

**Jointly Dissenting Opinion in Application No. 012/2015 Anudo Ochieng Anudo v. The United Republic of Tanzania**

We disagree with the Court's decision with respect to some of the Applicant's prayers relating to the alleged material prejudice he suffered, namely:

- Loss of income owing to loss of employment
- Loss of income accruing from the Applicant's business
- Losses related to two vehicles and a motorcycle.

**i) Loss of income owing to loss of employment**

1. In his allegations, the Applicant states that he was employed as the Director of an NGO called "Tanzania Human for Peoples Rights," and Coordinator of the NGO "Fog Water Project" at Ped World, that he was paid a substantial salary. He further claims to have lost the sum of, Seventy-Six Thousand, Five Hundred United States Dollars (USD 76,500) which is equivalent to forty-five (45) months' salary, starting from the date he was expelled to 1 June 2018 when he filed his submissions on reparations before this Court.
2. In its decision, the Court found that the copies of the salary payment slip tendered are sufficient evidence of an employment relationship between the Applicant and the NGO "Tanzania Human for Peoples Rights" and Fog Water Project at Ped World.
3. We agree with the reasoning of the Court regarding the supporting documents that "human rights bodies and courts must proceed on a case-by-case basis and are especially sensitive to the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or the unavailability of evidence in the relevant circumstances"<sup>1</sup>.
4. However, we note that in the instant case, the Applicant resided in Tanzania where the assets in question were located and where the violations established by the Court took place. Moreover, the NGOs, *Tanzania Human for Peoples Rights* and *Ped World Organization*, from which the Applicant alleges he received his monthly salary, operate there and the Applicant was assisted by a lawyer throughout the proceedings before this Court.

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<sup>1</sup> In that regard the Court refers to *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, International Criminal Court, Ruling on reparation under Article 75 of the Statute, para. 39 (24 March 2017), § 47.

5. In light of the above, there is nothing in the records to indicate that evidence in support of the Applicant's claims has been destroyed or that it is absolutely impossible to obtain, the relevant legal consequences must be drawn.
6. Regarding material prejudice in general, the Court has consistently stated, as it does in the instant Judgment <sup>2</sup> that "[i]t is not sufficient to establish that the Respondent State has violated provisions of the Charter, it is also necessary to provide evidence of the harm for which the Applicant seeks compensation from the Respondent. In principle, a violation of the Charter is not sufficient to establish material harm"<sup>3</sup>. It is in this regard that the Court required the Applicant to prove, among other things, the prejudice suffered with documentary evidence<sup>4</sup>.
7. The Applicant tendered the following documents as evidence of the salary that he earned:
  - a copy of the employment contract between Ochieng Anudo and Ped World;
  - a copy of a payment *voucher dated 15 March 2013* issued by *Tanzania Human for Peoples Rights* according bearing the sum of Tsh 600,000 Tanzanian Shillings paid to the Applicant as salary for the month of February;
  - a copy of a payment receipt dated 30 March 2013, again, issued by the NGO. Tanzania Human for Peoples Rights bearing an amount of 2,800,000 Tanzanian Shillings paid the Applicant as salary in respect the month of March 2013.
  - *Employment contract*
8. The Applicant tendered a copy of a contract of cooperation between him and the NGO PED World. The document, which was signed only by Bernhard Koppers, president of the NGO, bears the name of Ochieng Anudo who, as indicated by the Respondent State in its Reply, did not sign the contract.
9. Besides, the document in question states that he was on temporary employment from 1 July 2011 to 30 June 2012. Therefore, there is nothing in

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<sup>2</sup> Paragraph 30.

<sup>3</sup> See also *Reverend Mitikila v. Tanzania*, (Reparations) (13 June 2014) 1 ACtLR 81, §§ 31 to 32.

<sup>4</sup> Paragraph 29.

the records to suggest that the contract was renewed or was still in effect at the time of the Applicant's deportation on 1 September 2014.

- *Salary for the month of February*

10. The Applicant tendered in Court a copy of the payment voucher from Tanzania Human for Peoples' Rights according bearing an amount of 600,000 Tanzanian Shillings paid to him on 15 March 2013 as salary for the month of February. It is indicated on the copy that the said payment was made and authorized by Ped World.

11. This document, on which the Applicant relies, also raises a number of issues. Not only is it a simple copy that was not certified by any competent authority, but it also does not bear the signature or seal of Ped World even though that NGO signed and authorized the payment. Moreover, it is difficult to ascertain the link between Tanzania Human for Peoples' Rights and Ped World, which raises the question as to why the receipt was issued by Tanzania Human for Peoples' Rights instead of Ped World.

