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The Court composed of: Modibo SACKO, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, 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 Rights (hereinafter referred to as "the Prot (hereinafter refer")[1], Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

Kabalabala KADUMBAGULA and Daud MAGUNGA

Self-represented

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Mr. Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General; and
ii. Ms. Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General.

After deliberation,

renders this Judgment:

[1] Rule 8(2), Rules of Court, 2 June 2010.

I. THE PARTIES

1. Kabalabala Kadumbagula and Daud Magunga (herein after referred to as “the First Applicant” and “the Second Applicant” “the Applicants” jointly) are nationals of Tanzania currently serving sentences of life imprisonment at the Uyui Central Prison, Tabora, having been convicted of gang rape. The Applicants allege the violation of their rights in the proceedings before domestic courts.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), became a Party to the African Charter on Human and Peoples' Rights (Charter”) on 21 October 1986 and to the Furthermore, on 29 March 2010, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), thro of the Court to receive applications from Individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one year after its deposit.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. The Applicants, together with two others who are not part of the proceedings before this Court, were charged with abduction and gang rape at the District Court of Kibondo. The District Court acquitted the Applicants of the

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, §§ 37-39.

abduction and gang rape charge but found them guilty of rape on 30 November 2000 in Criminal Case No. 22 of 2000. The First Applicant was sentenced to 40 years imprisonment as the principal while the Second Applicant, who was aged 16 at the time of the offence, was sentenced to 30 years' imprisonment as an accessor… The other two co-accused were acquitted of all charges.

4. The Applicants appealed the District C… Appeal No. 67 of 68/2003 at the High Court in Tabora. In a decision of 18 May 2006, the High Court substituted the … a conviction of gang rape and sentenced them to life imprisonment. The Applicants further appealed to the Court of Appeal respectively in Criminal Appeals No. 128 and 129 of 2007 where the appeals were dismissed in their entirety for lack of merit on 5 November 2009.

5. In 2010, the Second Applicant then filed an application for review of the Court of Appeal's decision … Crimi… No. 1 of 2010, which was dismissed on 4 August 2017 for lack of merit.

B. Alleged violations

6. The Applicants allege that their right to defence was violated due to the failure of the Respondent State to provide them with legal representation, in violation of Article 7(1)(c) of the Charter and Article 10(2) of the Protocol.

7. The First Applicant alleges that the Respondent State violated his right to have one's cause heard under Article 7(1) of the Charter when the trial court combined his grounds of appeal with those of his co-appellant; relying on the evidence of close relatives, not fully evaluating their evidence and failing to produce Police Form 3 to prove the offence of rape.

8. The Second Applicant alleges that the Respondent State violated Article 7(2) of the Charter when it meted the sentence of life imprisonment to him whereas the lawful sentence would have been corporal punishment in terms

of section 131 A (3) of the Penal Code given that he was 16 years of age at the time of the commission of the offence.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

9. The Application was received at the Registry of the Court on 27 September 2017, and served on the Respondent State on 19 April 2018.

10. The Respondent State filed the reply to the Application on 17 August 2018.

11. The Parties filed all their other pleadings within the time prescribed by the Court.

12. Pleadings were closed on 3 July 2023 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

13. The Applicants pray that the Court grant the following orders and declarations:

    i. That the Court is vested with jurisdiction to adjudicate the Application;
    ii. That the Application has met the admissibility requirements provided by Rule 40(5) of the Rules of Court;
    iii. That the Application has met the admissibility requirements provided by Rule 40(6) of the Rules of Court;
    iv. That the Application be declared admissible; and
    v. That the Respondent State violated their rights under Articles 3(2), 7(1), 7(1)(c) and 7(2) of the Charter and Article 10(2) of the Protocol.

14. The First Applicant additionally prays for the Court to:

    i. Grant him reparations pursuant to Article 27(1) of the Protocol;

ii. Restore justice where it was overlooked, quash both conviction and sentence imposed on him and release him from prison; and
iii. Order any other Order that the Court deems appropriate in the circumstances.

15. On his part, the Second Applicant additionally prays the Court to order the Respondent State to pay him compensation in special damages in the amount this Court may deem fit.

16. The Respondent State prays the Court to grant the following orders with regard to the jurisdiction and admissibility of the Application:

i. That the Court is not vested with jurisdiction to adjudicate the Application;
ii. That the Application has not met the admissibility requirements provided by Rule 40(5) of the Rules of Court;
iii. That the Application has not met the admissibility requirements provided by Rule 40(6) of the Rules of Court;
iv. That the Application be declared inadmissible; and
v. That the Application be dismissed.

17. With respect to the merits of the Application, the Respondent State prays the Court for the following orders:

i. That the Respondent State has not violated the First
provided under Article 3(2) of the Charter;
ii. That the Respondent State has not violated the Applicants 'rights provided under Articles 7(1)(c) of the Charter and Article 10(2) of the Protocol;
iii. That the Applicants not be awarded reparations; and
iv. That the cost of this Application be borne by the Applicants.

V. JURISDICTION

18. The Court notes 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.

19. The Court further observes that pursuant
conduct a preliminary examination of it
the Charter, the Protocol[3] and these Rul

20. On the basis of the above-cited provisions, the Court must, in every Application, preliminarily ascertain its jurisdiction and rule on the objections to its jurisdiction, if any.

21. In the present Application, the Court notes that the Respondent State raises an objection to its material and temporal jurisdiction. The Court will first consider the said objections before examining other aspects of its jurisdiction, if necessary.

A. Objection to material jurisdiction

22. The Respondent State submits that the Court is not vested with material jurisdiction to adjudicate the Application, namely, to quash the conviction and order the release of a convict. It avers that Article 3(1) of the Protocol and Rule 26 of the Rules of Court[4] only grant the Court jurisdiction to deal with cases or disputes concerning the application and interpretation of the

[3] Rule 39(1), Rules of Court, 2 June 2010.
[4] Rule 29 of the Rules of 25 September 2020.

