008/2015
26/09/2019
(000330-000306) JF

000330

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA

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

THE MATTER OF

SHUKRANI MASEGENYA MANGO & OTHERS

V

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 008/2015

JUDGMENT

(MERITS AND REPARATIONS)

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

26 SEPTEMBER 2019

TABLE OF CONTENTS

The Court composed of: Sylvain ORÉ, President; Ben KIOKO, Vice-President; Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, and Stella I. ANUKAM 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 8(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Imani D. ABOUD, member of the Court and a national of Tanzania did not hear the Application.

In the matter of
Shukrani Masegenya MANGO and Others

represented by:
William Ernest KIVUYO, East Africa Law Society

Versus

UNITED REPUBLIC OF TANZANIA
represented by:

i. Dr Clement J MASHAMBA, Solicitor General, Attorney General's Chambers;

ii. Ms. Sarah MWAIPOPO, Director, Constitutional Affairs and Human Rights, Attorney General's Chambers;

iii. Mr. Baraka LUVANDA, Head of Legal Unit, Ministry of Foreign Affairs and International Cooperation;

iv. Ms. Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers;

v. Mr Mark MULWAMBO, Principal State Attorney, Attorney General's Chambers;

vi. Ms. Aidah KISUMO, Senior State Attorney, Attorney General's Chambers;

vii. Mr. Elisha SUKU, Foreign Service Officer, Ministry of Foreign Affairs and International Cooperation.

After deliberation,

renders the following Judgment:

I. THE PARTIES

1. Shukrani Masegenya Mango, Ally Hussein Mwinyi, Juma Zuberi Abasi, Julius Joshua Masanja, Michael Jairos, Azizi Athuman Buyogela, Samwel M Mtakibidya (hereinafter referred to as "the Applicants") are all nationals of the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). The First Applicant, Shukrani Masegenya Mango, and the Seventh Applicant, Samwel M Mtakibidya, were both convicted and sentenced for armed robbery while the rest of the Applicants were convicted and sentenced for murder. Although the Applicants were convicted in different cases and at different times, they filed this Application jointly raising one major common grievance which relates to the exercise of the presidential prerogative of mercy by the Respondent State. With the exception of the Second Applicant, who died on 11 May 2015, all the Applicants are serving their sentences at Ukonga Central Prison in Dar es Salaam.

2. The Respondent State 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 also deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. SUBJECT MATTER OF THE APPLICATION

A. Facts of the matter

3. It emerges from the Application that the First Applicant, Shukrani Masegenya Mango, was charged with the offence of armed robbery before the District Court at Mwanza. On 7 May 2004 he was convicted and sentenced to serve a term of thirty (30) years imprisonment. The Seventh Applicant, Samwel M Mtakibidya, was also charged with the offence of armed robbery before the District Court of Handeni, Tanga. He was convicted and sentenced to thirty years imprisonment on 5 August 2002.

4. The Second Applicant, Ally Hussein Mwinyi, was charged with the offence of murder before the High Court, Dar es Salaam. He was convicted and sentenced to death on 15 February 1989. On 21 September 2005 his sentence was commuted to life imprisonment. The Third Applicant, Juma Zuberi Abasi, was charged with the offence of murder before the High Court, Dar es Salaam and on 27 July 1983 he was convicted and sentenced to death. On 14 February 2012 his sentence was commuted to life imprisonment.

5. The Fourth Applicant, Julius Joshua Masanja, was charged with the offence of murder before the High Court, Dodoma. On 11 August 1989 he was convicted and sentenced to death. On 13 February 2002 his sentence was commuted to life imprisonment. The Fifth Applicant, Michael Jairos, was charged with the offence of murder before the High Court, Morogoro. On 25 May 1999 he was convicted and sentenced to death. On 12 February 2006 his sentence was commuted to life imprisonment. The Sixth Applicant, Azizi Athuman Buyogela, was charged with the offence of murder before the High Court, Kigoma. In 1994 he was convicted and sentenced to death. His sentence was commuted to life imprisonment on 28 July 2005.

6. The Applicants have filed a joint application since they all claim to be aggrieved by the manner in which authorities in the Respondent State have exercised the prerogative of mercy which is vested in the President of the Respondent State. Additionally, the First Applicant and the Seventh Applicant are complaining about the legality of their sentence for the offence of armed robbery.

