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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

BAHATI MTEGA AND FLOWIN MTWEVE

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 009/2019

JUDGMENT

26 JUNE 2025

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

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The Court composed of: Modibo SACKO, President; Chafika BENSAOULA Vice President; Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Dennis D. ADJEI, Duncan GASWAGA – 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"),[1] Justice Imani D. ABOUD, a member of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

Bahati MTEGA and Flowin MTWEVE

Represented by:

Dr Benedict Maige NCHALLA,
Advocate and Lecturer, Tumaini University Makumira.

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr Ally POSSI, Solicitor General, Office of the Solicitor General;
ii. Mr Gabriel P. MALATA, Deputy Solicitor General, Office of the Solicitor General;
iii. Mr Vicent E. A. TANGOH, Director, Civil Litigation, Office of the Solicitor General;
iv. Ms Alesia A. MBUYA, Assistant Director, Constitutional, Human Rights and Election Petitions, Office of the Solicitor General;

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

v. Ms Vivian METHOD, State Attorney, Office of the Solicitor General;
vi. Mr Daniel NYAKIHA, State Attorney, Office of the Solicitor General;
vii. Ms Narindwa SEKIMANGA, State Attorney, Office of the Solicitor General; and
viii. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Bahati Mtega (hereinafter referred to as "the First Applicant") and Flowin Mtweve (hereinafter referred to as "the Second Applicant") (hereinafter collectively referred to as "the Applicants"), are Tanzanian nationals. At the time of filing this Application, they were imprisoned at Ruanda Prison in Mbeya following their trial, conviction, and sentence by the District Court of Ludewa, to life imprisonment and 12 strokes of the cane, for gang rape. They allege that the Respondent State violated their rights to a fair trial and to dignity in the course of the domestic proceedings against them.

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. It also deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol, through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations (hereinafter referred to as "the Declaration"). On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing the Declaration. The Court has held that this withdrawal did not have any effect on pending cases as well as 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] This Application, having been filed on 22 March 2019, is thus not affected by the withdrawal.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that the Applicants were arrested on 26 October 2010, having been accused of raping one Ester Mchilo, a resident of Lipangala Village in Ludewa District. They were taken to Lugarawa Police Station where they were charged with the offence of gang rape.

4. The Applicants were subsequently arraigned before the District Court of Ludewa. On 2 September 2013, after a full trial, the District Court convicted them of gang rape and sentenced them to life imprisonment and 12 strokes of the cane each.

5. On 14 February 2014, the Applicants appealed to the High Court of Tanzania, sitting at Iringa, seeking to quash both their conviction and sentence. On 18 September 2015, the High Court upheld the judgment of District Court and dismissed the Applicants' appeal.

6. The Applicants then filed an appeal against the High Court's judgment before the Court of Appeal of Tanzania sitting at Iringa. On 3 August 2016, the Court of Appeal dismissed the Applicants' appeal.

B. Alleged violations

7. The Applicants allege violation of the following:

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, § 38.

i. The right to enjoyment of rights and freedoms recognized and guaranteed in the Charter without discrimination under Article 2 of the Charter;
ii. The right to equality before the law and equal protection of the law under Article 3 of the Charter;
iii. The right to dignity under Article 5 of the Charter;
iv. The right to a fair trial under Article 7 of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. The Application was filed on 22 March 2019 and transmitted to the Respondent State on 23 October 2019. The Respondent State was granted 30 days to file its list of representatives and 60 days within which to file its Response.

9. On 23 May 2019, in response to the Registry's request to file documents in support of their Application, the Applicants filed submissions on reparations which included a request for provisional measures.

10. On 19 June 2020, after several reminders, the Respondent State filed its Response to the Application.

11. On 17 July 2023, the Court, *suo motu*, granted *pro bono* legal assistance to the Applicants under its legal aid scheme.

12. On 26 July 2023, the Court issued a ruling dismissing the Applicants' request for provisional measures. The Ruling was transmitted to the Parties on 22 August 2023.

13. On 5 January 2024, the Applicants filed their amended Application which was served on the Respondent State on 8 January 2024. The Respondent State was granted 30 days to file any observations on the amended Application but no observations were filed.