Charter, Protocol and any other relevant human rights instrument ratified by the State concerned hence do not afford the Court unlimited jurisdiction.

23. The Respondent State further avers that though the Court can make its findings as per Article 27(1) of the Protocol, the prayers being sought by the First Applicant are beyond the mandate of the Court as the Applicant is seeking to be released from custody. In support of its arguments, the Respondent State referred to the Court’ *Alex Thomas v. Tanzania* and submits that to grant the order sought is beyond the jurisdiction of the Court.

24. The Applicants rebut the Respondent State's objection and contend that the Court has jurisdiction pursuant to Article 3(1) of the Protocol and Article 56(2) of the Charter since the Application involves alleged violations of human rights protected by the Charter.

***

25. The Court recalls that pursuant to Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[5]

26. The Court further notes that pursuant to Article 27(1) of the Protocol, “[i]f the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

27. It follows from these provisions, and its jurisprudence that the Court is empowered to make any order that it deems appropriate when a violation

[5] *Matoke Mwita and Masero Mkami v. United Republic of Tanzania,* ACtHPR, Application No. 007/2016, Judgment of 13 June 2023 (judgment), § 24; *Marthine Christian Msuguri v. United Republic of Tanzania*, ACtHPR, Application No. 052/2016, Judgment of 1 December 2022 (merits and reparations), §§ 23-27 and *Kalebi Elisamehe v. Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 265, § 18.

of the Charter or any other human rights instrument ratified by the State concerned is established.[6]

28. In the instant case, the Applicants allege the violation of rights guaranteed under the Charter to which the Respondent State is a party. The Court is therefore empowered to make the appropriate reparation, including issuing an order for release, should the circumstances so require.

29. In light of the above, the Court dismisses the Respo
and consequently finds that it has material jurisdiction to hear this Application.

B. Objection to temporal jurisdiction

30. The Respondent State is contesting the temporal jurisdiction of the Court and submits that the alleged violations raised by the Applicants are not ongoing. It avers that the Applicants are serving a lawful sentence for the commission of an offence as provided by statute.

31. The Applicants did not address this objection.

***

32. The Court recalls that, when it comes to temporal jurisdiction, the relevant date, in relation to the Respondent State, is that of entry into force of the Protocol, which is on 10 February 2006.[7]

33. The Court notes that the alleged violations in the present Application are based on the alleged denial of the right to a fair trial in the domestic courts,

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[6] *Reuben Juma and Gawani Nkende v. United Republic of Tanzania*, ACtHPR, Consolidated Applications Nos. 015/2017 and 011/2018, Judgment of 5 September 2

[7] *Jebra Kambole v. United Republic of Tanzania* (judgment) (15 July 2020) 4 AfCLR 460, § 22; *Niyonzima Augustine v. United Republic of Tanzania,* ACtHPR, Application No. 058/2016, Judgment of 13 June 2023 (judgment), § 29 and *Tanganyika Law Society and Legal and Human Rights Centre v. United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 25.

which occurred between 2000 and 2009. Furthermore, the Applicant remains convicted on the basis of what he considers as an unfair process. As such, while the alleged violations commenced before the entry into force of the Protocol in respect of the Respondent State, they continued thereafter.[8]

34. Given the preceding, the Court dismisses the Respondent S
and finds that it has temporal jurisdiction to examine this Application.

C. Other aspects of jurisdiction

35. The Court observes that no objection has been raised with respect to its personal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,[9] it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

36. Having found that there is nothing on t
Court concludes that it has:

i. Personal jurisdiction, in so far as t
the Charter, the Protocol and has de
vein, the Court recalls its earlier p
withdrawal of its Declaration ... 20 ... 25
instant Application ... the
Application was submitted before the Court.[10]

ii. Territorial jurisdiction, given that the alleged violations are all said to have occurred within the territory of the Respondent State and this has not been contested.

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[8] *Yassin Rashid Maige v. United Republic of Tanzania*, ACtHPR, Application No. 018/2017, Judgment of 5 September 2023 (merits and reparations), §§ 34 and 35; *Zongo and Others v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71-77.

[9] Rule 39(1) of Rules of Court, 2 June 2010.

[10] *Cheusi v. Tanzania* (judgment), *supra*, § 38 and *Ingabire Victoire Umuhoza v. United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

37. In light of all of the above, the Court finds that it has jurisdiction to determine the present Application.

VI. ADMISSIBILITY

38. Pursuant to Article 6(2) of the Protoc
admissibility of cases taking into account the provisions of Article 56 of the Charter”.

39. In line with Rule 50(1) of the Rules,
admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protoc

40. The Court notes that 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 of the following conditions:
>
> a. Indicate their authors even if the latter request 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 seized 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.

41. The Respondent State raises objections to the admissibility of the Application on the ground of non-exhaustion of local remedies and on the basis that the Application was not filed within a reasonable time. The Court will consider these objections individually before examining other conditions of admissibility, if necessary.

A. Objection based on non-exhaustion of local remedies

42. The Respondent State submits that the Applicants have not fulfilled the condition of Rule 40(5) of the Rules[11] on exhaustion of local remedies. It is the Respondent State's that by not applying for legal aid during their trial or appeals before the High Court and before the Court of appeal, the Applicants failed to exhaust local remedies in respect of the alleged violation of their right to defence as a result of its alleged failure to provide them with legal aid.

43. The Respondent State further avers that the First Applicant failed to exhaust local remedies by not filing an application for review under Rule 66(1)(b) of the Court of Appeal Rules, 2009. The Respondent State submits that while the Second Applicant filed an application for review before the Court of Appeal, he did not raise the issue of legal aid but rather focused on issues of evidence and the sentence imposed. It is the Responden contention that the issue of legal aid is therefore being raised for the first time before this Court while it could have been addressed within the national judicial system.