- *Salary for the month of March 2013*

12. The Applicant submitted to the Court a copy of the payment receipt issued by the NGO Tanzania Human for Peoples Rights in respect of his salary amounting to Tsh. 2,800,000 for the month of March 2013 as one of the documents supporting the loss of income owing to the loss of employment that he suffered.

13. It should be noted, on the one hand, that the document in question is a simple copy and, on the other, that it does not bear the seal of the organization or the name and position of the person who authorized the payment<sup>5</sup>. Furthermore, even though the Applicant alleges that he was the Director of the NGO Tanzania Human for Peoples' Rights, no contract or other document was tendered in Court to establish the link between the NGO and him.

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<sup>5</sup> Before the name of the person who authorized the payment, one only reads "THPR".

14. Regarding the Applicant's loss of salary, the Court indicated<sup>6</sup> that it "will exercise its judicial discretion and consider the period running from 1 September 2014 until the date of the Judgment on the merits and will use the Applicant's last salary of Three Million, Four Hundred Thousand Tanzanian Shillings (TZS 3,400,000) for the computation".
15. The observations above relating to the evidence adduced by the Applicant show that, under the circumstances of the case, it is difficult to state with certainty that the Applicant's last salary was 3,400,000 Tanzanian Shillings.
16. In view of the foregoing, it is clear that there are still many grey areas in this case with regard to the material prejudice suffered by the Applicant owing to the loss of employment.
17. In the light of these findings, the Court had the option, in the interests of justice, as it has done in various cases<sup>7</sup>, to request additional evidence that would have enabled it decide the instant case based on solid and reliable evidence. It should be recalled that pleadings were closed on July 15, 2020, but in the interest of justice, the Court decided to reopen them to allow the Applicant to file his Reply to the Respondent State's Response. Finally, it should be noted that the Rules of Procedure of the Court<sup>8</sup> grant the Court discretionary power to request that parties file additional exhibits or evidence.
18. Hence, since the Court had found that some evidence in support of the Applicant's allegations were not before it, as already indicated above, it should have taken advantage of the reopening of the pleadings to request the Applicant's Counsel to produce additional evidence as proof of material prejudice.

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<sup>6</sup> Paragraph 36.

<sup>7</sup> *Gozbert Enrico v. Tanzania*, ACtHPR, Application No. 056/2016, Judgement of 2 December 2021 (Merits and Reparations).

*Akwasi Boateng and 351 others v. Ghana*, ACtHPR, Application N. 059 /2016, (Jurisdiction).

*Alfred Agbesi Woyome v. Ghana*, ACtHPR, Application No. 001/2020 (Merits and Reparations).

<sup>8</sup> Rule of 25 September 2020 revised in April 2021. Rule 51 (1) provides that: "The Court may, during the course of the proceedings and at any other time the Court deems it appropriate, call upon the parties to file any pertinent document or to provide any relevant explanation".

## ii) Loss of income accruing from his business

19. The Applicant claims that he had a "Sawmill" which brought him income, but which he lost because when he was deported. He further submits that his timber stock was damaged and that he lost his clients' trust to the extent that it is "virtually impossible for him to recommence that business" and estimates the loss from his business to be United States Dollars Ten Thousand United States (USD 10000).
20. In its reasoning, the Court took account of the fact that the Applicant produced copies of the Certificate of Business Registration and Tax Certificate for the said "Sawmill".
21. After finding that the accounting records, bank transaction records, and the balance sheet of these firms could have proved if they were profitable or not, as the Respondent State argues, the Court nonetheless considered that the documents tendered by the Applicant constitute preliminary proof that the Applicant made investments and it was logical for him to have expected income from them.
22. With respect to the sawmill, the fact that the Applicant owns it is not in contention in the instant case. The problem is that nothing in the records indicates that the sawmill was actually operating and, more importantly, that it was generating income.
23. Moreover, the Court appears to contradict itself in its decision given its reasoning on the Applicant's loss of income owing to the abandonment and lack of supervision of two houses. Regarding this allegation, the Court found that the Applicant "has also not produced a detailed evaluation of his investments with regard to the two houses, their current condition, neither does he produce an estimate of income that would have accrued to him had he been able to complete the said houses."
24. Similarly, in the *Wilnifred Onyango and others*<sup>9</sup> Judgement, the Court noted, regarding the alleged loss of income suffered due to the termination of the

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<sup>9</sup> *Wilfred Onyango and others v. Tanzania*, ACtHPR, Application No. 006/2013, Judgement of 4 July 2019, (Reparations): In this case, one of the Applicants averred that he ran a chicken supply business

delivery contract, that: “the contract for supply and termination letter adduced by the Applicant are *prima facie* evidence of the existence of a contract but not of the actual income flowing from such a contract.”