14. Pleadings were closed on 11 March 2024 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

15. The Applicants pray the Court to find that the Respondent State has violated the following rights:

    i. The right to enjoyment of rights and freedoms in the Charter without distinction under Article 2 of the Charter;
    ii. The right to equality before the law and to equal protection of the law under Article 3 of the Charter;
    iii. The right to dignity under Article 5 of the Charter;
    iv. The right to a fair trial under Article 7 of the Charter.

16. The Applicants also pray the Court to grant the following remedies and reparations:

    i. The setting aside of the sentences of life imprisonment in jail and of twelve (12) strokes of the cane imposed on the Applicants;
    ii. Restitution of the Applicants' liberty by their release from prison;
    iii. Payment of reparations in the amount of TSH100 000 000.00 (a hundred million Tanzanian shillings) for each, on account of moral damage suffered to compensate the Applicants for the loss in their dignity and reputation, as well as physical, mental and emotional harm;
    iv. Rehabilitation of the Applicant Bahati Mtega who is HIV positive in order to receive proper medical and psychological care;
    v. The Applicants also pray that the Respondent is ordered to amend its laws to ensure respect for dignity as enshrined under Article 5 of the African Charter on Human and Peoples' Rights by removing the corporal punishment in her statute books.

17. On jurisdiction and admissibility, the Respondent State prays the Court to order that:

i. …the African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate the Application;
ii. …the Application had not met the admissibility requirements provided by Rule 40(5) of the Rules of the African Court on Human and Peoples' Rights;
iii. ...the Application be declared inadmissible;
iv. ... the Application be dismissed.

18. On the merits, the Respondent State prays the Court to grant the following orders:

i. That, the Respondent has not violated any of the Applicants' rights provided under Article 5 of the African Charter on Human and Peoples' Rights;
ii. That, the Respondent has not violated any of the Applicants' rights provided for under the African Charter on Human and Peoples' Rights;
iii. That, the Respondent has not violated article 12(1) and (2) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

V. JURISDICTION

19. The Court recalls that Article 3 of the Protocol provides as follows:

i. 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.
ii. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

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

21. On the basis of the above-cited provisions, the Court must, in every Application, preliminarily conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

22. In the instant Application, the Court notes that the Respondent State has merely prayed that the Court should find that it "is not vested with jurisdiction to adjudicate the Application" without providing any particulars as to the alleged lack of jurisdiction. Notwithstanding the lack of particulars to the Respondent State's prayer, given the prescriptions of Rule 49(1) of the Rules, the Court will, nevertheless, proceed to assess all aspects of its jurisdiction before further considering this Application, if necessary.

23. Regarding its material jurisdiction, the Court recalls that it has previously held that Article 3(1) of the Protocol empowers it to examine an Application provided that it contains allegations of violations of rights protected by the Charter, or any other human rights instruments ratified by the concerned Respondent State.[3] Given that the Applicants are raising allegations of violations of rights guaranteed under Articles 2, 3, 5 and 7 of the Charter, the Court concludes that it has material jurisdiction to examine this Application.

24. Concerning its personal jurisdiction, the Court notes that the Respondent State is a Party to the Protocol and deposited the Declaration. Despite the fact that the Respondent State subsequently withdrew its Declaration, on 21 November 2019, for the reasons stated in paragraph 2 of this Judgment, this Application is not affected by the said withdrawal.[4] Accordingly, the Court finds that it has personal jurisdiction.

25. With regard to its temporal jurisdiction, the Court notes that the alleged violations were committed after the Respondent State became a party to the Protocol on 10 February 2006. Notably, the Applicants were convicted

[3] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45; *Oscar Josiah v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 83, § 24.
[4] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540, § 67; *Laurent Munyadilikirwa v. Republic of Rwanda* (admissibility) (2 December 2021) 5 AfCLR 793, § 2.

and sentenced to life imprisonment on 2 September 2013 and all domestic proceedings that they complain of took place thereafter. Furthermore, the Court observes that the Applicants remain convicted on the basis of what they consider an unfair process.[5] For these reasons, the Court finds that it has temporal jurisdiction to examine this Application.

26. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicants occurred within the territory of the Respondent State which is a party to both the Charter and the Protocol. In the circumstances, the Court finds that it has territorial jurisdiction.[6]

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

VI. ADMISSIBILITY

28. In accordance with Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter."

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

30. Rule 50(2) of the Rules,[7] 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,

[5] *Evodius Rutechura v. United Republic of Tanzania* (26 February 2021) 5 AfCLR 1, § 29.
[6] *Lohé Issa Konaté v. Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 41.
[7] Rule 40, Rules of Court, 2 June 2010.

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 the African Union or the provisions of the Charter.

31. The Court notes that the Respondent State raises an objection to the admissibility of the Application relating to the requirement of exhaustion of local remedies. The Court will consider this objection, first, before examining other conditions of admissibility, if necessary.

A. Objection based on non-exhaustion of local remedies

32. The Respondent State contends that the Applicants have not exhausted local remedies and thus their Application should be declared inadmissible. According to the Respondent State, the Applicants had the remedy of instituting a review or revision of the Court of Appeal's decision.[8]

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[8] According to the Respondent State, this could have been done under Part IIIB, Rule 65 and 66 of the Court of Appeal Rules, 2009.

33. The Applicants contend that they filed their Application after exhausting all domestic remedies. They specifically highlight that, in the Respondent State, there is no further judicial remedy beyond the Court of Appeal.

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34. The Court notes that pursuant to Rule 50(2)(e) of the Rules, any application filed before it must fulfil the requirement of exhaustion of local remedies unless the local remedies are unavailable or ineffective, or the domestic procedure to pursue them is unduly prolonged.[9] This is to ensure that, as the primary duty bearers, States have the opportunity to address human rights violations occurring within their jurisdiction before an international body is called upon to intervene. In its jurisprudence, the Court has affirmed that in order for this requirement to be met, the remedies to be exhausted must be ordinary judicial remedies.[10]

35. In the instant Application, the Court observes that the Applicants were tried before the District Court of Ludewa and convicted on 2 September 2013. Thereafter, the Applicants appealed to the High Court sitting at Iringa which upheld their conviction and sentence on 18 September 2015. The Applicants lodged a further appeal with the Court of Appeal which was dismissed on 3 August 2016. It was only after the Court of Appeal's judgment that the Applicants filed this Application. Given that the Court of Appeal, within the Respondent State's legal system, is the highest judicial body that one can have recourse to, the Court finds that the Applicants exhausted domestic remedies.

36. As for the claim that the Applicants ought to have instituted a process to review the Court of Appeal's decision, the Court reiterates that this is an extraordinary remedy that the Applicants were not required to exhaust.[11]

[9] *Kennedy Owino Onyachi and Charles Mwanini Njoka v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 56.
[10] *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 308, § 95.
[11] *Kalebi Elisamehe v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 265, § 36.

37. In view of the foregoing, the Court holds that the Applicants exhausted local remedies as required under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and therefore, dismisses the Respondent State's objection.

B. Other conditions of admissibility

38. The Court notes that there is no contention as between the Parties, regarding the Application's compliance with the conditions set out in Rule 50(2)(a), (b), (c), (d), (f) and (g) of the Rules. It, however, must satisfy itself that the Application fulfils these requirements.

39. From the record, the Court notes that the Applicants are clearly identified by name thereby fulfilling Rule 50(2)(a) of the Rules.

40. The Court also notes that the Applicants' claims seek to protect their rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Furthermore, nothing on record indicates that the Application is incompatible with the Constitutive Act of the African Union. The Court, therefore, finds that the requirements of Rule 50(2)(b) of the Rules are met.

41. The Court further notes that the language used in the Application is not disparaging or insulting toward the Respondent State, its institutions, or the African Union in compliance with Rule 50(2)(c) of the Rules.

42. The Court also observes that the Application is not exclusively based on news disseminated through mass media; rather, it is based on judicial decisions from the domestic courts of the Respondent State. The Court finds, therefore, that the Application complies with Rule 50(2)(d) of the Rules.

