief(s) sought that this Honourable Court may deem fit.

*

107. In Response to the First Applicant's submission on reparations, the Respondent State prays the Court for the following:

    i. A declaration that, the Applicant's trial in the domestic courts of the Respondent State leading to the conviction and sentence was lawful and in accordance with national laws, the African Charter and other relevant international human rights instruments.

ii. A declaration that the Applicant's Application for reparations is unfounded and devoid of merit for failure to meet the test enshrined in the principles and prerequisites of reparations.
iii. An order for dismissal of the Application for reparations with costs.
iv. Any other order/relief this Honourable court deems fit and just to grant under the prevailing circumstances.

108. The Respondent State, in respect of the Second Applicant's submissions on reparations, prays for the following declarations and orders:

i. A Declaration that the Applicant has not violated the African Charter or the Protocol.
ii. A Declaration that the Applicant is not entitled to compensation of TSH 151 200 000.
iii. An Order to dismiss the Application and the Applicant's submission on reparations.
iv. Any other Order this Court might deem right and just to grant under the prevailing circumstances.

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109. The Court recalls Article 27(1) of the Protocol which provides that:

> If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of the fair compensation or reparation.

110. The Court considers that for reparations to be granted, the Respondent State should, first, be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where granted, reparation should cover the full damage suffered. It is also clear that it is always the Applicant that bears the onus of justifying the claims made.[27] As the Court has stated

[27] See, *Guehi v. Tanzania* (merits and reparations), *supra*, § 157. See also, *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31; *Lohé Issa Konaté v. Burkina Faso*

previously, the purpose of reparations is to place the victim in the situation he/she would have been in but for the violation.[28]

111. In relation to material loss, the Court recalls that it is the duty of an applicant to provide evidence to support his/her claims for all alleged material loss. In relation to moral loss, however, the Court restates its position that prejudice is assumed in cases of human rights violations and the assessment of the quantum must be undertaken in fairness looking at the circumstances of the case. [29] As such, the causal link between the wrongful act and moral prejudice "can result from the human rights violation, as a consequence thereof, without a need to establish causality as such".[30] The practice of the Court, in such instances, is to award lump sums for moral loss.[31]

112. The Court acknowledges that although Article 27 empowers it to "make appropriate orders" to remedy the violation of human rights, in line with its jurisprudence, it can only order the release of a convict in exceptional and compelling circumstances. Such exceptional circumstances could exist where the Court finds that the Applicant's conviction was based entirely on arbitrary considerations such that his continued imprisonment would be a miscarriage of justice.[32]

113. In respect of both Applicants, the Court confirms that they have failed to demonstrate the existence of any exceptional circumstances that would necessitate ordering their release. The Applicants' prayers for release are, therefore, dismissed.

(reparations) (3 June 2016) 1 AfCLR 346, §§ 52-59 and *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§ 27-29.

[28] *Lucien Ikili Rashidi v. United Republic of Tanzania* (28 March 2019) 3 AfCLR 13, § 118 and *Zongo and Others v. Burkina Faso* (reparations), *supra*, § 60.

[29] *Guehi v. Tanzania* (merits and reparations), *supra*, § 55; and *Rashidi v. Tanzania* (merits and reparations), *supra*, § 58.

[30] *Zongo and Others v. Burkina Faso* (reparations), *supra*, § 55; and *Konaté v. Burkina Faso* (reparations), *supra*, § 58.

[31] *Zongo and Others v. Burkina Faso* (reparations), *supra*, §§ 61-62.

[32] *William v. Tanzania*, *supra*, § 101 and *Makungu v. Tanzania*, *supra*, § 84.

114. However, the Court having found that the Respondent State violated the Applicants' right to free legal assistance, contrary to Article 7(1)(c) of the Charter, there is a presumption that both Applicants suffered moral prejudice.

115. In assessing the quantum of damages for the violation of the Applicants' right to free legal assistance, the Court bears in mind that it has adopted the practice of granting applicants an average amount of Three Hundred Thousand Tanzanian Shillings (TZS 300,000) in instances where legal aid was not availed by the Respondent State especially where the facts reveal no special or exceptional circumstances.[33] In the circumstances, and in the exercise of its discretion, the Court awards each of the Applicants the amount of Three Hundred Thousand Tanzanian Shillings (TZS 300,000) as fair compensation.

IX. COSTS

116. The Court observes that the Respondent State prays that the costs should be borne by both Applicants. The Court further observes that the Second Applicant prayed that the Court order costs against the Respondent State.

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117. The Court notes that Rule 32(2) of the Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs, if any".[34]

118. In the circumstances, the Court does not find any reason for departing from the stipulation in Rule 32(2) and, therefore, orders that each Party shall bear its own costs.

[33] *Evarist v. Tanzania* (merits), *supra*, § 90; and *Paulo v. Tanzania* (merits), *supra*, § 111.
[34] Formerly Rule 30(2) of the Rules of 2 June 2010.

X. OPERATIVE PART

119. For these reasons:

THE COURT,

Unanimously:

On jurisdiction

i. *Dismisses* the objections to its material jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections to the admissibility of the Application;
iv. *Declares* that the Application is admissible.

On the merits

v. *Holds* that the Respondent State did not violate the Applicants' right to non-discrimination and equal protection of the law under Articles 2 and 3 of the Charter;
vi. *Holds* that the Respondent State did not violate the Applicants' right to fair trial under Article 7(1)(a) of the Charter;
vii. *Holds* that the Respondent State did not violate the Applicants' right to a fair trial, provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, due to the failure to accord the Applicants free legal assistance.

On reparations

Pecuniary reparations

viii. *Orders* the Respondent State to pay each of the Applicants the sum of Tanzanian Shilling Three Hundred Thousand (TZS300,000) as reparations for violation of their right to free legal assistance;

ix. *Orders* the Respondent State to pay the amount indicated under (viii) above free from taxes effective six (6) months from the date of notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

Non-pecuniary reparations

x. *Dismisses* both Applicants' prayers for release from prison.

On implementation and reporting

xi. Orders the Respondent State to submit to this Court, within six (6) months from the date of notification of the present Judgment, a report on the measures taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xii. *Orders* each Party to bear its own costs.

Signed:

Modibo SACKO, Vice-President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar.

Done at Arusha, this Fifth Day of September in the Year Two Thousand and Twenty-Three in English and French, the English text being authoritative.