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**The Court composed of:** Blaise TCHIKAYA, Vice President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO, Dennis D. ADJEI – 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 9(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the matter of

Abdallah Sospeter MABOMBA and others
*Self-represented*

Versus

UNITED REPUBLIC OF TANZANIA
*Represented by:*
Mr Gabriel P. MALATA, Solicitor General, Office of the Solicitor General

After deliberation,

*renders the following Ruling,*

## I. THE PARTIES

1. Abdallah Sospeter Mabomba, Hussein Kyamba Nyawaya, Daniel Ngulu and Nyigini Alex (hereinafter referred to as "the Applicants"), are nationals of the United Republic of Tanzania, who at the time of filing the Application, were incarcerated at Uyui Central Prison in the Tabora region, serving a term of thirty (30) years' imprisonment having been convicted of armed

robbery and gang rape. They challenge the conduct of the proceedings in the domestic courts.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration provided for under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one year after its deposit, which is on 22 November 2020.[1]

## II. SUBJECT MATTER OF THE APPLICATION

### A. Facts of the matter

3. It emerges from the records, that, on 27 December 1999, the Applicants robbed a shop attendant at gun point of Tanzania Shillings one hundred and sixty thousand (TZS 160,000) as he went to open the shop. In the course of the robbery, the Applicants instructed the shop attendant to call out for the shop owner who lived adjacent to the shop, which he did. In response to the call, the shop owner and his wife opened the door to their house. At that point, the shop owner was assaulted with an iron bar which led him to fall on the floor. As he lay on the floor, the Applicants led his wife outside the house and gang raped her.

[1] *Andrew Ambrose Cheusi v. United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

4. On 16 February 2001, the Applicants were jointly charged together with others not before this Court with two offences, namely: armed robbery and gang rape at the District Court of Musoma. They were convicted of both offences on 16 July 2002 and sentenced to thirty (30) years imprisonment for armed robbery as well as life imprisonment for gang rape, to be served concurrently. The Applicants appealed the decision to the High Court of Tanzania sitting at Mwanza which, on 2 July 2004, upheld the decision of the District Court. They further appealed to the Court of Appeal, which dismissed their appeal in its entirety on 16 March 2007.

### B. Alleged violations

5. The Applicants allege the violation of the following:

   i. The right to be equal before the law and equal protection of the Court protected under Article 3(1) and (2) of the Charter;
   ii. The right to a fair trial protected under Article 7(1) of the Charter;
   iii. The right to defence protected under Article 7(1)(c) of the Charter.

## III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Application was filed on 13 June 2017. On 10 August 2017, the Applicants filed a request for joinder of Applications and pleadings with Application No. 010/2016, *Hamad Mohamed Lyambaka v. United Republic of Tanzania*.

7. On 9 February 2018, the Court dismissed Applicants' request for joinder on the ground that pleadings had been closed in Application No. 010/2016, *Hamad Mohamed Lyambaka v. United Republic of Tanzania*, and thus a joinder would occasion a delay in determining Application No. 010/2016.[2]

[2] The Court delivered the Ruling in Application No. 010/2016 on 25 September 2020.

8. On 12 February 2018, the Application was served on the Respondent State, which filed its response on 17 August 2018.

9. The Parties filed their pleadings on the merits and reparations of the Application, having benefited from several extensions of time.

10. Pleadings were closed on 27 July 2022 and the Parties were notified thereof.

## IV. PRAYERS OF THE PARTIES

11. The Applicants pray the Court to "restore the justice where it was overlooked and quash both the conviction and sentence imposed on them and set them free" as well as "grant them any other order it deems fit."

12. With respect to jurisdiction and admissibility, the Respondent State prays the Court to find:

    1. That the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this Application;
    2. 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;
    3. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules and Article 6(2) of the Protocol;
    4. That the Application be declared inadmissible;
    5. That the Application be dismissed in accordance to Rule 38 of the Rules of Court;
    6. That the costs of this Application be borne by the Applicants.