43. In relation to the requirement of filing applications within a reasonable timeframe, under Rule 50(2)(f) of the Rules, the Court recalls that neither

the Charter nor the Rules specify the time frame within which applications must be filed, after the exhaustion of local remedies. As per the Court's jurisprudence, "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-to-case basis."[12]

44. In the instant Application, the Court notes that the decision of the Court of Appeal was rendered on 3 August 2016 while the Application was filed on 22 March 2019. The period at stake hence is two years, seven months and nineteen days. It is this period, therefore, that the Court must assess to determine reasonableness.

45. In its jurisprudence, the Court has taken into consideration, among other factors, incarceration and the resultant limited movement and limited access to information[13] as being relevant factors in determining the reasonableness of time.[14]

46. In *Matoke Mwita and Masero Mkami v. United Republic of Tanzania*, for example, the Court held that a period of two years and one month was a reasonable period within which to approach the Court.[15] In this case, the applicants were lay and serving life sentences. Similarly, in *Alex Thomas v. United Republic of Tanzania*[16] the Court also held that a period of three years and five months to file an application was reasonable in circumstances where the applicant was lay, indigent and incarcerated with lack of access to information.

47. In the present Application, given the Applicants' situation as lay and incarcerated persons, who were serving a life sentence and had been convicted in proceedings where they allege having not been provided legal

[12] *Norbert Zongo and Others v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92.
[13] *Igola Iguna v. United Republic of Tanzania,* ACtHPR, Application No. 020/2017, Judgment of 1 December 2022 (merits and reparations), §§ 37-38.
[14] *Thomas v. Tanzania* (merits), *supra,* § 73; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[15] ACtHPR, Application No. 007/2016, Judgment of 13 June 2023 (merits and reparations), §§ 42-44.
[16] *Thomas v. Tanzania* (merits), *supra*, §§ 73-74.

assistance, the Court finds that the Application was filed within a reasonable time as required by Rule 50(2)(f) of the Rules.

48. Concerning the admissibility requirement specified under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules, the Court notes that there is nothing on record to show that the Application concerns a case which has already been settled 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. The Court thus finds that the Application complies with Rule 50(2)(g) of the Rules.

49. Given all the above, the Court, therefore, finds that all the admissibility requirements in Article 56 of the Charter, and as reiterated in Rule 50(2) of the Rules are met and holds the instant Application admissible.

VII. MERITS

50. The Applicants allege that the Respondent State violated their Charter protected rights to: (A) non-discrimination (Article 2); (B) equality before the law and equal protection of the law (Article 3); (C) dignity (Article 5) and (D) fair trial (Article 7). The Court will now individually address each of the alleged violations.

A. Alleged violation of the right to non-discrimination

51. The Applicants aver that the Respondent State violated their right to non-discrimination, under Article 2 of the Charter.

*

52. The Respondent State, in its Response, did not directly deal with this allegation. It submitted, however, that it had “not violated any of the

Applicants' rights provided for under the African Charter on Human and Peoples' Rights."

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53. Article 2 of the Charter provides as follows:

> Every individual shall be entitled to the enjoyment of rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

54. In *African Commission on Human and Peoples' Rights v. Republic of Kenya* the Court stated thus:[17]

> Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.
>
> The scope of the right to non-discrimination extends beyond the right to equal treatment by the law and also has practical dimension in that individuals should in fact be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status.

55. The Court has consistently reiterated that any party that alleges the violation of the right to non-discrimination bears the duty of substantiating the same. This can be done by a party leading evidence which establishes the unlawful differentiation in treatment of similarly placed individuals.[18]

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[17] (merits) (2017) 2 AfCLR 9, §§ 137-138.
[18] *Alfred Agbesi Woyome v. Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 138-139 and *Majid Goa alias Vedastus v. United Republic of Tanzania* (merits and reparations) (26

56. In the instant Application, the Applicants have provided no evidence on the basis of which the Court can assess as to whether they were discriminated against or not. Given the lack of evidence, in support of the Applicants' allegations, the Court finds that the Applicants' allegation of violation of Article 2 of the Charter has not been established.

57. Accordingly, the Court dismisses the alleged violation of Article 2 of the Charter.

B. Alleged violation of the right to equality before the law and equal protection of the law

58. The Applicants allege that their right to equality before the law and to equal protection of the law under Article 3 of the Charter was violated.

