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## JUDGMENT SUMMARY

**BOB CHACHA WANGWE AND LEGAL AND HUMAN RIGHTS CENTRE**

**V.**

**UNITED REPUBLIC OF TANZANIA**

**APPLICATION NO. 011/2020**

**JUDGMENT ON MERITS AND REPARATIONS**

**13 JUNE 2023**

**A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

**Arusha, 13 June 2023:** The African Court on Human and Peoples' Rights (the Court), today, delivered a Judgment in the case of *Bob Chacha Wangwe and Legal and Human Rights Centre v. United Republic of Tanzania*.

Bob Chacha Wangwe and the Legal and Human Rights Centre, (the Applicants) are, respectively, a Tanzanian national and a Non-Governmental Organisation registered in Tanzania that has observer status before the African Commission on Human and Peoples' Rights. The Applicants brought this action challenging provisions of the National Elections Act (NEA) of Tanzania.

In its judgment, the Court first considered whether it had jurisdiction to examine the Application. The Court observed that, as per Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), it had to, preliminarily, determine whether it had jurisdiction to hear the Application. In this regard, the Court noted that the Respondent State had raised an objection to its material jurisdiction. The Respondent State argued that, under Article 3 of the Protocol, the Court complements rather than substitutes a State's internal domestic mechanisms for redressing human rights violations. In the instant Application, according to the Respondent State, if the Court considered the Applicants' allegations in relation to section 4(1) of the NEA it would be sitting as a court of first instance to consider a provision that had never been challenged in its domestic courts. The Respondent State further argued that the

Application was frivolous and vexatious since it did not establish any human rights violated by section 4(1) of the NEA.

With regard to the argument that the Court would constitute itself as a court of first instance in considering the Application, the Court recalled that it has consistently held that, so long as an application alleges violation of rights protected in the African Charter on Human and Peoples' Rights (the Charter) or any other international instrument to which the Respondent State is a party, it possesses jurisdiction. In relation to the Applicants' allegations, the Court observed that these directly related to rights guaranteed in the Charter. Since the Applicants were alleging violations of the Charter, and other instruments to which the Respondent State was a party, the Court held that it would not be sitting as a court of first instance in adjudicating on the Applicants' allegations. Accordingly, the Court dismissed the first limb of the Respondent State's objection to its material jurisdiction

As to the other limb of the Respondent State's objection, by which it was contending that the Applicants' claims are frivolous and vexatious, the Court held that the question of whether or not the Application was frivolous or vexatious was one to be resolved in its consideration of the merits of the Application. Given the preceding, the Court dismissed the second limb of the Respondent State's objection to its material jurisdiction and held that it had material jurisdiction to consider the Application.

Although none of the parties questioned other aspects of its jurisdiction, the Court nevertheless examined its personal, territorial and temporal jurisdiction and confirmed that it had jurisdiction to hear the Application.

In terms of the admissibility of the Application, the Court, as empowered by Article 6 of the Protocol, had to determine whether the requirements for admissibility, as provided under Article 56 of the Charter and Rule 50 of the Rules of Court (the Rules), had been met. In this connection, the Court noted that the Respondent State had raised an objection relating to the exhaustion of domestic remedies by the Applicants.

The Respondent State, citing Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, argued that this Application was inadmissible due to the Applicants' failure to exhaust domestic remedies. While conceding that the Applicants did commence a case before the High Court which was subsequently appealed to the Court of Appeal it was the Respondent State's contention that the Applicants were, before this Court, challenging section 4(1) of the NEA, which was never challenged before any domestic court.

The Court recalled that pursuant to Article 56(5) of the Charter, whose requirements are mirrored in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement

of exhaustion of local remedies. Having perused the record, the Court confirmed that section 4(1) of the NEA was not part of the domestic litigation between the Parties. The Court observed that the Applicants' petition before the domestic courts did not mention, either directly or indirectly section 4(1) of the NEA. Given the preceding, the Court held that the Applicants did not exhaust domestic remedies to the extent that their allegations concerned section 4(1) of the NEA.