B. Alleged violations

7. All the Applicants submit that the Respondent State discriminates against prisoners serving long term sentences in the manner in which it implements the prerogative of mercy under Article 45 of its Constitution. In the Applicants' view, the Respondent State automatically excludes prisoners serving long term sentences from the prerogative of mercy thereby violating Article 2 of the Charter and Article 13(1) (2) (3) (4) and (5) of the Respondent State's Constitution. The Applicants further contend that prisoners serving long term sentences are isolated and discriminated against based on their social or economic status since they do not earn a pardon on the basis of their good behaviour after serving one third of their sentences unlike all other prisoners. This, the Applicants contend, is in violation of Articles 3, 19 and 28 of the Charter.

8. The Applicants further submit that the Respondent State treats prisoners convicted of corruption and other economic crimes lightly and favourably compared to other prisoners since they can access the presidential pardon twice, a condition, which is not afforded to other convicts. The Applicants' contend that this violates Article 3(1) and (2) of the Charter, Article 7 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Article 107A 2(a) of the Respondent State's Constitution.

9. The Applicants also submit that the Respondent State's implementation of the prerogative of mercy discriminates among prisoners who were

convicted for the same offence since some are released while others are condemned to life in prison. In the Applicants view this amounts to a violation of Article 4 of the Charter.

10. It is also the Applicants' submission that sections 445 and 446 of the Prison Standing Orders (4th Edition) 2003 direct that every case involving a sentence of life imprisonment should be submitted to the President for review. The Applicants aver that these provisions are not being implemented by the Respondent State especially in connection with prisoners serving long term sentences. The Applicants further submit that the Respondent State applies parole discriminately only benefitting those convicted of minor offences. According to the Applicants, this distinction in the implementation of the law, and the denial of parole is cruel and amounts to a violation of Article 9 (1) and (2) of the Charter and Article 5 of the UDHR.

11. The Applicants also submit that prisoners do not get paid for the work they do while in prison and that upon release they are not given a starting capital or pension but simply abandoned which is in violation of Article 15 of the Charter.

12. The Applicants further submit that their rights were violated by the lengthy period that they spent on remand pending the conclusion of their trials. They submit that the period that they spent on remand was not considered and/or deducted from their sentences which is in violation of Article 5 of the Charter and Article 5 of the UDHR.

13. The Applicants further submit that it is pointless to file a constitutional case in the High Court of the Respondent State because it is not independent, fair and just especially when it adjudicates cases that implicate failures in the judicial system. In the Applicants' view, the Respondent State discredits all such matters without hearing the merits thereby violating Articles 8 and 10 of the UDHR.

14. In addition to the above claims, which relate to all the Applicants, the First Applicant and the Seventh Applicant submit that the sentences imposed on them, thirty (30) years imprisonment, was heavier than the penalty in force at the time of their conviction. It is their submission, therefore, that their sentences are contrary to Article 13 (6)(c) of the Respondent State's Constitution and section 285 and 286 of the Respondent State's Penal Code. It is also the contention of the Applicants, that sections 4(c) and 5(a) of the Minimum Sentences Act are invalid as they contravene Article 64(5) of the Constitution of the Respondent State hence the sentences imposed upon them are illegal, unconstitutional and in violation of Article 7(2) of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

15. The Application was filed on 17 April 2015 and on 28 September 2015 it was served on the Respondent State.

16. On 22 September 2016, the Registry received the Respondent State's Response to the Application.

17. On 26 September 2017, the Registry received the Applicant's Reply to the Respondent State's Response and this was transmitted to the Respondent State on 2 October 2017.

18. On 10 May 2018, the Registry received the Applicant's submissions on reparations and these were transmitted to the Respondent State on 22 May 2018.

19. Notwithstanding several reminders and extensions of time, the Respondent State did not file submissions on reparations.