*

59. The Respondent State's submissions did not directly address the Applicants' allegations under Article 3 of the Charter. It, however, generally submitted that it had not violated any of the Applicants' rights under the Charter.

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60. Article 3 of the Charter provides as follows:

> 1. Every individual shall be equal before the law
> 2. Every individual shall be entitled to equal protection of the law.

61. As the Court has previously emphasized, the right to equality before the law and equal protection of the law, as enshrined in Article 3 of the Charter, is closely related to the right to protection against discrimination, protected in Article 2 of the Charter.[19] The right to equality before the law requires that

September 2019) 3 AfCLR 498, §§ 75-77.
[19] *African Commission on Human and Peoples' Rights v. Kenya* (merits), *supra*, § 138.

"all persons shall be equal before the courts and tribunals."[20] Article 3 also requires that entities in charge of applying the law must do so equally with respect to all and that the law itself must treat everyone equally.[21]

62. In relation to the Applicants' allegations, the Court reaffirms that the burden of proof for a human rights violation, ordinarily, lies with he/she that alleges.[22] In the instant Application, the Court observes that the Applicants have made a general allegation that their right to equality before the law and equal protection of the law was violated. They have neither made specific submissions nor provided evidence to demonstrate how their right to equality and equal protection of the law was violated.

63. Given the lack of substantiation in the Applicants' claims of a violation of Article 3 of the Charter, the Court finds that the Applicants have failed to prove the said allegations.[23] In the circumstances, therefore, the Court dismisses the Applicants' allegations.

C. Alleged violation of the right to dignity

64. The Applicants allege that the Respondent State violated their right to dignity, as enshrined in Article 5 of the Charter, by sentencing them to suffer corporal punishment. According to the Applicants, the sentence of 12 strokes of the cane is "against human rights of the Applicants as it causes physical and emotional harm." The Applicants submit that this sentence is "a clear violation of Article 5 of the African Charter on Human and Peoples' Rights."

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[20] *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, §§ 84-85.
[21] *XYZ v. Republic of Benin* (merits and reparations) (27 November 2020) 4 AfCLR 49, § 151.
[22] *Sijaona Chacha Machera v. United Republic of Tanzania,* ACtHPR, Application No. 035/2017 Judgment of 22 September 2022 (merits), § 82.
[23] See, *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 153-154 and *Dismas Bunyerere v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 702, § 79.

65. The Respondent State reiterated its submission that it "has not violated the Applicants' rights under the African Charter on Human and Peoples' Rights" without any substantiation.

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66. The Court recalls that Article 5 of the Charter provides that:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

67. In *Yassin Rashid Maige v. United Republic of Tanzania* the Court examined, at length, the incompatibility of corporal punishment with, Article 5 of the Charter. In its examination, the Court noted that the United Nations Special Rapporteur on Torture along with the United Nations Human Rights Council were in agreement that prohibitions on inhuman and degrading treatment applied to corporal punishment.[24] The Court also demonstrated that the African Commission on Human and Peoples' Rights had similarly found that sentencing of persons to corporal punishment, in the form of lashings, violated Article 5 of the Charter and was tantamount to government sanctioned torture contrary to the Charter.[25] The findings, in respect of the incompatibility of corporal punishment with the Charter, were subsequently confirmed by the Court in *Kabalabala Kadumbagula and Another v. United Republic of Tanzania.* [26]

68. In the instant Application, the Applicants were sentenced to 12 strokes of the cane each by the District Court of Ludewa. This sentence was upheld both by the High Court and the Court of Appeal. The record, however, does

[24] *Yassin Rashdi Maige v. United Republic of Tanzania*, ACtHPR, Application No. 051/2016, Judgment of 5 September 2023 (merits and reparations), § 136.
[25] *Curtis Francis Doebbler v. Sudan*, ACHPR, Communication No. 236/2000, § 42.
[26] *Kabalabala Kadumbagula and Daud Magunga v. United Republic of Tanzania*, ACtHPR, Application No. 031/2017, Judgment of 4 June 2024 (merits and reparations), § 101.

not indicate if this sentence was executed. Nevertheless, by maintaining corporal punishment in its penal laws, the Respondent State creates a constant possibility that the punishment may be imposed by its Courts, as occurred in the Applicants' case. Given the preceding, the Court finds that the Respondent State violated the Applicants' right to dignity.

