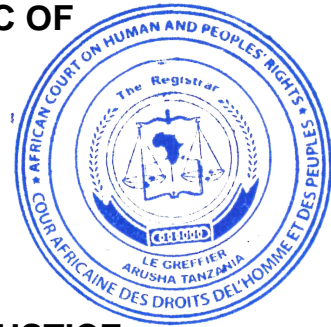


**THE MATTER OF JEBRA KAMBOLE V. UNITED REPUBLIC OF  
TANZANIA  
APPLICATION NO. 018/2018**



**JUDGMENT OF 15 JULY 2020**

**JOINT SEPARATE OPINION BY JUSTICE BEN KIOKO AND JUSTICE  
ANGELO V. MATUSSE**

1. We agree with the majority in terms of the finding of a violation of Articles 1, 2 and 7(1)(a) of the Charter. We also voted in favour of the Court finding a violation of Article 3(2) of the Charter. On the latter point, the majority found that the Respondent State did not violate Article 3(2) of the Charter and it is on this account that we proffer this separate opinion.
2. The Court, correctly in our view, held that article 41(7) of the Constitution of the United Republic of Tanzania violates Article 2 of the African Charter on Human and Peoples Rights (the Charter). Article 2 of the Charter, it must be recalled, guarantees the right to non-discrimination in relation to the enjoyment of all rights and freedoms enshrined in the Charter. We agree that the practical effect of article 41(7) of the Constitution of Tanzania is to impose a distinction among litigants such that litigants seeking to challenge the results of a presidential election are treated differently from other litigants. We, however, differ with the majority and hold the view that the same conduct, which was correctly found to have infringed Article 2 of the Charter, also automatically, on the facts of the present case, infringed Article 3(2) of the Charter.
3. In our view, the Charter's provisions on non-discrimination and equality broadly follow the scheme contained in the International Covenant on Civil and Political Rights (ICCPR). Just as is the case with the ICCPR, the Charter has a provision proscribing discrimination of any kind in relation to the enjoyment of all rights in the Charter (article 2) and a separate provision that, in a general way that is not limited to Charter rights, seeks to secure equality before the law and equal protection of the law. The corresponding ICCPR provisions are articles 2 and 26.
4. The result of the scheme created by Articles 2 and 3 of the Charter is that while Article 2 limits the application of the principle of non-discrimination to rights contained in the Charter, Article 3 does not have a similar restriction. Ultimately, therefore, Article 3 stipulates that all persons are equal before the law and entitled to equal protection of the law without any discrimination. In doing this, Article 3 does not simply replicate the provisions of Article 2 but creates an autonomous right proscribing discrimination in law and in fact in any field regulated and protected by public authorities.<sup>1</sup> Specifically in terms of national

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<sup>1</sup> "CCPR General Comment No. 18: Non-discrimination"  
<<https://www.refworld.org/docid/453883fa8.html>>

laws and Article 3(2) of the Charter, the obligation of State Parties is to ensure that the content of any legislation adopted is not discriminatory in substance or effect.

5. The presentation of the Articles 2 and 3 in the Charter and articles 2 and 26 of the ICCPR, demonstrates clearly the affinity between non-discrimination, on the one hand, and equality, on the other hand, as principles of human rights law. As a matter of fact, it is correct to view the principle of non-discrimination as possessing two dimensions: non-discrimination and equality.<sup>2</sup> It is, therefore, not uncommon to see the two terms used interchangeably since they are, in any event, two sides of the same coin. “Equality” represents the positive statement of the principle while “non-discrimination” stands for the negative statement of the principle. Thus, in practice, one can say he/she has been treated equally if he/she has not been discriminated against and conversely one can say he/she has been discriminated against if he/she has not been treated equally.
6. The right to equality before the law requires that “all persons shall be equal before the courts and tribunals”.<sup>3</sup> In *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh and 13 others v Angola*,<sup>4</sup> the African Commission on Human and Peoples’ Rights (the Commission) referred to the United States Supreme Court decision in *Brown v Board of Education of Topeka*<sup>5</sup> wherein the right to equal protection of the law was defined as the right of all persons to have the same access to the law courts and to be treated equally by the law courts, both in the procedure and in the substance of the law. Further, in *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana* the Commission stated that:

... the right to equal protection of the law envisaged under Article 3 of the African Charter consists of the right of all persons to have the same access to the law and Courts, and to be treated equally by the law and Courts, both in procedures and in the substance of the law. While it is akin to the right to due process of law, it applies particularly to equal treatment as an element of fundamental fairness. It is a guarantee that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property.<sup>6</sup>

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<sup>2</sup> Mpoki Mwakagali “International Human Rights Law and Discrimination Protections: A Comparison of Regional and National Responses” <[https://brill.com/view/journals/rpcd/1/2/article-p1\\_1.xml?language=en](https://brill.com/view/journals/rpcd/1/2/article-p1_1.xml?language=en)>

<sup>3</sup> *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 AfCLR 218 § 85 and *George Maili Kemboge v United Republic of Tanzania* (merits) (2018) 2 AfCLR 369 § 49.


<sup>4</sup> *IHRDA (on behalf of Esmaila Connateh and 13 Others v Angola* (2008) AHRLR (ACHPR 2008) 43 § 46.

<sup>5</sup> *Brown v Board of Education of Topeka* 347 US 483 (1954).

<sup>6</sup> *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana* (2011) AHRLR 3 (ACHPR 2011) § 59.

7. Article 41(7) of the Respondent State's Constitution, in our view, has the effect of removing from judicial scrutiny any determination by the Electoral Commission pronouncing a candidate as a winner of a presidential election. Notably, however, a challenge against the declaration of a winner of a presidential election may implicate the rights of the Respondent State's citizens, for example, under Article 13 of the Charter. The net result of article 41(7) of the Respondent State's Constitution, however, is that irrespective of the grievances that one may have with the declaration of the winner of a presidential election, no court can inquire into any such grievance. Citizens in the Respondent State, therefore, do not have the same opportunity in terms of accessing the Courts for relief on their grievances.
8. We also feel obliged to highlight that although the Respondent State pleaded the doctrine of margin of appreciation, this doctrine does not amount to a blanket licence for States to choose haphazardly the measures for implementation of Charter rights. Even within the context of the doctrine of the margin of appreciation, and as States craft measures for the Charter's implementation, it remains important that States preserve the spirit of the Charter and the values underlying it.
9. In relation to the present case, we find that the Respondent State has failed to provide details, which would justify barring any court of law from inquiring into the election of a president subsequent to the Electoral Commission announcing the results of an election.
10. Further, in the absence of arguments by the Respondent State as to the reasonableness or necessity of the provisions of article 41(7) of its Constitution, we believe the Court should have found that the Applicant's right to equal protection of the law guaranteed under Article 3(2) of the Charter has been violated.
11. We particularly find it difficult to understand how the same conduct which the majority correctly determined to be against the principle of non-discrimination could somehow pass the test for equal treatment. In our view, the same reasoning used to support a finding of a violation of Article 2 could have been used to support a violation of Article 3(2) of the Charter.

Ben Kioko: 

Angelo Matusse: 

Dated the 15<sup>th</sup> day of July 2020.

