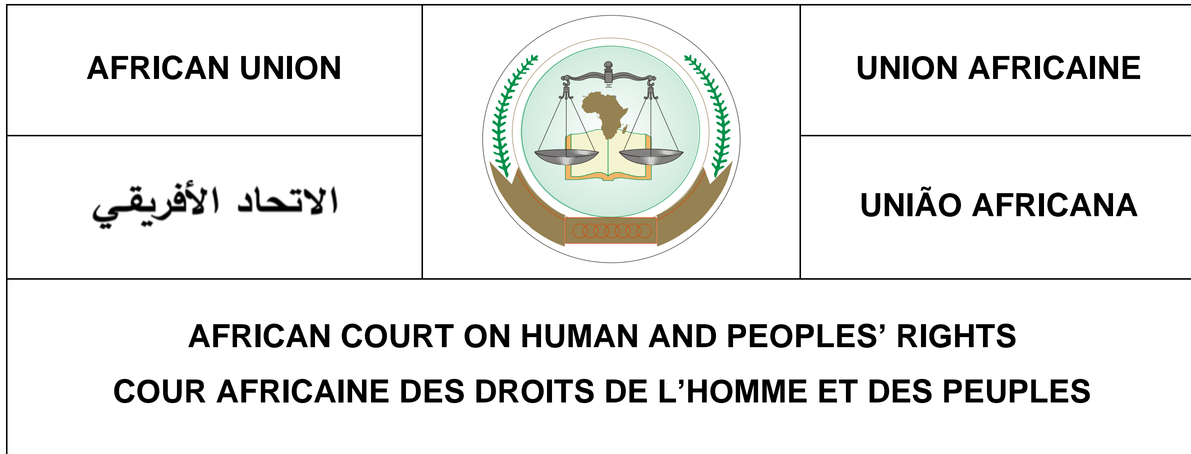

THE MATTER OF

MATOKE MWITA AND MASERO MKAMI V. UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 007/2016

JOINT DISSENTING OPINION OF

JUSTICES BEN KIOKO, TUJILANE R. CHIZUMILA AND DENNIS D. ADJEI

1. The facts of this case have been well outlined in the majority decision, and we are persuaded to adopt the same as ours. We shall be referring to the relevant portion of the facts of the case to buttress our position whenever we deem it necessary. Our dissenting opinion is grounded on the admissibility of the case and goes to the root of the application. We are of the considered opinion that the application is incompetent and should have been dismissed on grounds of inadmissibility, and we therefore depart from the majority decision, which seeks to undermine the established jurisprudence of the Court on admissibility, especially with regard to the requirement of filing an application within a reasonable time.

2. The Applicants were charged with rape and robbery with violence and arraigned before the District Court of Tarime in the Musoma Region. The District Court convicted the Applicants for both offences and sentenced

each of them to life imprisonment. The Applicants, dissatisfied and aggrieved by the conviction and sentence, appealed to the High Court, Nwanza. The High Court on 18 February 2002 affirmed the conviction by the District Court and declared the appeal unmeritorious. The High Court, however, substituted thirty (30) years of imprisonment for each Applicant in place of the life imprisonment imposed on the Applicants by the District Court.

3. The Applicants further appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal on 3 November 2004 dismissed the appeal in its entirety, set aside the thirty years imprisonment, and restored the life imprisonment imposed on them by the District Court.

4. The majority in this judgment, following their majority decision in Igola Iguna v. United Republic of Tanzania delivered on 1 December 2022, to which we dissented, has declared the application admissible even though the Applicants exhausted the local remedies on 3 November 2004 and sat on their rights for a period of well over 12 years, until 1 February 2016, when they filed the application to invoke the jurisdiction of this Court.

5. Undoubtedly, at the time the Applicants exhausted the domestic remedies on 1 November 2004, the Respondent State had not deposited the Declaration prescribed under Article 34(6) of the Protocol to accept the competence of the Court to entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it in accordance with Article 34(6) of the Protocol. The Applicants were serving their sentences and in custody when the Respondent State, on 29 March 2010, deposited the Article 34(6) Declaration conferring jurisdiction on the Court to receive applications from individuals and NGOs.