44. The Applicants on their part aver that the Application has fulfilled the condition of Rule 40(5) of the Rules.[12] The Applicants submit that local remedies were fully exhausted when the Court of Appeal, being the highest

[11] Rule 50(2)(e) of the Rules of 25 September 2020.
[12] Rule 50(2)(e) of the Rules of 25 September 2020.

court of Tanzania dismissed their appeal in its entirety on 5 November 2009. Regarding the Respondent State's contention that the Fi have filed an application for review of the decision of the Court of Appeal, the Applicants argue that an application for review is an extraordinary remedy, which an applicant is not required to pursue. In support of their submission, the Applicants cite the Court's decision in *Alex Thomas v. Tanzania*.

***

45. The Court recalls that, as it has consistently held, the requirement of exhaustion of local remedies is an internationally recognised and accepted rule restated in Article 56(5) of the Charter, and Rule 50(2)(e) of the Rules.[13] As established in the Court's jurisprudence, the rule of exhaustion of local remedies reinforces the primacy of domestic courts in the protection of human rights *vis-à-vis* this Court and, as such, aims at providing States the opportunity to deal with human rights violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations.[14] The remedies to be exhausted must be those that are ordinary in nature.[15]

46. In the present Application, the Court notes tha objection to admissibility based on non-exhaustion of local remedies is two-fold; firstly, that the First Applicant should have filed an application for review of the Court of Appeal's decision; and secondly, that the alleged violation of the right to legal representation is being raised before this Court for the first time.

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[13] *Sébastien Germain Ajavon v. Republic of Benin* (judgment) (4 December 2020) 4 AfCLR 133, § 85 and *Diakité Couple v. Republic of Mali* (jurisdiction and admissibility) (28 September 2017) 2 AfCLR 118, § 41.

[14] *Jibu Amir alias Mussa and Saidi Ally alias Mangaya v. United Republic of Tanzania* (merits and reparations) (2019) 3 AfCLR 629, § 34 and *African Commission on Human and Republic of Kenya* (merits), *supra,* §§ 93-94.

[15] *Laurent Munyandilikirwa v. Republic of Rwanda*, ACtHPR, Application No. 023/2015, Ruling of 2 December 2021, § 74 and *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 64.

47. In relation to the first limb of the Respondent State's objection that the First Applicant should have filed an applicati decision, the Court recalls that in several cases involving the Respondent State, it has repeatedly stated that the remedies of review available before the Court of Appeal, as framed in the Respond an extraordinary remedy that an Applicant is not required to exhaust prior to seizing this Court.[16] Consequently, in instances where the Applicant has gone through the judicial system up to the Court of Appeal, which is the highest court in the Respondent State, it should be considered that local remedies have been exhausted.[17]

48. The Court notes that in the present Ap were determined through a judgment rendered on 5 November 2009 by the Court of Appeal, which is the highest judicial authority of the Respondent State. Given that a petition for review is an extraordinary remedy that the First Applicant is not compelled to use, it must therefore be considered that domestic remedies were exhausted in the present matter.

49. Consequently, the Court dismisses the first limb of the Respondent Sta objection on the failure to file an application for review.

50. Regarding the second limb of the objection that the lack of legal representation is being raised before this Court for the first time, the Court observes that the alleged violation occurred in the course of the domestic judicial proceedings. They, accordingly, form part of the "bundle of ri and guar that were related to or were the basis of their appeals, which the domestic authorities had ample opportunity to redress even though the Applicants did not raise them explicitly.[18] It would, therefore, be

[16] *James Wanjara and Others v. United Republic of Tanzania* (judgment) (25 September 2020) 4 AfCLR 673, § 43; *Thomas v. Tanzania* (merits), *supra,* § 65 and *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ [illegible].

[17] *Hamis Shaban alias Hamis Ustadh v. United Republic of Tanzania*, ACtHPR, Application No. 026/2015, Judgment of 2 December 2021, § 51 and *Abubakari v. Tanzania* (merits), *ibid,* § 76.

[18] *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Mussa and Mangaya v. Tanzania* (merits and reparations), *supra,* § 37 and *Wanjara and Others v.* Tanzania (judgment), *supra,* § 45.

unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for these claims.[19] Local remedies should thus be deemed to have been exhausted with respect to this allegation.

51. As a consequence, the Court dismisses the second limb of the Respondent State's objection on the failure to raise the violation of the right to legal representation before domestic courts.

52. In light of the foregoing, and given that the issues raised in this Application have been adjudicated by the Court of Appeal, as the highest judicial body of the Respondent State, this Court dismisses the Responde objections and finds that the Applicants have exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules.

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

53. The Respondent State contends that the Application has not been filed within a reasonable time given that the present Application was filed on 27 September 2017 while the Court of Appeal delivered its judgment on 5 November 2009. The Respondent State further submits that it deposited its Declaration on 29 March 2010 and therefore a period of seven (7) years and five (5) months had elapsed when the present Application was filed. The Respondent State prays the Court to find that such period does not fall within the parameters of reasonable time.

54. On their part, the Applicants submit that this Application was filed nearly eight (8) years after exhausting local remedies due to the fact that the existence of the Court was unknown to the prisoners at Uyui Central Prison at Tabora, themselves included, before May 2017. The Applicants aver that the first Application to be lodged before the Court from Uyui Central Prison is *Abdallah Sospeter Mabomba and Others v. Tanzania* which was filed on

[19] *Mussa and Mangaya v. Tanzania* (merits and reparations), *supra,* § 37; *Thomas v. Tanzania* (merits), *supra,* §§ 60-65 and *Wanjara and Others v. Tanzania* (judgment), *ibid,* § 45.

13 June 2017 after the news of the Court's existence were first heard at the said prison in May 2017. It is the Applicants' contention that the present Application was filed on 27 September 2017, which is four (4) months after they became aware of the existence of the Court. The Applicants refer to the Court's decision in *Reverend Christopher Mtikila v. Tanzania* where it held that there was no fixed period within which to seize it and each case would be decided according to its own facts and circumstances.