In the circumstances, since sections 6(1) and 7(1), 7(2), 7(3) of the NEA were litigated between the Parties all the way to the highest court in the Respondent State, the Court found that domestic remedies, in respect of these provisions, were exhausted. The Court thus held that the Application was admissible only in so far as it related to the Applicants' challenge of sections 6(1) and 7(1), 7(2), 7(3) of the NEA. It thus dismissed all the Applicants' prayers, in so far as they were premised on the alleged violation of section 4(1) of the NEA.

In terms of the other conditions of admissibility, the Court noted from the record, that the Applicants were well identified and that the Application was not incompatible with the Constitutive Act of the African Union and the Charter. The Court also confirmed that the language used in the Application was not offensive or insulting and that the Applicants submitted documents of various types as evidence; thereby, established that the Application was not based exclusively on news disseminated through the media. The Court further confirmed that the Application was filed within a reasonable time after the exhaustion of local remedies and that the Application did not deal with matters or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union. Therefore, the Court held that the Application met all the admissibility requirements in Article 56 of the Charter which are restated in Rule 50(2) of the Rules, and thus declared the Application admissible except in so far as it concerned the allegations related to section 4(1) NEA.

On the merits of the Application, the Court had to determine whether or not sections 6(1), 7(1), 7(2) and 7(3) of the NEA violated the Applicants' rights. Although the Applicants had framed four (4) separate violations, corresponding to the four (4) sections of the NEA which they impugned, the Court noted that the Applicants were alleging a violation of their right to freely participate in the government of their country through two principal means: first, in the appointment of the Director of the Elections (section 6(1) NEA); and second, in the manner in which returning officers are appointed (sections 7(1), 7(2), 7(3) of the NEA). The Applicants also alleged a violation of their right to non-discrimination. The Court thus proceeded to assess the alleged violation of the Applicants' rights under these two heads.

The Applicants alleged that the Respondent State had violated their right to participate in the government of their country contrary to Article 13(1) of the Charter and also their right to equality before the law and to equal protection of the law contrary to Article 3 of the Charter.

The Applicants submitted that section 6(1) of the NEA violated the Charter because the Director of Elections is appointed by the President who is the Chairperson of the ruling party and also among the contestants in elections. This manner of appointing the Director of Elections, the Applicants contended, raised questions of impartiality and independence of the Electoral Commission. The Applicants also submitted that section 6(1) "lacks the criteria for the appointment of the Director of Elections and thus, makes it wide, broad and vague, and subject to abuse".

The Court noted that at the core of the Applicants' grievances, in respect of the appointment of the Director of Elections, was the question of the independence and impartiality of the office. In line with its jurisprudence, the Court pointed out that States have latitude in terms of configuring their electoral management bodies while bearing in mind the overriding responsibility of establishing an institution that is independent and impartial.

Having considered the Parties' arguments, and given the various methods for constituting electoral management bodies in use in Africa, the Court held that there is no violation of Article 13(1) of the Charter by the mere reason that the Director of Elections is appointed by the President. It also held that Article 13(1) of the Charter is not violated simply on the basis that the President makes the appointment of the Director of Elections following recommendation(s) by the Electoral Commission.

In respect of the Applicants' allegation that section 6(1) of the NEA "lacks the criteria for the appointment of the Director of Elections and thus, makes it wide, broad and vague, and subject to abuse", the Court observed that, indeed, section 6(1) did not set out any qualifications that an appointee for the position must possess in order to qualify for appointment.

The Court thus found it anomalous that the Respondent State's laws contain no provisions stipulating the qualifications that one must possess to be appointed a Director of Elections. The Court held, therefore, that in relation to the head of the Electoral Commission's secretariat, it behoved the Respondent State to appoint individuals of the highest calibre who can independently, impartially and transparently coordinate the management of the electoral process. However, without a clearly laid out qualifications scheme, the considerations that the appointing authority may take into mind when appointing a Director of Elections were unclear. The Court found that this exposed the process not only to uncertainty but also the possible consideration of irrelevant factors.