13. With respect to the merits of the Application, the Respondent State prays the Court to find:

1. That the Government of the United Republic of Tanzania did not violate the rights of the Applicants provided under Article 3(2) of the African Charter on Human and Peoples' Rights;
2. That the Government of the United Republic of Tanzania did not violate the rights of the Applicants provided under Article 7(1)(c) of the African Charter on Human and Peoples' Rights;
3. That the Application be dismissed for lack of merit;
4. That the Applicants not be granted reparations;
5. That the Applicants continue to serve their sentence;
6. That the Applicants' prayers be dismissed;
7. That the costs of this Application be borne by the Applicants.

## V. JURISDICTION

14. The Court observes that Article 3 of the Protocol provides as follows:

> 1. 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.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

15. In accordance with Rule 49(1) of the Rules, "[t]he Court shall conduct a preliminary examination of its jurisdiction in accordance with the Charter, the Protocol and these Rules."

16. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

17. The Respondent State objects to the material and temporal jurisdiction of the Court.

## A. Objections to the jurisdiction of the Court

### i. Objection to material jurisdiction

18. The Respondent State submits that this Court does not have jurisdiction to hear this Application as it raises issues of fact and law, which had been determined with finality by its Court of Appeal. The Respondent State avers that, through this Application, this Court is being asked to act as an appellate court.

19. Relying on Rule 26 of the Rules and the Ruling in the case of *Ernest Francis Mtingwi v. Republic of Malawi*, the Respondent State also avers that this Court lacks jurisdiction to quash the conviction, set aside sentences and order the release of the Applicants from prison as these decisions were upheld by its highest court.

20. The Applicants aver that the Court has jurisdiction to determine this Application "in accordance with Articles 3 and 27 of the Protocol." Furthermore, that the Court's jurisdiction extends to examining whether the procedures undertaken in the national courts are in conformity with the Charter.

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21. The Court recalls, as it has consistently held, that pursuant to Article 3(1) of the Protocol, it has jurisdiction to consider any Application filed before it provided that the latter alleges the violation of rights guaranteed in the Charter, the Protocol or any other human rights instruments ratified by the Respondent State.

22. The Court further reiterates that, while it does not exercise appellate jurisdiction with respect to decisions of domestic courts, it is empowered by provisions of Article 3(1) of the Protocol to ensure the observance of the obligations undertaken under the Charter and any other human rights instruments ratified by the Respondent State.

23. From the foregoing, the Court finds that it has material jurisdiction to hear the Application.

**ii. Objection to temporal jurisdiction**

24. According to the Respondent State, the alleged violations are not on-going as the Applicants are serving a lawful sentence for the commission of an offence provided for by statute. Therefore, it contends that the Court lacks the temporal jurisdiction to consider this Application.

25. The Applicants did not file a reply to this objection.

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26. The Court notes that the alleged violations in this case are based on the alleged denial of the right to a fair trial in the national courts, which occurred between 2001 and 2007. In this regard, the alleged violations occurred after the Respondent State had ratified the Charter and the Protocol but prior to the deposit of the Declaration on 29 March 2010. However, the alleged violations continued thereafter since the Applicants are still serving sentences based on convictions from procedures in the national courts that they consider to be unfair.[3]

27. The Court underscores, in accordance with the principle of non-retroactivity, that it cannot consider allegations of human rights violations that occurred before the Respondent State's obligati violations are continuing in nature as is the case herein, indicated in the preceding paragraph.

[3] *Jebra Kambole v. United Republic of Tanzania*, ACtHPR, Application No. 018/2018, Judgment of 15 July 2020 (merits and reparations) § 24; *Dismas Bunyerere v. United Republic of Tanzania*, (merits and reparations) (28 November 2019) 3 AfCLR 702 § 28(ii); *Norbert Zongo and Others v. Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197 §§ 71-77.