***

55. The Court recalls that, pursuant to Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, in order for an application to be admissible, it must be “submitted within a reasonable e were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter”.

56. In its caselaw, the Court has held that: “… the reasonablenes timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis”.[20] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[21] indigence, illiteracy, lack of awareness of the existence of the Court,[22] and the use of extra-ordinary remedies.[23] In establishing reasonableness of time, the Court has further held that failure to file an application within a reasonable time

[20] *Norbert Zongo and Others v. Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92 and *Thomas v. Tanzania* (merits), *supra*, § 73.
[21] *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83 and *Thomas v. Tanzania* (merits), *supra*, § 73.
[22] *Ramadhani v. Tanzania* (merits), *ibid,* § 50; *Jonas v. Tanzania* (merits), *ibid*, § 54.
[23] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 56; *Werema Wangoko Werema and Wasiri Wangoko Werema v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 49; *Alfred Agbessi Woyome v. Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 83-86.

due to indigence and incarceration must be proved and cannot be justified by blanket assertions or assumptions.[24]

57. The Court also reiterates its case-law that while exhausting extraordinary remedies, such as the review procedure at the Court of Appeal, which is not mandatory in the Respondent State, the time spent in attempting to exercise these remedies should be considered in assessing reasonableness under Article 56(5) of the Charter.[25]

58. In the instant Application, this Court observes that the judgment of the Court of Appeal in Criminal Appeals Nos. 128 and 129 of 2007 involving the Applicants was delivered on 5 November 2009. However, as the Applicants could not submit the present Application before the Respondent State had deposited its Declaration on 29 March 2010, the time to be considered should be computed from the filing of the Declaration. Seven (7) years, five (5) months and twenty-nine (29) days thus elapsed between 29 March 2010 and 27 September 2017 when the Applicants filed the present Application. The issue for determination is whether the said period is reasonable within the meaning of Article 56(6) of the Charter.

59. The Court notes that, in the present Application, the Applicants aver that the time to be considered is four (4) months given that they became aware of the existence of the Court only from 13 June 2017 when the first Application from the prison where they were detained was filed in the case of *Abdallah Sospeter Mabomba and Others v. United Republic of Tanzania*.

60. The Court recalls in this regard that, as it has held in the *Mabomba* Ruling being cited by the Applicants, a period of seven (7) years, two (2) months and fifteen (15) days is an unreasonable lapse of time before filing an

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[24] *Abdallah Sospeter Mabomba and Others v. United Republic of Tanzania*, ACtHPR, Application No. 017/2017, Ruling of 22 September 2022 (jurisdiction and admissibility), § 54 and *Anthony Kisite v.* *Republic of Tanzania* (jurisdiction and admissibility) (2019) 3 A… § 49.

[25] *Msuguri v. Tanzania* (merits and reparations), *supra*, § 57 and *Juma and Another v. T*… (judgment), *supra*, § 59.

application as there was no clear and compelling justification for the lapse of time.[26]

61. Furthermore, in the instant case, being cognisant of the principle of legal certainty, this Court is constrained in its interpretation of reasonable time and cannot overstretch the construction of reasonableness without decisive elements that are sufficiently proven.[27]

62. As such, the Applicants' r[illegible] *Mabomba* Ruling in the present matter cannot stand the test of reasonableness just as it did not in the said Ruling.

63. As a consequence, this Court finds that the present Application, in respect of the First Applicant, does not meet the requirement of reasonableness set out under Article 56(6) of the Charter given that the First Applicant's case bears exclusively on the *Mabomba* Ruling.

64. In light of the above, the Court uphol[illegible] and finds that the Application was not filed within a reasonable time in respect of the First Applicant.

65. Regarding the Second Applicant, the Court notes that circumstances pertaining to him require taking a different approach in determining reasonableness of time to file his application. Firstly, after the Court of Appeal dismissed his appeal on 5 November 2009, the Second Applicant filed an application for review sometime in 2010, which is the very year when the Respondent State filed the Declaration and this Court began to receive cases involving the said Respondent State. As this Court has consistently held, while the review procedure is not a remedy to be exhausted, an applicant cannot be disadvantaged for pursuing it and doing so will be taken

[26] *Mabomba v. Tanzania* (ruling), *supra,* § 54. See also, *Anthony and Kisite v. Unit*[illegible] *Tanzania* (jurisdiction and admissibility) (2019) 3 AfCLR [illegible] § 49.
[27] *Rajabu Yusuph v. United Republic of Tanzania*, ACtHPR, Application No. 036/[illegible] March 2022 (jurisdiction and admissibility), § 71.

into account in assessing reasonableness of time to file an application.[28] Further, after filing an application for review, an applicant is expected to observe some time awaiting the outcome thereof before he considers his next step.[29] In the instant case, the outcome was known on 31 July 2017 when the Court of Appeal dismissed the application for review for lack of merit. The present Application was then filed on 27 September 2017, that is, one (1) month and twenty-seven (27) days later.

66. As a consequence, the Court dismisses the Respondent State's object and finds that the Application was filed within a reasonable time, in respect of the Second Applicant, as construed under Article 56(6) of the Charter.

C. Other conditions of admissibility

67. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 50(2) (a), (b), (c), (d) and (g) of the Rules. However, the Court must satisfy itself that these conditions have been met.

68. The record shows that the Second Applicant has been clearly identified by name, in fulfilment of Rule 50(2)(a) of the Rules.

69. The Court also notes that the claims that are made by the Applicant seek to protect his rights guaranteed under the Charter in conformity with one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, which is the promotion an rights. Furthermore, the Application does not contain any claim or prayer that is incompatible with a provision of the said Act. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the

[28] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 ... 3 AfCLR 539, § 51; *Evodius Rutechura v. United Republic of Tanzania*, ACtHPR, Application No. 004/2016, Judgment of 26 February 2021 (merits and reparations); *Godwin Nkende v. United Republic of Tanzania*, ACtHPR, Consolidated Applications ... 011/2018, Judgment of 1 September 2023 (merits and reparations), § 59.