69. In light of the above, the Court holds that the Respondent State has violated Article 5 of the Charter by maintaining, in its penal law, provisions prescribing corporal punishment as well as by permitting its courts to impose the penalty of corporal punishment on the Applicants.

D. Alleged violation of the right to a fair trial

70. The Applicants allege that the Respondent State failed to ensure their right to a fair trial under Article 7 of the Charter by not affording them legal representation at any stage in the proceedings before the domestic courts.

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71. The Respondent State, without specifically addressing the Applicants' allegations, submits that it did not violate any of the Applicants' rights under the Charter.

***

72. The Court observes that Article 7(1)(c) of the Charter provides that: "Every individual shall have the right to have his cause heard. This comprises… the right to defence, including the right to be defended by counsel of his choice."

73. The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance. Nevertheless, the Court has held that Article 7(1)(c) of the Charter, read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to

as “ICCPR”),[27] establishes the right to free legal assistance as a part of the general right to fair trial. The right to free legal assistance arises where a person cannot afford to pay for legal representation and where the interests of justice so require.[28] The interests of justice also require the provision of free legal assistance where, among others, the Applicant is indigent, the offence he/she is facing is serious and the penalty provided by the law is severe.[29]

74. The Court confirms, from the record, that the Applicants conducted their case without the assistance of counsel throughout all domestic proceedings. As against this, the Court observes that the Applicants were charged with a serious offence, to wit, gang rape, which carries a mandatory sentence of life imprisonment on conviction. In the circumstances, the interests of justice required that they should have been provided with free legal assistance. This obligation persisted regardless of whether or not the Applicants requested for free legal assistance.

75. The Court, therefore, holds that the Respondent State has violated Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, due to its failure to accord the Applicants free legal assistance during proceedings before domestic courts.

VIII. REPARATIONS

76. Article 27(1) of the Protocol provides that:

> If 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] The Respondent State became a party to the International Covenant on Civil and Political Rights on 11 June 1976.
[28] *Thomas v. Tanzania* (merits), *supra*, § 114.
[29] See also *Abubakari v. Tanzania* (merits), *supra*, and *Anaclet Paulo v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 92.

77. The Court has consistently held 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 granted, reparations should cover the full damage suffered.[30]

78. The Court reiterates that the onus is always on the Applicant to provide evidence to justify his prayers, particularly for material damages.[31] With regard to moral damages, the Court has held that the requirement of proof is not strict,[32] since it is presumed that there is prejudice caused when violations are established.[33] Additionally, the Court has also held that the quantum of damages for moral prejudice is assessed based on equity considering all the circumstances of the case[34] and that compensation in the form of a lump sum is the established practice towards reparations for moral prejudice.[35]

79. The Court also restates that the measures that a State may take to remedy a violation of human rights include restitution, compensation, and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.[36]

80. The Court recalls that, specifically, the Applicants pray the Court to grant the following reparations:

    i. The setting aside of the sentences of life imprisonment in jail and of twelve (12) strokes of the cane imposed on the Applicants;
    ii. Restitution of the Applicants' liberty by their release from prison.

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[30] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, § 133; *and Lucien Ikili Rashidi v. United Republic of Tanzania of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119.
[31] *Kennedy Gihana and Others v. Republic of Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139.
[32] *Elisamehe v. Tanzania* (merits and reparations), *supra*, § 97.
[33] *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, § 55.
[34] *Ibid*, § 160.
[35] *Ibid*, § 119.
[36] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20.

iii. Payment of reparations in the amount of TSH100 000 000.00 (a hundred million Tanzanian shillings) for each, on account of moral damage suffered to compensate the Applicants for the loss in their dignity and reputation, as well as physical, mental and emotional harm;

iv. Rehabilitation of the Applicant Bahati Mtega who is HIV positive in order to receive proper medical and psychological care;

v. The Applicants also pray that the Respondent is ordered to amend its laws to ensure respect for dignity as enshrined under Article 5 of the African Charter on Human and Peoples Rights by removing the corporal punishment in her statute books.