20. On the 11 April 2019, pleadings were closed and the Parties were duly informed.

IV. PRAYERS OF THE PARTIES

21. Although the First Applicant and the Seventh Applicant have an additional claim which is distinct from the allegations that all the Applicants have jointly made, the Applicants have not desegregated their prayers and they have jointly prayed the Court for the following:

    i. An order that the application is admissible;

    ii. An order declaring that their basic rights have been violated through the unconstitutional acts of the Respondent State;

    iii. An order that they "regain and enjoy" their fundamental rights in respect of the violations perpetrated by the Respondent State;

    iv. An order that the Respondent State recognise the rights and duties enshrined in the Charter and take legislative and other measures to give effect to them;

    v. An order nullifying the Respondent State's decisions violating the Applicants rights and ordering their release from custody;

    vi. An order for reparations;

    vii. Any other order(s)/relief(s)/remedies as the Court may be pleased to grant and as seems just in the circumstances of the case.

22. In respect of the jurisdiction and admissibility of the Application, the Respondent State prays the Court to grant the following orders,:

    "i. That, the African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this matter.

ii. That, the Application has not met the admissibility requirements stipulated under Rule 40 (5) of the Rules of Court or Article 56 and Article 6(2) of the Protocol.

iii. That, the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court or Article 56 and Article 6(2) of the Protocol.

iv. That, the Application be deemed inadmissible.

v. That, the Application be dismissed with costs. "

23. In respect of the merits of the Application, the Respondent State prays the Court to order the following:

"i. That, the Respondent has not violated Articles 13(1) (2) (3) (4) and (5), 13(6)(c) and 107A(2) (a) of the Constitution of the United Republic of Tanzania.

ii. That, the Respondent has not violated Article 2, 3(1)(2), 4,5,7(2), 9(1)(2), 15,19 and 28 of the African Charter on Human and Peoples' Rights.

iii. That, the Respondent has not violated Articles 5, 7, 8 and 10 of the Universal Declaration of Human Rights.

iv. That, the Respondent State is not unlawfully detaining the Applicants and has not violated their fundamental rights.

v. That, the Respondent State does not discriminate between long term and short term prisoners.

vi. That, Sections 4(c) and 5(a) of the Minimum Sentence Act are valid and do not infringe the fundamental rights of the Applicants.

vii. That, Section 4(c) and 5(a) of the Minimum Sentence Act are in conformity with Articles 64(5) of the Constitution of the United Republic of Tanzania, 1977.

viii. That, the sentence of Thirty years imprisonment for the offence of Armed Robbery was lawful.

ix. That, the Application lacks merits and should be dismissed.

x. That, the Applicants should not be awarded reparations.

xi. That, the costs of this Application be borne by the Applicants."

V. JURISDICTION

24. Pursuant to Article 3(1) of the Protocol, "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." Further, in terms of Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction ...".

A. Objections to material jurisdiction

25. The Respondent State raises two objections relating to the material jurisdiction of the Court: firstly, that the Applicants are asking the Court to act as a court of first instance, and, secondly, that in so far as the First Applicant is concerned, this action is an abuse of process and it amounts to commencing multiple actions over the same facts.

i. **Objection on the ground that the Court is being asked to sit as a court of first instance**

26. The Respondent State submits that the Applicants are asking the Court to act as a court of first instance and deliberate over matters that have never been adjudicated on by its municipal courts. The Respondent State further submits that the Court does not have jurisdiction to sit as a court of first instance. In support of its contention, the Respondent State points out that all the Applicants are challenging the constitutionality of section 51 of the Prisons Act, 1967; sections 445 and 446 of the Prison Standing Orders and also the Parole Act. Additionally, the First Applicant and the Seventh Applicant, are also challenging the constitutionality of sections 4(c) and 5(a) of the Minimum Sentences Act. All the Applicants are also alleging a violation of Article 13 of the Respondent State's Constitution. It is the submission of the Respondent State that all the Applicants have never raised any of these challenges before its domestic courts.

27. The Applicants, in their Reply, contend that the Court has jurisdiction as per Article 3 of the Protocol and Rule 26(a) of the Rules. It is the Applicants' submission that the essence of their prayers give the Court jurisdiction since their Application is inviting the Court to review the conduct of the Respondent State in light of the international standards and human rights instruments that it has ratified.