25. The Court also stated that “further evidence in the form of bank statements or tax certificates attesting to taxes paid with respect to the alleged annual income and the gross income ...should have been tendered. In the absence of these documents, there is insufficient proof of the alleged loss and related compensation claim”. It is important to note that the Court followed the same reasoning with respect to the allegations of other Applicants.<sup>10</sup>

26. This example only goes to confirm that the Court is inconsistent in its rulings on reparations awarded for the alleged loss of income.

27. In the instant case, the Court repeatedly emphasized<sup>11</sup> that it would consider the fact that the Applicant was illegally expelled from the territory of the Respondent State and the difficult circumstances in which he suddenly found himself. It therefore considered that it was impossible for him to produce other documentary evidence.

28. However, it should be noted that in its previous judgments<sup>12</sup> the Court dismissed the allegations of applicants, even when they were incarcerated, on the grounds that they did not adduce evidence of the material harm they allegedly suffered, although their situation did not allow them to have access to evidence in support of their allegations.

29. It is regrettable that the Court did not apply its own jurisprudence, hitherto consistent, in the instant case.

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and that the net annual income accrued from the business was approximately Forty-one Thousand Two Hundred and Fifty US Dollars (41,250) Dollars. He tendered evidence to that effect, that is, a contract for services and a letter terminating that contract due to non-delivery of goods as agreed. The Applicant prayed the court to award him the sum of Two Hundred and Eighty-Eight Thousand, Eight Hundred and Eighty-Nine US Dollars (US\$ 288,889) for the loss suffered over the entire period of his incarceration.

<sup>10</sup> Paragraphs 35 and 37//

<sup>11</sup> Paragraphs 35, 44, 55.

<sup>12</sup> Alexis Thomas v. Tanzania, ACtHPR, Application No. 005/2013, Judgement of 2 November 2015

(Reparations); Mohamed Abubakari v. Tanzania, ACtHPR, Application No. 007/2013, Judgement of 4 July 2019, (Reparations).


**ii) Losses related to two vehicles and one motorcycle**


30. The Applicant alleges that he owned two vehicles and a motorcycle and that since his deportation from the Respondent State, these have not been used or maintained, resulting in damage to them, and that, this damage constitutes a significant loss which he estimates to be in the amount of Twelve Thousand United States Dollars (USD 12000).
31. In its reasoning, the Court found that the arbitrary expulsion of the Applicant from the territory of the Respondent State under difficult conditions certainly did not allow the Applicant to take measures to maintain and protect his assets and, accordingly, granted the Applicant in fairness the lump sum of Three Million Tanzanian Shillings (TZS 3,000,000).
32. It appears from the records that the Applicant tendered two registration certificates covering his two vehicles: the first dated 11 November 2005 for a Toyota Corolla 1991 model, which means that, at the time of its registration, the vehicle was 14 years old, and the second dated 13 June 2011, for a Toyota Opa 2002 model, which shows that, at the time of its registration, it was 9 years old.
33. The Applicant also submitted to the Court a certificate of registration issued on 19 February 2011 for his Honda motorcycle which shows that it was manufactured in 1987. According to that date, at the time of its registration, the motorcycle had been in use for 24 years and, at the time of his expulsion on 1 September 2014, it was 27 years old!
34. Based on the numbers of years and the depreciation of the said vehicles, it is easy to have an idea of the condition of the two vehicles and the motorcycle which were not new when they were purchased.
35. In order to produce solid evidence that would hold up to sound legal analysis, the Applicant should have demonstrated in an irrefutable manner the impact of his absence on the deterioration of the above-mentioned vehicles and motorcycle.


36. However, in the instant case, the Applicant failed to provide the court with information about the condition of his vehicles when they were bought and their condition at the time he was deported from Tanzania. As for the motorcycle which was 27 years old at the time of the Applicant's deportation, in the absence of any other proof of its condition other than the certificates produced, it can be concluded that it was not in a good functional condition since it had already depreciated.

37. As noted above, due to the lack of convincing evidence, the Court could have asked for additional evidence in the interests of justice, or could have found that there were insufficient evidence, as it did in the judgement referred to above.

Signed:

  
Judge M-Therese Mukamulisa

  
Judge Stella I. Anukam

  
Judge Modibo Sacko

Done in Dar es Salaam, the second day of December 2021