*

81. The Respondent State, for its part, prays the Court to dismiss the matter in its entirety.

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82. In the instant case, the Court has established that the Respondent State has violated the Applicants' right to dignity, by reason of prescribing and applying corporal punishment, as well as the right to a fair trial by denying the Applicants free legal assistance during proceedings before domestic courts. It is in respect of these violations that it must assess the reparations due.

A. Pecuniary reparations

i. Material prejudice

83. As established in its jurisprudence, for the Court to grant reparations for material prejudice, there must be a causal link between the violation established and the prejudice suffered.[37] It is thus important that there should be specification of the nature of the prejudice and proof thereof.

[37] *Kadumbagula and Another v. Tanzania* (merits and reparations), *supra*, § 116.

84. In the instant Application, the Applicants have not specified any material prejudice that could be said to have arisen as a result of the violations established by the Court. The Court, therefore, does not make any award for material prejudice.

ii. Moral prejudice

85. As the Court has stated before, reparations for moral prejudice are due when individuals suffer mental or physical anguish as a result of conduct attributable to states.[38]

86. In the present case, the Court has established that the Respondent State violated the Applicants' rights to a fair trial and dignity. These violations necessitate the award of reparations to compensate the Applicants for the moral prejudice suffered. In this regard, the Court notes that the Applicants have prayed for the sum of TZS100 000 000 (One Hundred Million Tanzanian Shillings) each as damages for moral prejudice.

87. The Court finds that a lump sum award would, in the present case, be adequate reparations for the moral prejudice suffered by the Applicants. It does not, however, agree with the Applicants' prayer for TZS100 000 000, which it finds to be exorbitant. The Court, therefore, in the exercise of its equitable jurisdiction, awards each of the Applicants the sum of Three Hundred Thousand Tanzanian Shillings (TZS 300,000) for the moral prejudice suffered as a result of violations of the right to fair trial and dignity.

[38] *Nguza Viking and Another v. United Republic of Tanzania* (reparations) (8 May 2020) 4 AfCLR 3, § 38.

B. Non-pecuniary reparations

i. Setting aside sentences of life imprisonment and 12 strokes of the cane, and restoration of liberty

88. The Applicants pray the Court to overturn their conviction and sentence and set them free. They also pray that the Court should set aside their sentences to life imprisonment and 12 strokes of the cane.

*

89. The Respondent State prayed that the Court dismisses the Application in its entirety.

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90. The Court recalls that Article 27(1) of the Protocol empowers it, upon finding a violation, to order measures of reparations including, the release of prisoners. However, as per its jurisprudence, an order for release of an Applicant can only be made under special and compelling circumstances.[39]

91. In the present case, however, the Court notes that it has not established any violations relating to the conviction and sentence of the Applicants except in so far as concerns the question of corporal punishment and access to free legal assistance. These violations, in the Court's assessment, do not vitiate the findings reached by the domestic courts in relation to the guilt of the Applicants.

92. As a consequence of the above, the Court dismisses the Applicants' prayer for the overturning of their conviction, and for their release from prison.

93. The above notwithstanding, the sentence of 12 strokes of the cane, as earlier demonstrated, contravenes the Charter. Given the findings in this

[39] *Thomas v. Tanzania* (merits), *supra*, § 157.

judgment, the Court orders the setting aside of the sentence of 12 strokes of the cane, meted on the Applicants. For the avoidance of doubt, the setting aside of this sentence does not have any other bearing on the other sentences rendered by the domestic courts in the Applicants' case.

ii. Amendment of law to ensure respect for dignity

94. The Applicants prayed the Court to order the Respondent to amend its laws to remove caning as a form of punishment since it violates Article 5 of the Charter.

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95. The Respondent State reiterated its prayer that the Application be dismissed in its entirety.