***

28. The Court notes that the crux of the Respondent State's objection is that it is being asked to sit as a court of first instance. Although the Respondent State has raised this objection as relating to the Court's material jurisdiction, the Court notes that the Respondent State has, essentially, argued that the matter is not competently before the Court since all the Applicants never attempted to activate domestic mechanisms to remedy their grievances.

29. In so far as the Respondent State's objection relates to exhaustion of domestic remedies, the Court will address this issue later in this judgment. Nevertheless, the Court recalls that, by virtue of Article 3 of the Protocol, it has material jurisdiction in any matter so long as "the Application alleges violations of provisions of international instruments to which the Respondent State is a party."[1] In the instant Application, the court notes that all the Applicants are alleging violations of the Charter, to which the Respondent State is a Party, and the UDHR. In respect of the UDHR, the Court recalls that in *Anudo Ochieng Anudo v United Republic of Tanzania* it held that while the UDHR is not a human rights instrument subject to ratification by States, it has been recognised as forming part of customary law and for this reason the Court is enjoined to interpret and apply it.[2]

30. In light of the above, the Court, therefore, finds that it has material jurisdiction in this matter.

ii. Objection alleging that the Application violates the rules on *res judicata*

31. The Respondent State submits that the First Applicant, Shukrani Masegenya Mango, already filed an Application before the Court – Application No. 005 of 2015 – in which he raised the same matters that he is raising now. For this reason, the Respondent State contends that the Court does not have jurisdiction to hear the same matters that were already raised before it.

32. The Court notes that the Applicants' did not make any submission on this point.

---

[1] See, Application No. 025/2016. Judgment of 28/03/2019 (Merits and Reparations), *Kenedy Ivan v United Republic of Tanzania* (hereinafter referred to as "*Kenedy Ivan v Tanzania*") §§ 20-21; Application No. 024/2015. Judgment of 7/11/18 (Merits and Reparations), *Armand Guehi v. United Republic of Tanzania* § 31; Application No. 006/2015. Judgment of 23/03/18 (Merits), *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* § 36.

[2] Application No. 012/2015. Judgment of 23/03/2018 (Merits), § 76.

***

33. The Court notes that this objection only relates to the First Applicant in this Application. The Court recalls that the Applicants in Application No. 005/2015 were Thobias Mang'ara Mango and Shukrani Masegenya Mango. It is clear, therefore, that the First Applicant in the present matter was indeed party to earlier litigation before the Court. The Court recalls that Application No. 005/2015 was filed on 11 February 2015 and judgment was delivered on 11 May 2018. As earlier pointed out, the Applicants filed the present Application on 17 April 2015. Clearly, therefore, as at the time the present Application was being filed, the Applicant had a separate but subsisting claim pending before the Court.

34. The Court also notes, however, that in Application No. 005/2015 the Applicants raised a range of alleged violations of their rights pertaining to the manner in which they were detained, tried and convicted by the judicial authorities of the Respondent State.[3] Admittedly, as part of the claims, in Application No. 005/2015, the First Applicant also argued that he was condemned to serve a sentence of thirty (30) years imprisonment for armed robbery when this was not the applicable sentence at the time the offence was committed, which is also exactly the same claim that he is jointly raising with the Seventh Applicant in this matter.

35. The Court observes that although the Respondent State raises this issue as an objection to the Court's material jurisdiction, it is an allegation contesting the admissibility of the First Applicant's claim on the basis that it violates the rules on *res judicata* as captured under Article 56(7) of the Charter. The Court will, therefore, consider this objection, if need be, when it is dealing with the admissibility of the matter.

[3] Application No. 005/2015. Judgment of 11/05/2018 (Merits), *Thobias Mang'ara Mango and Another v United Republic of Tanzania* §§11-12.

B. Other aspects of jurisdiction

36. The Court notes that the other aspects of its jurisdiction are not contested by the Parties and nothing on the record indicates that the Court lacks jurisdiction. The Court thus holds that:

    i. It has personal jurisdiction given that the Respondent State is a party to the Protocol and it deposited the required Declaration.

    ii. It has temporal jurisdiction as the alleged violations were continuing at the time the Application was filed, which is after the Respondent State became a party to the Protocol and deposited its Declaration.

    iii. It has territorial jurisdiction given that the alleged violations occurred within the territory of the Respondent State.