6. The right of the Applicants to file an application before the Court, therefore, accrued on 29 March 2010, when the Respondent State deposited the Declaration. Nevertheless, the Applicants were still obligated file their

applications within a reasonable time from that date and to show that the alleged violations were of a continuing nature and were therefore still continuing.

7. Article 6 of the Protocol mandates the Court to rule on the admissibility of any application taking into account the provisions of Article 56 of the Charter. Article 56(6) of the Charter provides that applications will not be received by the Court, unless they "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." The same provision is reproduced verbatim in Rule 50(2)(f) of the Rules of Court, which was Rule 40 of the Rules of 2 June 2016, the enabling Rules at the time the application was filed. Neither Article 56(6) of the Charter nor the Rules of Court provide a specific time limit and therefore, the Court has in its consistent jurisprudence resorted to a case-by-case approach.[1]

8. Article 56(6) of the Charter does not prescribe the time limit within which an application is to be filed, but the jurisprudence of the Court is that what is reasonable time is determined on a case-by-case basis and must be premised on established mitigating factors.[2] In this regard, the jurisprudence of the Court is that in assessing reasonableness for delay in seizing the Court, consideration should be given to the situation of the Applicant, namely whether he was incarcerated, lay and indigent without the benefit of legal assistance or had limited knowledge of the operation of this Court intimidation and fear of reprisal and the use of extra-ordinary remedies as relevant factors.[3] Further, where an applicant alleges mitigating factors,

[1] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (merits) (28 March 2014), 1 AfCLR 219 § 92. See also *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2014), 1 AfCLR 465 § 73.

[2] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse et-al v. Burkina Faso* (merits) (2014) 1 AfCLR 219, § 92. See also the case of *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.

[3] *Iguna v. Tanzania*, *supra*, § 35; *Thomas v. Tanzania*, *supra*, § 73; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

intended to persuade the Court to make his case admissible, he must prove same to the satisfaction of the Court.[4] A mere assertion of a mitigating factor shall not suffice unless the Respondent State does not deny or contradict it.

9. In the instant case, the Applicants failed to act within a reasonable time and waited until 1 February 2016 when they filed their application, to seek the reliefs contained in the application. The majority erroneously came to the conclusion that the period between 2007 and 2013 was the formative years of the Court's operation when the general public was not aware of its existence and time shall not run for the whole period, and as a result of that reasoning, the application was declared admissible. We are of the considered opinion that the basis for this moratorium is arbitrary and intended to overreach the provisions of the Charter, Protocol, the Rules of Court, and the established jurisprudence of the Court, which makes it mandatory for an applicant who is seeking relief from the Court to file the application within a reasonable time.

10. We are of the considered opinion that none of the mitigating factors that allow the Court to determine reasonable time on a case-by-case basis can inure to the benefit of the Applicant who has slept on his rights.

11. Additionally, the Court departed from its jurisprudence and fixed on its own a specific period of years when the public should be presumed not to have been aware of the existence of the Court without offering any empirical evidence to that effect or the methodology used to arrive at those dates, This finding by the Court *suo motu* without any submissions by the parties begs the question: why seven years and why not five or ten years? Why did the majority not invite the parties to make submissions on this novel concept?

[4] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse et-al v. Burkina Faso* (merits) (2014) 1 AfCLR 219, § 92. See also the case of *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.

12. We are mindful that this Court is a human rights Court and should be liberal to persons who allege that their human rights have been violated, but the rights to invoke human rights jurisdiction are time-bound in every jurisdiction and therefore help the vigilant and not the indolent. A person should not be permitted to keep a State in an uncertain situation as to whether a person whose case was heard by a domestic court would seek relief from a continental or regional court for human rights violations or not.