[29] *Rajabu and Others v. Tanzania*, *ibid*; *Werema Wangoko v. Tanzania* (merits), *supra,* §§ 49-50; and *Alfred Agbesi Woyome v. Republic of Ghana* (merits and reparations) (28 June ... 8 387.

African Union and the Charter and holds that it meets the requirements of Rule 50(2)(b) of the Rules.

70. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

71. The Application is not based exclusively on news disseminated through mass media as it is based on court documents from the municipal courts of the Respondent State in fulfilment of Rule 50(2)(d) of the Rules.

72. Further, the Application does not concern a case which has already been 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 in fulfilment of Rule 50(2)(g) of the Rules.

73. In view of the above, the Court concludes that the Application meets all the admissibility conditions under Article 56 of the Charter as read together with Rule 50(2) of the Rules in respect of the Second Applicant, hence, declares it admissible.

VII. MERITS

74. In view of its finding above on the admissibility of the Application, the Court will only examine the Second Applicant’ on the merits.

75. The Second Applicant alleges the violation of his right to defence protected under Article 7(1)(c) of the Charter and Article 10(2) of the Protocol. He also alleges a violation of Article 7(2) of the Charter regarding the imposition of a sentence of life imprisonment. The Court will examine these allegations in turn.

A. Alleged violation of the right to defence

76. The Second Applicant alleges that his right to defence was violated due to the failure of the Respondent State to provide him with legal representation. The Applicant submits that by failing to provide him with legal representation, the Respondent State violated his fundamental rights under Article 7(1)(c) of the Charter and Article 10(2) of the Protocol.

77. The Respondent State disputes the allegations and submits that the fact that the Applicant had no legal representation does not mean he was deprived of the right to defence. According to the Respondent State, the Applicant was accorded the right to defend himself and was not denied the right to be represented by the legal counsel of his choice.

78. The Respondent State avers that free legal representation in its judicial system is mandatory only for specific offences including treason, manslaughter and murder which is not the case for the Applicant. It states that for all other offences, legal aid is upon application by the accused; and if the Applicant required legal representation, he should have applied for it from the State or from NGOs which provide legal assistance to an incumbent who requires legal assistance.

79. The Respondent State argues that, in any event, the alleged lack of legal representation alone did not vitiate the proceedings and the trial.

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80. The Court notes that Article 7(1)(c) of the Charter provides that the right to have one's cause heard includes “the right to de
be defended by counsel of [their] choic

81. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights

(ICCPR),[30] and determined that the right to defence includes the right to be provided with free legal assistance.[31]

82. The Court has established in its jurisprudence that where accused persons are charged with serious offences which carry heavy sentences and they are indigent, free legal assistance should be provided as of right, whether or not the accused persons request for it.[32] The Court has also held in the case of *Alex Thomas v. United Republic of Tanzania that* the duty to provide free legal assistance to indigent persons facing serious charges which carry a heavy penalty is for both the trial and appellate stages.[33]

83. The Court confirms, from the record, that the Second Applicant was not afforded free legal assistance throughout the proceedings in the national courts. The Court also notes that, the Respondent State did not dispute that the Second Applicant was not provided legal assistance although he was indigent and charged with a grave offence. The Court takes note, in this connection, the Respondent State's averment that legal assistance is not mandatory and that the Applicant did not suffer any disadvantage by conducting his own defence.

84. In the instant case, the Court observes that the Second Applicant is indigent and faced a serious charge of gang rape carrying a sentence of life imprisonment, yet he was not informed of his right to legal assistance. The Court is of the considered view that given his circumstances, the interests of justice required that the Second Applicant should have been provided with free legal assistance throughout his trial and appeals.

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[30] The Respondent State became a State Party to the ICCPR on 11 June 1976.
[31] *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 72; *Augustine v. Tanzania* (judgment), *supra,* § 73 and *Thomas v. Tanzania* (merits), *supra*, § 114.
[32] *Minani Evarist v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402, § 68; *Diocles William v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 85 and *Onyachi and Njoka v. Tanzania* (merits), *supra*, § 104.
[33] *Thomas v. Tanzania* (merits), § 124; *Chacha Wambura and Mang'azi Mkama v. Tanzania*, ACtHPR, Consolidated Applications Nos. 011/2016 a[illegible] 2023 (judgment), § 101 and *Wilfred Onyango Nganyi 9 Others v. United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 183.

85. Given the foregoing, the Court finds that the Respondent State has violated the Second Applicant's right to defence under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, due to its failure to accord him free legal assistance during the proceedings before the domestic courts.

B. Allegation relating to the Second Applicant's sentence

86. The Second Applicant avers that the Respondent State violated Article 7(2) of the Charter when it meted the sentence of life imprisonment to him for the offence of gang rape contrary to Section 131 A (1) and (2) of the Penal Code. The Applicant submits that he was only 16 years of age at the time of the commission of the offence, therefore the lawful sentence should have been corporal punishment in terms of section 131 A (3) of the Penal Code and not a sentence of life imprisonment.

87. The Respondent State did not make any submission in respect of these allegations.

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88. The Court notes that the following two allegations in light of the proceedings before domestic courts: Firstly, (i) whether the new provisions of the Penal Code should have been applied to the Applicant retrospectively; and, secondly, (ii) whether his age at the time when the offence was committed should have been considered in sentencing him.

i. On the retroactive application of the new law to the Applicant

89. The Court notes that Article 7(2) of the Charter provides that:

> No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made

at the time it was committed. Punishment is personal and can be imposed only on the offender.

90. The Court notes that while Article 7(2) of the Charter does not make an explicit provision on the retrospective application of lenient penalties, the ICCPR to which the Respondent State is a party does. Article 15(1) of the ICCPR provides for the retrospective application of lenient penalties hence the determination of this allegation will be made in light of Article 15(1) of the ICCPR.