37. In light of the foregoing, the Court finds that it has jurisdiction to hear the Application.

VI. ADMISSIBILITY

38. In terms of 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." Pursuant to Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of ... the admissibility of the Application in accordance with Article 50 and 56 of the Charter, and Rule 40 of these Rules."

39. Rule 40 of the Rules, which in essence restates Article 56 of the Charter, stipulates that Applications shall be admissible if they fulfil the following conditions:

    "1. Indicate their authors even if the latter request anonymity,

2. Are compatible with the charter of the organization of African Unity or with the present Charter,

3. Are not written in disparaging or insulting language'

4. Are not based exclusively on news disseminated through the mass media,

5. Are filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,

6. Are filed within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and

7. Do not deal with cases which have been settled by the States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provision of the present Charter."

40. While the Parties do not dispute that some of the admissibility requirements have been fulfilled, the Respondent State raises two objections. The first one relates to the exhaustion of domestic remedies, and the second one relates to whether the Application was filed within a reasonable time after the exhaustion of domestic remedies.

41. The Respondent State avers that the Applicants did not exhaust local remedies because they never raised the allegations presented to this Court before any of its municipal courts. The Respondent State submits that the Applicants could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act challenging the alleged violations of their rights especially in relation to the alleged discrimination by virtue of the exercise of the presidential prerogative of mercy.

42. The Respondent State further submits that except for the First Applicant, the Fifth Applicant and the Sixth Applicant, all the other Applicants never

applied for review of their original cases though they lodged appeals at the Court Appeal which were dismissed.

43. The Applicants assert that convicts serving long term sentences who exhaust all local remedies in their original cases have no other available domestic remedy and that the only opportunity to address their grievances is found under Article 45 of the Constitution of the Respondent State which refers to the prerogative of mercy by the President of the Respondent State.

44. The Applicants also submit that it is useless for them to utilise the avenue provided by the Basic Rights and Duties Enforcement Act, since the Respondent State's courts are not independent, fair and just in adjudicating matters that involve the judicial system itself.

45. In their Reply, the Applicants further submit that all of them except the Second Applicant appealed to the Court of Appeal against their convictions but their appeals were dismissed. They further contend that there is no other judicial avenue, in the Respondent State, for pursuing a remedy after the Court of Appeal.

***

46. The Court notes that the crux of the Respondent State's objection is that the Applicants should have first filed a constitutional petition challenging, among other things, the constitutionality of the Prisons Act and the Parole Act.

47. The Court also notes that the gravamen of the Applicants' case revolves around the manner in which Respondent State has implemented the presidential prerogative of mercy. All the other violations alleged by the Applicants have, in one way or the other, been linked to the exercise of the prerogative of mercy.

48. In resolving the admissibility of this Application the Court considers it apposite to make a distinction among the Applicants before pronouncing itself on this issue. On the one hand, all the Applicants are, primarily, alleging a violation of their rights to equality and non-discrimination by reason of the exercise of the presidential prerogative of mercy and, on the other hand, the First Applicant and the Seventh Applicant, in addition to the claims made by everyone else, are also challenging the legality of their sentences for armed robbery. The Court will proceed to deal with these allegations seriatim.

49. In relation to the alleged violation of the Applicants rights by reason of the exercise of the presidential prerogative of mercy, the Court notes that the Applicants do not dispute that the avenue offered by the Basic Rights and Duties Enforcement Act was available to them whereby they could have challenged, before the High Court, the alleged violation of their rights. Instead, the Applicants contend that "it is so useless and senseless to refile an application to the high court of the respondent state" since "the tribunal/court is not independent, fair and just in adjudicating justice to the parties particularly to which refers to judicial system ...".

50. The Court recalls that in *Diakite Couple v Republic of Mali* it held that "exhausting local remedies is an exigency of international law and not a matter of choice; that it lies with the Applicant to take all such steps as are necessary to exhaust or at least endeavour to exhaust local remedies; and that it is not enough for the Applicant to question the effectiveness of the State's local remedies on account of isolated incidents."[4]

51. In this Application, the Court finds that all the Applicants could have approached the High Court to challenge the legality of the exercise of the presidential prerogative of mercy, the Prisons Act, the Parole Act and

[4] Application No. 009/2016. Judgment of 26/09/2017 (Jurisdiction and Admissibility), *Diakite Couple v Republic of Mali* § 53.

other laws which they perceive to be implicated in the discrimination that they allegedly suffered. It was not open to the Applicants to offhandedly dismiss the remedies available within the Respondent State without attempting to activate them.