In the circumstances, the Court held that section 6(1) of the NEA violates Article 13(1) of the Charter in so far as it does not prescribe qualification criteria for persons to be appointed as Director of Elections and that this infringement of the Charter is not a permissible limitation under the terms of Article 27(2) of the Charter.

The Applicants also contended that the current system for appointing the Director of Elections violated their rights under Article 3 of the Charter since only persons in the civil service qualify for appointment.

The Court recalled its jurisprudence reiterating that the principle of equality before the law, which is implicit in the principle of equal protection of the law, does not necessarily require equal treatment in all instances and may allow differentiated treatment of individuals placed in different situations. Consequently, a violation of Article 3 of the Charter does not necessarily follow simply from an alleged instance of differentiated treatment. The party alleging the violation, the Court reiterated, must lead evidence to prove the violation.

In the present case, the Court held that restricting recruitment of the Director of Elections to the civil service does not violate the Charter. The Court took notice that no impropriety had been made against the Respondent State's system for recruitment into the public service, from where the Director of Elections is subsequently appointed. The Court thus held that the section 6(1) of the NEA is not in violation of the Charter in so far as it restricts the appointment of the Director of Elections only to candidates from the public service.

The Applicants also alleged that the manner in which returning officers are appointed violated their right to participate in the government of their choice as well as their right to equality and equal protection before the law. According to the Applicants, sections 7(1), 7(2) and 7(3) of the NEA violated the Charter by "... disallowing the existence of a free and fair election through having electoral officials who are appointees of the president, who is also a chairman of the ruling party and potential candidate with a direct interest in the elections process". The Applicants also argued that the provisions do not contain any criteria or qualification or guiding principles that should inform the appointing process thereby giving "... leeway for abuse of power by the President in terms of who to appoint to occupy such a position".

The Applicants further argue that, section 7(3) of the NEA, by providing that the Electoral Commission may "where circumstances so require" appoint any person in the public service as a returning officer, introduce "... wide subjectivity and likely abuse of power" due to a failure to clarify the circumstances under which the Electoral Commission may act. To buttress their allegations, the Applicants submitted a list of individuals who they alleged were members of the ruling party when they were appointed as returning officers.

The Court noted that the Applicants' challenged the fact that the Respondent State's Electoral Commission utilises civil servants for its administrative and operational requirements. Specifically, in contest in the present matter is the use of civil servants, of various ranks, as returning officers

The Court found it important to point out that the use of civil servants in the operations of an electoral management body is not, by itself, inimical to the independence, autonomy and accountability of an electoral management body. According to the Court, whether or not the involvement of civil servants compromises the independence of an electoral management body would depend on the peculiar facts of each situation. As a minimum standard of acceptable conduct, however, if civil servants are involved in the operations of an electoral management body, it is important to safeguard their independence by, for example, requiring that they should be reporting directly and only to the electoral management body and not to anyone or any other entity outside.

In respect of the appointment of every city director, municipal director, town director and district executive director as returning officers under section 7(1) of the NEA, Court reiterated that a lack of impartiality on particular officer bearers could not be deduced simply from the fact that a person was appointed by the President.

In the circumstances the Court found that section 7(1) of the NEA did not violate Article 13(1) of the Charter by permitting certain office bearers, that is, city directors, municipal directors, town directors and district executive officers to serve as returning officers by virtue of their positions.

As for sections 7(2) and 7(3) of the NEA, however, the Court noted that these provisions grant the Electoral Commission the leeway to appoint returning officers from among public officers at large. The Court thus found that sections 7(2) and 7(3), were different from section 7(1) which tied the qualification of a potential returning officer to his official position within the public service. The Court held, therefore, that the latitude created by sections 7(2) and 7(3) of the NEA could not be justified. This latitude, the Court further held, could result in the appointment of returning officers that were not fit for duty since, for example, there was no clear indication as to the level of placement, within the public service, from whence such appointments could be made.