91. The issue for determination in the instant case is whether the sentencing of the Second Applicant to life imprisonment for the offence of gang rape was an unlawful sentence given that he was 16 years of age at the time of the commission of the offence and that subsequent to the commission of the offence and before the Court of Appeal upheld the sentence, the Respondent State's Penal Code was amen penalty for offenders below 18 years and convicted of gang rape.

92. The Court notes that Section 131A(2) of the Respondent State Penal Code provided for life imprisonment in cases of gang rape; while the newly enacted Section 131A(3) of the same Code substitutes the sentence of life imprisonment with that of corporal punishment, namely strokes of the cane, for offenders under 18 years at the time of commission of the offence. Further, Section 73 of the Interpretation of Laws Act of the Respondent State provides that the above-mentioned substitution of sentence shall not apply to offenders retrospectively.[34]

93. It emerges from the record that the Second Applicant was indeed aged 16 years when the offence was committed; and he was convicted for rape and sentenced to 30 years imprisonment by the District Court on 30 November 2000. However, the Second Applicant's contention is

[34] Section 73, Interpretation of Laws Act [Cap. 1 R.E. 2 Where an act constitutes an offence and the penalty for such offence is amended between the time of the commission of such offence and conviction thereof, the offender shall unless the contrary intention appears be liable to the penalty prescribed at the time of commission of such offence.

sentencing to life imprisonment which occurred when the High Court, on 18 May 2006, changed his conviction from rape to gang rape.

94. The Court notes that in the instant case, the amendment referenced by the Second Applicant, which substituted life imprisonment with corporal punishment, that is strokes of the cane, was effected in 2007 without any provision for retrospective application as stated under Section 73 of the Respondent State's Interpretation Act.

95. In assessing the legality of the above cited domestic law and decisions against international norms, this Court recalls that pursuant to Article 15(1) of the ICCPR:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

96. The Court also takes note of the gradually emerging consensus in international human rights case-law on the retrospective application of lenient penalties especially in criminal law, including legislation enacted after the commission of the offence. This trend is exemplified by the case of *Scoppola v. Italy*, where the European Court of Human Rights (ECHR) held that inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time.[35] The ECHR has specifically held in *Jidic v. Romania,* that where there are differences between the criminal law in force at the time of the commission of an offence and subsequent criminal laws enacted before a

[35] *Scoppola v. Italy* (no. 2) [GC], (Application no. 10249/03), Judgment, European Court of Human Rights (17 September 2009), para 106-108.

final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant.[36]

97. The Court notes that in the instant Application, the Second Applicant was convicted for rape and sentenced to 30 years imprisonment by the District Court on 30 November 2000. However, upon appeal to the High Court, on 18 May 2006, his conviction was changed from rape to gang rape and he was sentenced to life imprisonment. The Applicant further appealed to the Court of Appeal and on 5 November 2009, the appeal failed for lack of merit and the judgment of the High Court was upheld including the sentence thereof.

98. The Court also takes cognisance that the newly enacted 2007 Section 131A(3) of the Respondent State's Penal Code substituted the sentence of life imprisonment with that of corporal punishment for offenders under the age of 18 years as opposed to the previous provision which did not make any distinction in respect of age.

99. The Court further observes that the newly enacted provisions of the Penal Code came into effect after the commission of the offence by the Second Applicant and could therefore not apply to him as per the Interpretation of Laws Act.

100. However, the Court finds that the Respondent State's Court of Appeal ought to have considered the provisions of the amended Penal Code in line with Article 15(1) of the ICCPR to which the Respondent State is a party and imposed the more lenient sentence of corporal punishment. The Court finds that by upholding the sentence of life imprisonment imposed by the High Court whereas a lighter sentence had been adopted, the Court of Appeal disregarded the legislative change favourable to the accused and continued to apply penalties provided under the repealed law. The Court equally finds

[36] *Jidic v. Romania* (Application no. 45776/16), Judgment, European Court of Human Rights (18 February 2020), para 80. See also, *Achour v. France* (Application no. 67335/01) Judgment, European Court of Human Rights (29 March 2006), para 5.

that imposition of the harsher penalty constitutes an infringement of Article 15(1) of ICCPR considering the general rule on settling conflicts between successive criminal statutes.

101. Further, the Court recalls its jurisprudence that corporal punishment constitutes a violation of the right to dignity protected under Article 5 of the Charter.[37] As such, corporal punishment introduced by the Respondent State as a lenient sentence in substitution of life imprisonment does not conform to the Charter.

102. The Court, therefore, finds that the Respondent State has violated Article 15(1) of the ICCPR with regard to the imposition of the sentence of life imprisonment by failing to impose a lighter sentence as provided for in the amended law. Further, the Respondent State has violated Article 5 of the Charter for introducing corporal punishment, which is inherently inhuman and degrading, as an alternative sentence to life imprisonment for offenders under 18 years.

ii. On the propriety of the Second Applicant age

103. The Court considers that, although it is not expressly pleaded in the present Application, the age factor should also be brought to bear in considering the propriety of the Second Applicant's sen

104. In this regard, the Court takes note of Article 17(3) of the African Charter on the Rights and Welfare of the Child (ACRWC),[38] which provides that:

[37] *Yassini Rashid Maige v. United Republic of Tanzania*, ACtHPR, Application No. 018/2017, Judgment of 5 September 2023 (merits and reparations), § 136-143. See also, *Doebbler v. Sudan*, Communication No. 236/2000, 2003 AHRLR 153 (ACHPR 2003), § 42.
[38] Ratified by the Respondent State on 16 March 2003.