52. In the circumstances, the Court finds that the Applicants failed to exhaust local remedies as stipulated under Article 56(5) of the Charter and as restated in Rule 40(5) of the Rules.

53. The Court recalls that admissibility requirements under the Charter and the Rules are cumulative such that where an Application fails to fulfil one of the requirements then it cannot be considered.[5] In the circumstances, therefore, the Court does not consider it necessary to examine the other admissibility requirements in so far as they relate to the allegation by all the Applicants that their rights were violated as a result of the exercise of the presidential prerogative of mercy.

54. In light of the above, the Court finds that the Application, in so far as it relates to all the Applicants and their allegation of a violation of their rights due to the exercise of the presidential prerogative of mercy, is inadmissible for failure to fulfil the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules.

55. The above notwithstanding, the Court recalls that the First Applicant and the Seventh Applicant made an additional allegation which is distinct from the allegations made by all the Applicants jointly and this pertains to the legality of their sentence for armed robbery. In this connection the Court notes, firstly, that the legality of their sentence for robbery implicates their right to fair trial.

[5] Application No. 016/2017. Ruling of 28 March 2019, (Jurisdiction and Admissibility), *Dexter Johnson v Ghana* § 57.

56. The Court further notes that both the First Applicant and the Seventh Applicant appealed their convictions and sentences to the Court of Appeal which dismissed the appeals. The question of the legality of their conviction and sentence, therefore, was enmeshed in the bundle of rights and guarantees due to the Applicants which the Court of Appeal could have pronounced itself on during the hearing of the appeals. The Court of Appeal, therefore, which is the highest court in the Respondent State, had the opportunity to pronounce itself on the allegation pertaining to the legality of the Applicants' sentences.

57. Secondly, the Court, recalling its jurisprudence, reiterates its position that the remedy of a constitutional petition, as framed in the Respondent State's legal system, is an extraordinary remedy that an applicant need not exhaust before approaching the Court.[6] For this reason, the Court holds that the First Applicant and Seventh Applicant need not have filed a constitutional petition before approaching the Court.

58. The Court, therefore, holds that the Application is admissible in so far as it relates to the allegations by the First Applicant and the Seventh Applicant. The Respondent State's objection is, therefore, dismissed.

59. The Court, having declared inadmissible the joint allegations by all the Applicants and having only admitted the allegation by the First Applicant and the Seventh Applicant will now proceed to examine the merits of this allegation.

VII. MERITS

60. The First Applicant and the Seventh Applicant submit that their fundamental rights under Article 13(6)(c) of the Respondent State's

[6] Application No. 053/2016. Judgment of 28/03/2019 (Merits), *Oscar Josiah v United Republic of Tanzania*, §§38-39 and Application No. 006/2013. Judgment of 18/03/2016 (Merits), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, § 95.

56. The Court further notes that both the First Applicant and the Seventh Applicant appealed their convictions and sentences to the Court of Appeal which dismissed the appeals. The question of the legality of their conviction and sentence, therefore, was enmeshed in the bundle of rights and guarantees due to the Applicants which the Court of Appeal could have pronounced itself on during the hearing of the appeals. The Court of Appeal, therefore, which is the highest court in the Respondent State, had the opportunity to pronounce itself on the allegation pertaining to the legality of the Applicants' sentences.

57. Secondly, the Court, recalling its jurisprudence, reiterates its position that the remedy of a constitutional petition, as framed in the Respondent State's legal system, is an extraordinary remedy that an applicant need not exhaust before approaching the Court.[6] For this reason, the Court holds that the First Applicant and Seventh Applicant need not have filed a constitutional petition before approaching the Court.

58. The Court, therefore, holds that the Application is admissible in so far as it relates to the allegations by the First Applicant and the Seventh Applicant. The Respondent State's objection is, therefore, dismissed.