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96. As earlier pointed out in this Judgment, the question of the compatibility of corporal punishment with the Charter, in the Respondent State, was previously dealt with in *Yassin Rashid Maige v. Tanzania*[40] as well as in *Kabalabala Kadumbagula and Another v Tanzania.*[41] In these decisions, the Court found that the Respondent State's Penal Code, for endorsing corporal punishment, contravenes Article 5 of the Charter. Consequently, the Respondent State was ordered to repeal the provisions relating to corporal punishment in its Penal Code, Criminal Procedure Act and the Corporal Punishment Act.[42]

97. Specifically, in *Kabalabala Kadumbagula and Another v. Tanzania*, a decision which was delivered on 4 June 2024, the Respondent State was given a period of two years within which to take steps to amend its criminal laws and align them with its international human rights obligations. In this connection, the Court observes that the period given to the Respondent

[40] *Supra*, § 143.
[41] *Supra,* § 101.
[42] *Ibid*, §§ 170-173.

State will lapse on 4 June 2026. As at the time of this judgment, the Court notes that the Respondent State has not filed any report indicating the steps that it has taken in order to align its laws with its international obligations as directed in *Kabalabala Kadumbagula and Another v. Tanzania.* In the circumstances the Court orders that the Respondent State take all necessary steps to facilitate the amendments to its criminal laws so that provisions for corporal punishment are expunged within one year of notification of this decision.

iii. Claim for medical and psychological rehabilitation of the First Applicant

98. The First Applicant prays for his "rehabilitation" on the basis of his HIV positive status.

99. The Respondent State did not address this prayer.

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100. The Court observes that, in the original Application filed, the First Applicant's prayer was not substantiated and appears only in two sentences in the section on prayers sought.

101. In the Amended Application, however, the Court notes that the First Applicant attached his "HIV Card". This card, seemingly, confirms that the First Applicant has been able to access medical treatment for his condition.

102. With regard to this prayer, the Court observes that the First Applicant has failed to demonstrate a connection between the reparations claimed and the violations established by the Court. In the circumstances, the Court dismisses his prayer.

IX. COSTS

103. Both Parties did not make submissions on costs.

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104. The Court observes that Rule 32(2) provides that "unless otherwise decided by the Court, each party shall bear its own costs, if any."

105. In the instant Application, the Court finds no justification for departing from the above provision in the circumstances of the case and, therefore, rules that each Party shall bear its own costs.

X. OPERATIVE PART

106. For these reasons:

THE COURT,

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

ii. *Dismisses* the objection to the admissibility of the Application;
iii. *Declares* the Application admissible.

On merits

iv. *Holds* that the Respondent State did not violate the Applicants'

right to non-discrimination as provided for in Article 2 of the Charter;

v. *Holds* that the Respondent State did not violate the Applicants' right to equality and equal protection before the law as provided for in Article 3 of the Charter;

vi. *Holds* that the Respondent State violated the Applicants' right to dignity as provided in Article 5 of the Charter by maintaining corporal punishment in its criminal laws;

vii. *Holds* that the Respondent State violated the Applicants' right to a fair trial as provided in Article 7(1)(c) of the Charter by failing to provide them with free legal assistance in domestic proceedings.

On reparations

On pecuniary reparations

viii. *Does* not make any award for material prejudice;

ix. *Grants* the Applicants' prayer for damages for moral prejudice and awards each of the Applicants the sum of Three Hundred Thousand Tanzania Shillings (TZS 300,000) as compensation;

x. *Orders* the Respondent State to pay the sum awarded under (ix) above, free from tax as fair compensation to be made within six months from the date of notification of this Judgment, failing which, it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

On non-pecuniary reparations

xi. *Dismisses* the Applicants' prayer for the quashing of their conviction and release from prison;

xii. *Orders* the Respondent State to set aside the sentence of 12 strokes of the cane imposed on the Applicants;

xiii. *Orders* the Respondent State to take all practicable steps to

ensure that its criminal laws are aligned with its human rights obligation by expunging corporal punishment from its laws within one year from the date of notification of this Judgment.

On implementation and reporting

xiv. *Orders* the Respondent State to submit to it, within six 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 months until the Court considers that there has been full implementation thereof.

On costs

xv. *Orders* that each Party shall bear its own costs.

Signed:

Modibo SACKO, President;

Chafika BENSAOULA, Vice President;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

Duncan GASWAGA, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the Separate Opinion of Justice Blaise TCHIKAYA is appended to this Judgment.

Done at Arusha, this Twenty-Sixth Day of June in the Year Two Thousand and Twenty-Five in English and French, the English text being authoritative.