> The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

105. The Court also observes that pursuant to Article 40(1) of the United Nations Convention on the Rights of the Child (CRC):[39]

> States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

106. Specifically on the severity of sentences in light of the age of the offender, this Court finds it relevant to take cognisance of the ECHR's decision in *Singh v. the United Kingdom* where the Court held that while an indeterminate term of detention for a convicted young person which may be long as that person's life can only be public, a failure to have regard to the changes that take place as a child matures means that the said child would have forfeited their liberty for the rest of their lives.[40]

107. This Court is of the considered view that while both the CRC and ACRWC do not explicitly make provision regarding the age for the imposition of the sentence of life imprisonment on child offenders, by providing for re-integration, reformation and assuming a constructive role in society, it becomes clear that imposing a sentence of life imprisonment runs contrary to the goals of these instruments. It follows that if a child offender is incarcerated for life, they cannot be re-integrated nor be able to assume a constructive role in society. Such interpretation is only in line with a

[39] Ratified by the Respondent State on 10 June 1991.
[40] *Singh v. the United Kingdom* (Application No. 23389/94), Judgment (21 February 1996), para 61.

fundamental principle governing children, which demands that all laws and acts performed by relevant duty-holders, including States, should abide by the best interest of the child.[41]

108. Given the above, this Court finds that by sentencing the Second Applicant to life imprisonment in the present Application, the domestic courts failed to take into account the Applicant's age a
reformation and re-integration into society.

109. Further, by failing to impose the lenient penalty provided for in the new law, the domestic courts also failed to safeguard the best interest of the child. This notwithstanding, given that the more lenient penalty is corporal punishment, the Court restates its position on the nature of such penalty as recalled earlier in paragraph 101 of this judgment.

110. In light of the foregoing, the Court finds that the Respondent State violated Article 17(3) of ACRWC as read together with Article 40(1) of CRC by imposing the sentence of life imprisonment on the Second Applicant.

VIII. REPARATIONS

111. The Second Applicant prays that the Court should order the Respondent State to pay him compensation in special damage in the amount this Court may deem fit. The Second Applicant further prays for the Court to order the Respondent State to pay him compensation amounting to Thirteen Million and Twenty-Two Thousand Tanzanian Shillings (TZS 13,022,000) including the value of the properties that he lost upon his arrest.

[41] See Art 4(1) of the African Charter on the Rights and Welfare of the Child; see also, *Institute for Human Rights and Development in African and Open Society Justice Initiative (on behalf of children of Nubian descent) v. Kenya*, Communication No. No 002/Com/002/2009, Decision of 22 March 2011, para 29.

112. The Respondent State prays that the Second Applicant should not be awarded reparations.

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113. The Court recalls Article 27(1) of the Protocol which provides that:

> If the Court finds that there has bee
> rights, it shall make appropriate orders to remedy the violation including the payment of the fair compensation or reparation.

114. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act and causation should be established between the wrongful act and the alleged prejudice.[42] Furthermore, and where granted, reparation should cover the full damage suffered; and the Applicant bears the onus of justifying the claims made.[43]

115. In the instant case, the Court has established that the Respondent State violated the Second Applicant's right to defence under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR by failing to provide him with free legal assistance during his trial and appeals in the domestic courts. The Court has further made a finding of violation of Article 15(1) of the ICCPR, as well as Article 17(3) of the ACERWC read together with Article 40(1) of the CRC. The Court will thus consider reparations accordingly.

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[42] *XYZ v. Republic of Benin* (judgment) (27 November 2020) 4 AfCLR 49, § 158 and *Sébastien Germain Ajavon v. Republic of Benin* (reparations) (28 November 2019) 3 AfCLR 196, § 17.
[43] *Juma v. Tanzania* (merits and reparations), *supra,* § 141; *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31; and *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§ 27-29.

A. Pecuniary reparations

i. Material prejudice

116. The Court recalls that for it to grant reparations for material prejudice, there must be a causal link between the violation established by the Court and the prejudice caused and there should be a specification of the nature of the prejudice and proof thereof.[44]

117. In the instant Application, the Second Applicant submits that at the time of arrest he was a farmer growing a variety of crops and was able to earn an income of approximately Six Hundred and Fifty Thousand Tanzanian Shillings (TZS 650,000) per annum. He also submits that at the time of his arrest he left properties including three hundred (300) kilograms of beans valued at One Hundred and Twenty Thousand Shillings (TZS 120,000); one bike valued at Sixty-Two Thousand Tanzanian Shillings (TZS 62,000); one radio valued at Forty Thousand Tanzanian Shillings (TZS 40,000) and cash of Six Hundred and Seventy-Three Thousand Tanzanian Shillings (TZS 673,000). The Second Applicant therefore prays for the Court to order the Respondent to pay him compensation amounting to Thirteen Million and Twenty-Two Thousand Tanzanian Shillings (TZS 13,022,000) including the value of the stated properties.

118. The Respondent State does not specifically respond to the Second Applicant's claims but prays that he should not be awarded reparations.

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119. Regarding the Second Applicant's claims, the Court notes that, for the reparation of any material prejudice arising from the violation of any right,

[44] *Kijiji Isiaga v. Republic of Tanzania*, ACtHPR, Application No. 011/2015, Judgment of 25 June 2021 (reparations), § 20.

there must be evidence establishing a causal link between the facts and the prejudice suffered.[45]

120. In the instant Application, the Court notes from the record that the Second Applicant has failed to adduce evidence on his alleged material losses and does not explain how he arrived at the figures being claimed.

121. Consequently, the Court dismisses the prayer for reparations for material prejudice.

ii. Moral prejudice

122. The Second Applicant does not specifically request the Court to grant reparations for moral prejudice. However, as was indicated above, the Applicant prayed in general terms that the Court should grant him reparations. Further, the Second Applicant prayed the Co justice where it was overlooked”. Acco whether he is entitled to moral damages.

123. In line with established case-law that moral prejudice is presumed in cases of human rights violations, the Court notes that the quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.[46] The Court has, thus, adopted the practice of granting a lump sum in such instances.[47]

124. In the present Application, the Court has established that the Second Appl is right to legal assistance under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR has been violated; as well

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[45] *Mtikila v. Tanzania* (reparations), *supra,* § 30 and *Robert John Pene* (merits and reparations) (2 §§ 143-144 . AfCLR 593,

[46] *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, § 55; *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 59 and *Christopher Jonas v. Republic of Tanzania* (reparations) (25 September 2020), 4 AfCLR 545, § 23.