59. The Court, having declared inadmissible the joint allegations by all the Applicants and having only admitted the allegation by the First Applicant and the Seventh Applicant will now proceed to examine the merits of this allegation.

VII. MERITS

60. The First Applicant and the Seventh Applicant submit that their fundamental rights under Article 13(6)(c) of the Respondent State's

[6] Application No. 053/2016. Judgment of 28/03/2019 (Merits), *Oscar Josiah v United Republic of Tanzania*, §§38-39 and Application No. 006/2013. Judgment of 18/03/2016 (Merits), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, § 95.

Constitution have been violated since they were sentenced to a penalty of thirty (30) years imprisonment when the said penalty was heavier than the penalty in force at the time they committed their offences. They further submit that the offence of armed robbery came into existence via the enactment of Section 287A under Act No. 4 of 2004 which amended the Penal Code.

61. The First Applicant and the Seventh Applicant also submit that Section 4(c) and 5(a)(ii) of the Minimum Sentences Act are invalid as they contravene Article 64(5) of the Constitution.[7] They thus submit that the penalty imposed on them is unconstitutional for violating Article 7(2) of the Charter.

62. The Respondent State submits that the applicable sentence for the offence of armed robbery is a term of 30 (thirty) years as stipulated under Section 5 of the Minimum Sentences Act. The Respondent State further avers that the offence of armed robbery was in existence before the enactment of Section 287A of the Penal Code.

63. The Respondent State further submits that Sections 4(c) and 5(a) of the Minimum Sentences Act are valid since they do not in any way contravene Article 64(5) of the Respondent State's Constitution.

***

64. The Court notes that notwithstanding the submissions by the First Applicant and the Seventh Applicant, on the alleged violation of their right to fair trial by reason of their sentence, in their Reply the Applicants stated

[7] Section 4(c) provides thus: "Where any person is, after the date on which this Act comes into operation, convicted by a court of a scheduled offence, whether such offence was committed before or after such date, the court shall sentence such person to a term of imprisonment which shall not be less than– (c) where the offence is an offence specified in the Third Schedule to this Act, thirty years." And Section 5(a)(ii): "Notwithstanding the provisions of section 4– (a) (ii) if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons, or if at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to imprisonment to a term of not less than thirty years

violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

70. The Court notes that, in the instant case, no violation has been established and therefore the question of reparations does not arise. The Court, therefore, dismisses the prayer for reparations.

IX. COSTS

71. The Applicants pray that costs should be borne by the Respondent State.

72. The Respondent State prays the Court to dismiss the Application with Costs.

***

73. The Court notes that Rule 30 of the Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs."

74. In view of the above provision, the Court holds that each Party shall bear its own costs.

X. OPERATIVE PART

75. For these reasons,

The COURT,

Unanimously;

On jurisdiction

(i) *Dismisses* the objections on lack of jurisdiction;

(ii) *Declares* that it has jurisdiction.

On admissibility

By a majority Eight (8) for, and Two (2) against, Justices Rafaâ BEN ACHOUR and Chafika BENSAOULA dissenting:

(iii) *Declares* that the Application is inadmissible in relation to all the Applicants, for failure to comply with the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules, in so far as it relates to the allegation of violation of the Applicants' rights by reason of the exercise of the presidential prerogative of mercy;

(iv) *Declares* the Application admissible in respect of the allegation by the First Applicant and the Seventh Applicant in relation to the legality of their sentence for armed robbery;

On merits

(v) *Finds* that the Respondent State has not violated the First Applicant's and Seventh Applicant's right to fair trial under Article 7(2) of the Charter by reason of their sentences for armed robbery.

On reparations

(vi) *Dismisses* the prayer for reparations.

On costs

(vii) Decides that each Party shall bear its own costs.

Signed:

Sylvain ORÉ, President;

Ben KIOKO, Vice-President;

Rafaâ BEN ACHOUR, Judge;

Ângelo V. MATUSSE, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules, the separate opinion of Justice Blaise TCHIKAYA and the Dissenting Opinions of Justices Rafaâ BEN ACHOUR and Chafika BENSAOULA are attached to this Judgment.

Done at Arusha, this 26th Day of September in the year Two Thousand and Nineteen, in English and French, the English text being authoritative.