13. We note that the foregoing considerations have also found elsewhere. The Inter American Court construed Article 46 of the American Convention on Human Rights to the effect that no action shall be filed after six months from the date the final judgment was served on the person alleging violations of his rights. The European Court of Human Rights has religiously observed the four-month rule to maintain certainty and to prevent keeping the States in suspense as to whether a case would be brought against them in the foreseeable future or not.[5] The East African Court of Justice has construed Article 30 (2) of its Charter to the effect that no action shall be brought by a person who alleges violations of his rights after two months from the date of the judgment complained of, unless that person was in detention and the decision was not communicated to him.[6]

14. On its part, the Court has adopted a strict standard of proof on incremental basis with the effect that the longer an applicant delays filing his application, particularly for over five years, the stricter the Court's demand for justification and proof of such justification. For instance, in ***Godfred*** *Anthony and Another v. Tanzania*, the Court held that a delay of five (5) years and four (4) months was unreasonable even though the Applicants were "also incarcerated and thus restricted in their movement". The Court noted in this case that apart from simply describing themselves as "indigent", the applicants did not assert or provide "any proof that they were illiterate, lay,

[5] *Ramos Nunas de Carvalho e Sa v. Portugal* [GC] §§ 99-101 and *Sabri Gunes v. Turkey* [GC] 39.
[6] *Attorney-General of the Republic of Kenya v. Independent Medico Legal Unit*, Appeal No 1/211 and *The Attorney- General of the Republic of Rwanda v. Plaxeda Rugumba*, Appeal No 1 of 2012 delivered on 22 June 2012.

or had no knowledge of the existence of the Court."[7] The Court further observed that that "the Applicants were represented by legal counsel in their trial and appeals at the domestic level but they did not file for review of their final judgments".[8] In a similar fashion, in *Yusuph Said v. Tanzania*, the Court held[9] that a period of eight (8) years and three (3) months was an unreasonable lapse of time before the filing of an application. The Court opined that while the applicant was incarcerated, there was no indication on how the incarceration prevented him from filing his application timeously.[10] In *Chananja Luchagula v. Tanzania*, the Applicant was also a death-row inmate, but his application was found to be inadmissible as it was filed after a delay of six (6) years, five (5) months and fifteen (15) days.[11]

15. In the instant case, there was nothing on record to suggest that the Applicant was particularly "secluded" or was in any way in **a different situation** from other previous applicants who were in the same position as him. If the fact of being on the death row would automatically mean being cut off from the general population, the Court should have reached the same conclusion of admissibility as in *Godfred Anthony, Yusuf Said* and **Chananja Luchagula** cases.

16. We are of the view that taking into account the Court's jurisprudence on the need to bring human rights violations within a reasonable time so as to maintain certainty and consistency and not keep states in suspense as to whether litigation has ended or not, an application filed by an applicant about six years after the right accrued was not filed within a reasonable time and is therefore inadmissible.

17. In the light of the foregoing, we cannot agree with the majority decision, which is based on a novel hypothesis that lacks both a legal and factual

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[7] *Anthony and Kisite v. Tanzania* (jurisdiction and admissibility) (2019) 3 AfCLR 470, § 48.
[8] Ibid., § 49.
[9] *Yusuph Said v. United Republic of Tanzania*, ACtHPR, Application No. 011/2019, Ruling of 30 September 2021 (jurisdiction and admissibility), § 44.
[10] Ibid.
[11] *Chananja Luchagula v. United Republic of Tanzania*, ACtHPR, Application No. 011/2016, Ruling of 25 September 2020 (jurisdiction and admissibility), § 60.

basis, intended to defeat the clear and unambiguous language of the Protocol that established the Court. It is for the above reason that we hold that the application is inadmissible and not maintainable in law. We affirm our dissenting opinion in the case of *Igola Iguna v. Tanzania*, *supra*, and declare the application inadmissible.

Signed:

Justice Ben KIOKO;

Justice Tujilane R CHIZUMILA;

Justice Dennis D. ADJEI

Done at Arusha, this Thirteenth Day of June in the year Two Thousand and Twenty-Three, the English text being authoritative.