[47] *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119; *Evarist v. Tanzania* (merits), *supra,* §§ 84-85; *Guehi v. Tanzania* (merits and reparations), *supra,* § 177 and *Jonas v. Tanzania*, *supra,* § 24.

as his right to a fair trial, namely his right to the retroactive imposition of lighter penalties, protected under Article 15(1) of the ICCPR, and Article 17(3) of the ACRWC as read jointly with Article 40(1) of the CRC. The Second Applicant is therefore entitled to moral damages as there is a presumption that he has suffered some form of moral prejudice as a result of the said violation.[48]

125. In instances where free legal assistance was not availed by the Respondent State, where an applicant was charged with a serious offence, and where there were no extenuating circumstances, this Court, as a matter of practice, has granted applicants an amount of Three Hundred Thousand Tanzanian Shillings (TZS 300,000).[49]

126. The Court notes that in the present Application, in addition to violation of the right to free legal assistance, the Respondent State also denied the Second Applicant his right to a more lenient sentence and his age be considered in sentencing him. Further, the Second Applicant has served 24 years in jail as at the time of the present judgment while he ought not to have been sentenced to time in jail in the first place. This fact has inevitably exacerbated the prejudice that he suffered.

127. Consequently, given the circumstances of this case, and exercising its discretion in equity, the Court awards the Second Applicant the amount of One Million Tanzanian Shillings (TZS 1,000,000) for moral prejudice he suffered as a result of the violations established.

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[48] *Cheusi v. Tanzania* (merits and reparations), *supra* § 151.

[49] *Evarist v. Tanzania* (merits and reparations), *supra,* § 90; *Anaclet Paulo v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 446, § 11 and *Jonas v. Tanzania* (reparations), *supra,* § 25.

B. Non-pecuniary reparations

128. The Court observes that the Second Applicant prays that justice should be restored where it was overlooked while the Respondent State generally prays that no reparation should be awarded to the Applicants.

129. The Court is of the view that, in this judgment, its findings of violation under Article 15(1) of the ICCPR, and Article 17(3) of the ACERWC as read jointly with Article 40(1) of the CRC requires that remedial measures are considered to redress these violations.

i. Guarantees of non-repetition

130. The Court considers that the established violation of Article 15(1) of the ICCPR owing to the Respondent State's failure to consider the newly enacted more lenient sentence caused a personal prejudice to the Second Applicant. The same applies to the findings on Article 17(3) of the ACERWC as read jointly with Article 40(1) of the CRC regarding the lack of consideration of the Second Applicant's

131. The Court notes, notwithstanding the above, that its earlier finding in this judgment that corporal punishment contravenes the Charter requires a remedial order that the concerned provi laws be amended. Such order is also warranted because the prejudice caused by the Respondent State's failure exter Applicant as it bears on provisions of domestic law that affects actual or potential offenders at large.

132. In light of these considerations, the Court orders the Respondent State to amend all provisions of its criminal law including its Interpretation Act to align them with its international obligations including Articles 15(1) of the ICCPR, 17(3) of the ACERWC, and 40(1) of the CRC.

ii. Measures of restitution

133. In light of its findings above, corporal punishment as a remedial measure should no longer apply to the Second Applicant.

134. The Court however notes that, as earlier stated the Second Applicant has been imprisoned for over two-decades at the time of the present judgment, and restitution can therefore not be contemplated as a measure of reparation. In the present case, this Court considers that the prejudice suffered, compounded by the time already unduly spent in custody, constitutes a compelling circumstance that makes it most appropriate to order the Second Applicant's release as

135. Accordingly, the Court orders the Respondent State to release the Second Applicant without any delay.

IX. COSTS

136. In the present Application, the Applicant did not make any submissions as regards costs.

137. The Respondent State prays that the Applicant should bear the costs of the Application.

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138. The Court notes that Rule 32(2) of its Rules provides that "unless otherw decided by the Court, each party shall

139. Noting that there is nothing in the present Application that warrants departing from the above provision, the Court decides that each Party shall bear its own costs.

X. OPERATIVE PART

140. For these reasons:

THE COURT,

Unanimously

On jurisdiction

i. *Dismisses* the objection to its material jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility

By a majority of Nine Judges (9) for, and One Judge (1) against,

iii. *Upholds* the objection to admissibility on the basis that the Application was not filed within a reasonable time in respect of the First Applicant;
iv. *Declares* that the Application is inadmissible in respect of the First Applicant;

Unanimously,

v. *Dismisses* the objection to admissibility on the basis that the Application was not filed within a reasonable time in respect of the Second Applicant;
vi. *Declares* that the Application is admissible in respect of the Second Applicant.

On merits

vii. *Holds* that the Respondent State has violated Article 5 of the Charter for introducing corporal punishment, which is inherently

inhuman and degrading, as an alternative sentence to life imprisonment for offenders under 18 years;

viii. *Holds* that the Respondent State violated the Second Appliscant’ right to defence under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, for failure to provide the Second Applicant free legal assistance during domestic proceedings;

ix. *Holds* that the Respondent State violated the right to a fair trial under Article 15(1) of the ICCPR by failing to consider a more lenient sentence and imposing life imprisonment on him;

x. *Holds* that the Respondent State violated Article 17(3) of the ACERWC as read jointly with Article 40(1) of the CRC for failing to take into consideration, during sentencing, the age of the Second Applicant at the time of commission of the offence.

On reparations

Pecuniary reparations

xi. *Does not* grant reparations for material prejudice;

xii. *Orders* the Respondent State to pay the Second Applicant the sum of Tanzanian Shillings One Million (TZS 1,000,000) for moral prejudice ensuing for the violations established in the present Judgment;

xiii. *Orders* the Respondent State to pay the amount indicated under subparagraph (xii) free from taxes within six (6) months, effective from the notification of this judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.