Dissenting Opinion of Justices Ben KIOKO, Ângelo V. MATUSSE, Tujilane R. CHIZUMILA and Stella I. ANUKAM

1. We agree substantially with the findings of the majority on the merits of this Application but there is one particular issue relating to costs under paragraph 89 of the judgment where we differ in our position from the majority. In the said paragraph, on the issue of costs, the majority has decided that "the Respondent State shall bear the costs". In our considered opinion, this decision of the majority requiring the Respondent State to bear all the costs in the instant case is not correct for the reasons we outline below.

2. At the outset, we wish to point out that international human rights litigation is mostly but not exclusively between an individual and a State and due to the nature of the proceedings and the unequal capacity of the Parties, it is not always the rule that the loser party bears costs, which may be the norm in other forms of litigation. In particular, in circumstances where the loser party is the individual, he or she shall not in principle be penalized for exercising his/her right to be heard by being required to bear the entire costs of the litigation.

3. The only exception to this principle would be if the State sufficiently demonstrates that the individual abused his/her rights or acted in bad faith by filing frivolous claims while having been fully aware/ knowing that he was not entitled to make such claims. Even when the bad faith of the individual is sufficiently vindicated, the financial capacity of the individual and the amount of costs that the State incurred should guide the determination of whether the former shall bear the costs. It therefore rests on the discretion of a Court to assess and identify, having regard to the specific contexts of each case, the party which shall incur the costs.

4. In the instant case, it is evident from the facts on record that the Respondent State has prayed the Court to order that the Applicant shall bear the costs. However, the Applicant has neither prayed for costs nor did he provide any supporting documents showing expenses in relation to his Application, if any.

5. On the other hand, the Court has, in our view rightly, found that the Respondent State has violated the right to defence of the Applicant by failing to provide him legal

assistance during his trial contrary to Article 7 (1) (c) of the Charter (See paragraph 71 of the Judgment). From this finding, it is clear that the Respondent State is the losing party and in accordance with the general default principle, that a losing party meets the costs of the suit, it would ordinarily be the case that it shall be the Respondent State to bear the costs.

6. However, Rule 30 of the Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs". According to this rule, the default principle for the Court is thus that each party bears its cost unless the Court decides otherwise. In the past, the Court has applied this rule on many occasions and held in majority of cases that each party covers its own costs, even where the Respondent State was found to be in breach of the Charter and other relevant human rights instruments. This has been the case also where neither of the Parties has filed submissions on costs.[1] This reinforces the fact that costs are not damages for the violations of human rights as such but a compensation or reimbursement of expenses incurred by the a party for the litigation.

7. The opinion of the majority in the instant case is therefore a clear departure from the Court's established position. While we do not have problems with this shift in approach, we nevertheless believe that the departure should have been necessitated by some cogent reasons or, at the minimum, supported by adequate justification, which the majority did not provide. Regrettably in another judgment, in the Matter of *Dicoles William v. United Republic of Tanzania,* delivered on the same day with similar facts relating to costs, the Court contradicted itself by deciding that each party shall bear its own costs, In spite of the fact that in that matter, as in the instant Application, the Applicant neither claimed costs nor provided any supporting documentation, and only the Respondent State prayed the Court to order the Applicant to bear the costs, the majority in this case agreed that each party bears its own costs.[2]

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[1] See Application No. 010/2015. Judgment 11/05/ 2018. Amiri Ramadhani v. United Republic of Tanzania, para. 90, Application No 046/2016, Judgment of 11/05/2018. APDF & IHRDA v Republic of Mali, para. 134, Application No. 011/2015, judgment 28/09/2017. Christopher Jonas v. United Republic of Tanzania, para. 98, Application No. 032/2015 – Kijiji Isiaga v. United Republic of Tanzania. Judgment of 21/03/2018 para. 101

[2] Application No. 016/2016. Judgment of 21/09/2018. Diocles William v United Republic of Tanzania, paras. 107-110

8. Consequently, we are of the view that the position of the Court in the instant case reveals an unjustified inconsistency in its decisions with respect to similar cases that the Court has concluded so far.

9. Furthermore, according to the established jurisprudence of other human rights courts, a party is entitled to a refund of costs and expenses only in so far as it is demonstrated that such costs or expenses have been actually and necessarily incurred and are reasonable as to quantum.[3] This requires that the applicant should substantiate his claims with evidence showing that he incurred the said costs or expenses and were indeed necessary for pursuing his Application.

10. This is not the case in the instant Application. As we indicated earlier, the Applicant has not made any submissions or prayed for costs, or provided documents indicating that he incurred any costs. While ordering the Respondent State to bear the costs, the majority also did not specify or reckon the necessary and reasonable costs that the Respondent State is expected to bear. Nor did the Court, as it has done in some other cases[4], indicate in the instant case that it will in a future separate proceeding, determine the exact amount of such costs that the Applicant is entitled to get reimbursement. It is thus not clear what the majority envisaged as costs that should be borne by the Respondent State, since the Applicant is self-represented and the Court does not charge any fees.

11. We therefore conclude that the majority should, for purpose of maintaining consistency, have followed the Court's established position that, in the absence of submissions or claims on costs from one or both parties, each party shall bear its own costs. Alternatively, the majority should have provided reasons to justify their departure from the court's established position.

[3] *Applications nos. 68762/14 and 71200/14.* Judgment of 20/09/2018. Case of Aliyev v. Azerbaijan, para. 236, Series C No. 352. Judgment of 13/03/2018, Case of Carvajal Carvajal et al. v. Colombia. Merits, Reparations and Costs. Inter-American Court of Human Rights, para. 230

[4] In some previous cases, the Court has deferred the issue of costs to a later stage to consider it together with other forms of reparations. See Application No. 012/2015. Judgment of 22 /03/2018. Anudo Ochieng Anudo v. United Republic of Tanzania, para. 131

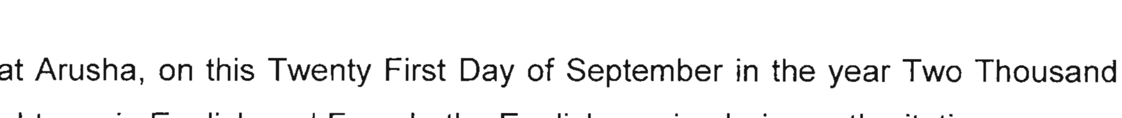
Signed:

Ben KIOKO, Vice- President;

Ângelo V. MATUSSE, Judge;

Tujilane R. CHIZUMILA, Judge;

Stella I. ANUKAM, Judge;



Done at Arusha, on this Twenty First Day of September in the year Two Thousand and Eighteen, in English and French, the English version being authoritative.