28. Consequently, the Court dismisses the objection to its temporal jurisdiction and holds that it has temporal jurisdiction.

### B. Other aspects of jurisdiction

29. The Court notes, with respect to its personal jurisdiction that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited with the African Union Commission, the Declaration made under Article 34(6) of the Protocol. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.

30. The Court recalls its jurisprudence that, the withdrawal of a Declaration does not apply retroactively and only takes effect one (1) year after the notice of such withdrawal has been deposited, in this case, on 22 November 2020. This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court finds that it has personal jurisdiction.

31. The Court also notes that it has territorial jurisdiction given that the alleged violations occurred in the Respondent State's territory.

32. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

## VI. ADMISSIBILITY

33. In terms of Article 6(2) of the Proto
admissibility of cases taking into account the provisions of article 56 of the Charter."

34. Pursuant to Rule 50(1) Court shall ascertain the Rules,
admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."

35. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a) Indicate their authors even though the latter requests anonymity;
> b) Are compatible with the Constitutive Act of the African Union and with the Charter;
> c) Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
> d) Are not based exclusively on news disseminated through the mass media;
> e) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f) 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 seised with the matter; and
> g) Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

36. The Respondent State raises two objections to the admissibility of the Application in relation to exhaustion of local remedies and on the requirement to file applications within a reasonable time after exhaustion of local remedies.

## A. Objections to the admissibility of the Application

### i. Objection based on non-exhaustion of local remedies

37. The Respondent State contends that the Application was prematurely filed at the Court as the Applicants did not file a constitutional petition in the High Court alleging the violations of their rights.

38. The Respondent State further alleges that the Applicants could have applied for review of the Court of Appeal's judgment in accordance with Part IIIB, Rule 66 of the Tanzanian Court of Appeal Rules, 2009.

39. Lastly, the Respondent State argues that the local remedies were available to the Applicants and were not unduly prolonged.

40. The Applicants aver that the Application should be found admissible in accordance with Articles 5(3), 6(1) and (2) of the Protocol.

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41. The Court notes pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, that, any application filed before it, has to fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.[4]

42. This Court has also stated in a number of cases involving the Respondent State that the remedies of filing a constitutional petition in the High Court and use of the review procedure in the Tanzanian judicial system are

[4] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94.

extraordinary remedies that an Applicant is not required to exhaust prior to seising this Court.[5]

43. In the instant case, the Court notes from the record, that the Applicants having been convicted at the District Court of Musoma on 16 July 2002, filed an appeal against their conviction and sentence to the High Court at Mwanza challenging the fairness of the proceedings, and the appeal was dismissed on 2 July 2004. The Applicants then appealed before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 16 March 2007, the Court of Appeal upheld the judgment of the High Court. Therefore, the Applicants exhausted all the available domestic remedies.

44. For this reason, the Court dismisses the objection based on non-exhaustion of local remedies.

**ii. Objection based on failure to file the Application within a reasonable time**

45. The Respondent State contends that the Court of Appeal delivered its judgment on 16 March 2007 while the Applicants seised the Court on 13 July 2017. In addition, the Respondent State alludes to the fact that it deposited its Article 34(6) Declaration on 29 March 2010 and therefore, the Applicants filed their case, "seven (7) years and four (4) months" la

46. According to the Respondent State even though the Charter does not set a time limit for seizure of the Court by applicants, the Court has held that it would consider what is reasonable on a case-by-case basis. The Respondent State argues that the Court should not consider the Application to have been filed within a reasonable time as seven (7) years and four (4) is unreasonable.

[5] See *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465 § 65; *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 §§ 66-70; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 44.

47. The Applicants did not reply to this objection.

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48. The Court notes that Rule 50(2)(f) of the Rules which in substance restates the contents of Article 56(6) of the Charter, requires an Application to be filed within: "a reasonable time from th
or from the date set by the Court as being the commencement of the time limit within which it shall be seise d with the matter."