As for the list of returning officers who the Applicants alleged were appointed to serve as returning officers while they were still active members of the ruling party, the Court observed that this issue was also in contention between the Parties during the litigation at domestic level and the Court of Appeal dealt with this matter and dismissed the Applicants' claims. Given this

clear finding on an evidential matter by the Court of Appeal, the Court held that it was constrained in interfering with the same.

Overall, the Court found that section 7(1) of the NEA did not violate Article 13(1) of the Charter. The Court also found that sections 7(2) and 7(3) of the NEA violate the Charter because these provisions do not contain any indication of the positions in the public service that public servants must occupy to be appointed returning officers or even an indication as to the qualifications that they must possess before they can be appointed as returning officers.

The Applicants also challenged the fact that under sections 7(1), 7(2) and 7(3) of the NEA only persons employed in the public service can serve as returning officers. According to the Applicants, these provisions restrict the appointment of returning officers thereby disallowing others from participating in public affairs. The Applicants submitted that restricting the appointment of returning officers to civil servants only violated Article 3 of the Charter.

The Court reiterated its earlier reasoning, in respect of the appointment of the Director of Elections, and found that sections 7(1), 7(2) and 7(3) by permitting the appointment of returning officers only from the public service do not violate Articles 13(1) and 3 of the Charter. According to the Court, while these provisions indeed do establish a differentiation between those in the public service and those outside it, as per the Court's earlier reasoning, this differentiation is not a violation of Article 13(1) and 3 of the Charter.

The Court observed that the Applicants did not specifically plead any violation of Article 2 of the Charter. However, in their submissions, especially in substantiating the alleged violation of Article 3 of the Charter, they submitted that the manner in which the Director of Elections is appointed is discriminatory. A similar argument was made in respect of the appointment of returning officers under sections 7(1), 7(2) and 7(3) of the NEA. The Applicants submitted that by restricting these appointments to only those persons in the civil service, they have suffered discrimination which compromises their right to participate in electoral processes

The Court recalled its earlier finding that the involvement of civil servants in the management of electoral processes is not, without more, *per se*, irregular. In the instant Application, in so far as the Applicants alleged a violation of their right to non-discrimination, primarily, in connection with their right to participate in the government of their country, the Court held that participation in one's government can take many forms, with serving as a Director of Elections or a returning officer(s) being just some of the possible avenues. Given that the Applicants led no proof to demonstrate that the Respondent State manages recruitment to its civil service in a manner that is discriminatory, the Court held that limiting the selection of the Director of Elections and the returning officers, from the civil service is reasonable and not a violation of Article 2 of the Charter.

Given the violations of the Charter that the Court had established, it also found a violation of Article 1 of the Charter.

On reparations, the Court reiterated its established jurisprudence that for reparations to be granted, the Respondent State should, first, be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full prejudice suffered. Finally, the Applicant bears the onus to justify the claims made.

The Court having found that sections 6(1), 7(2) and 7(3) of the NEA, in part, violate Article 13(1) of the Charter, ordered the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time and without any undue delay, to ensure that these provisions are amended and aligned with the provisions of the Charter so as to eliminate the violations of Article 13(1) of the Charter as established.

The Court also noted that the violations that it had established raised critical matters of public concern and specifically in relation to the management of electoral processes within the Respondent State. In the circumstances, the Court deemed it proper to make an order *suo motu* for publication of this Judgment. The Court, therefore, ordered the Respondent State to publish this Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

On implementation of decisions, the Court reiterated that this is required as a matter of judicial practice. The Court, therefore, ordered the Respondent State to submit to it within twelve (12) months from the date of notification of this Judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considered that there has been full implementation thereof.

Each Party was ordered to bear its own costs.

Justice Rfaâ BEN ACHOUR issued a Dissenting Opinion.

### **Further Information**

Further information about this case, including the full text of the decision of the African Court, may be found on the website at: <https://www.african-court.org/cpmt/details-case/0112020>

For any other queries, please contact the Registry by email [registrar@african-court.org](mailto:registrar@african-court.org)



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