49. The Court recalls its jurisprudence, that: "...the reasonableness timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis.[6] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[7] indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisals[8] and the use of extraordinary remedies.[9]

50. The Court observes that, the reckoning of time within which to assess reasonableness in filing the Application should have been the date when the Court of Appeal rendered its judgment that is on 16 March 2007. However, in the instant case, the actual starting date for computing the time is 29 March 2010 when the Respondent State filed its Declaration because that is when individuals could seise the Court with cases against the Respondent State. Given that the Application was filed on 13 June 2017, the time to be assessed is seven (7) years, two (2) months and fifteen (15)

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[6] *Norbert Zongo v. Burkina Faso* (merits), *op. cit* § 92. See also *Alex Thomas v. Tanzania* (merits) *op.cit* § 73.

[7] *Alex Thomas v. Tanzania* (merits), *op.cit* § 73; *Christopher Jonas v. Tanzania* (merits) *op.cit.* § 54; *Amir Ramadhani v. United Republic of Tanzania*, (merits) (11 May 2018) 2 AfCLR 344 § 83.

[8] *Association Pour le progress et la Defense des droit des Femmes Maliennes and the Institute for Human Rights and Development in Africa v. Republic of Mali* (merits) (11 May 2018) 2 AfCLR 380 § 54.

[9] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 56; *Werema Wangoko v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 49 *Alfred Agbes Woyome v. Republic of Ghana,* (merits and reparations) (28 June 2019) 3 AfCLR 235 §§ 83-86.

days. The issue for determination is whether such time is reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

51. In this respect, the Court has held in particular that failure to file an application within a reasonable time due to indigence and incarceration must be proved and cannot be justified by blanket assertions or assumptions.

52. The Court has held[10] that, a period of five (5) years and four (4) months was an unreasonable lapse of time before the filing of an application. The Court reasoned that while the applicants were incarcerated and therefore restricted in their movements, they had not asserted or provided any proof that they were illiterate, lay, or had no knowledge of the existence of the Court.[11]

53. In the instant case, the Applicants did not make any submissions as regards their filing of the Application within a reasonable time. Conversely, the Respondent State submits that the Applicants did not seise the Court within a reasonable time.

54. Against these submissions, the Court observes that while it emerges from the record that the Applicants were incarcerated, there is no proof that their incarceration constituted an impediment to the timely filing of the Application. As such, the Applicants have not justified as to why it took them seven (7) years, two (2) months and fifteen (15) days to file the Application. In the absence of clear and compelling justification for the above-mentioned lapse of time, the Court finds that the Application was not filed within a reasonable time in the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

[10] *Godfred Anthony and another v. United Republic of Tanzania* (26 September 2019) (Admissibility) 3 AfCLR 470 § 48.
[11] *Ibid.*

55. The Court therefore upholds the Respondent State's objection based on failure to file the Application within a reasonable time.

### B. Other conditions of admissibility

56. The Court having found that the Application does not satisfy Rule 50(2)(f) of the Rules, does not need to rule on the admissibility requirements set out in Article 56(1), (2), (3), (4) and (7) of the Charter reflected in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules,[12] as the admissibility requirements are cumulative.[13]

57. In view of the foregoing, the Court declares the Application inadmissible and dismisses it.

## VII. COSTS

58. The Respondent State prayed the Court for costs to be borne by the Applicants. The Applicants did not reply to this prayer.

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59. The Court notes that Rule 32(2) of its Rules [unless otherwise decided by the Court, each party shall bear its own costs, if any."

60. The Court does not see any reason to depart from the above Rule and thus orders that each Party bears its own costs.

[12] *Ibid*.
[13] *Mariam Kouma and Ousmane Diabaté v. Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 237 § 63; *Rutabingwa Chrysanthe v. Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018), 2 AfCLR 361 § 48; *Collectif des Anciens Travailleurs du Laboratoire ALS v. Republic of Mali* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 73 § 39.