

## Thomas v Tanzania (reparations) (2019) 3 AfCLR 287

Application 005/2013, *Alex Thomas v United Republic of Tanzania*

Judgment, 4 July 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant filed an Application for reparations following the Court's Judgment on merits, in which the Court found that the Respondent State had violated the Applicant's rights by concluding his trial for a criminal charge in his absence and for not providing him with legal aid. The Applicant claimed pecuniary reparations for himself and for indirect victims of the violation of his rights, counsel's legal fees, transport fees and stationery, restitution of liberty, and measures of satisfaction and guarantee of non-repetition. The Court dismissed the Applicant's claim for material damages, but awarded moral damages to him, his mother and his siblings. The Applicant's wife and son were not granted moral damages as he did not have contact with them.

**Reparations** (material damages, 26; moral damages to Applicant, 39-42, moral damages to Applicant's wife and son, 52-53; moral damages to Applicant's mother, 56, 57; moral damages for Applicant's siblings, 59, 60; non-repetition, 69; publication of Judgment, 74)

### I. Subject of the Application

1. The Application for reparations was filed by Mr. Alex Thomas (hereinafter referred to as the Applicant) against the United Republic of Tanzania (hereinafter referred to as "the Respondent State") following the Judgment of the Court on the merits of 20 November 2015. In the said Judgment, this Court found that the Respondent State violated Articles 1, 7(1) (a), (c) and (d) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter" and Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"), by concluding the trial on the charge of armed robbery in the Applicant's absence and not providing him free legal representation at any stage of the proceedings.
2. Having found these violations, the Court consequently ordered the Respondent State "to take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the Applicant, and to inform the Court, within six (6) months, from

the date of this judgment of the measures taken”.

3. Pursuant to Rule 63 of the Rules, the Court directed the Applicant to file his submissions on reparations within thirty (30) days of the judgment of 20 November 2015 and the Respondent State to file the submissions in response thereto within thirty (30) days of receipt of the Applicant’s submissions.

## **II. Brief background of the matter**

4. The above-mentioned Judgment of the Court of 20 November 2015 was on the merits of the Application filed by the Applicant on 2 August 2013. In the Application, he alleged that his rights to a fair trial had been violated by the Respondent State contrary to the Charter in the course of proceedings, following which he was convicted of the offence of armed robbery and sentenced to thirty (30) years imprisonment.

## **III. Summary of the procedure before the Court**

5. On 27 November 2015, the Registry transmitted a certified true copy of the Judgment on merits to the Parties.
6. The Parties filed their submissions on reparations within the time stipulated by the Court.
7. Pleadings on reparations were closed on 2 November 2017 and the Parties were duly notified.

## **IV. Prayers of the Parties**

### **A. Applicant’s Prayers**

8. The Applicant prays the Court to grant him the following reparations:

“a. Pecuniary reparations

For Alex Thomas as a Direct Victim:

- i. Moral prejudice: calculated at one thousand dollars (US\$1000) a month for each month from when he was first arrested. He was first arrested on 22 December 1996. This is a total of 19 years and two months which equates to two hundred and thirty thousand dollars (US\$230,000).
- ii. Fifty-five thousand eight hundred and ninety dollars (US\$55,890) for the material prejudice that the Applicant suffered. The current taxable wage in Tanzania is US\$81 \* 230 months (since he was first

arrested)\* 3 (he was earning at least 3 times the minimum wage) = US\$55,890.

For indirect victims:

...

- iii. Amount of twenty five thousand dollars (US\$25,000) payable to his son, Emmanuel Alex Mallya,
- iv. Amount of forty two thousand dollars (US\$42,000) payable to his wife,
- v. Amount of seventeen thousand dollars (US\$17,000) payable to his mother,
- vi. Amount of seventeen thousand dollars (US\$17,000) payable to his sister Flora Amos Mallya,
- vii. Amount of seventeen thousand dollars (US\$17,000) payable to his sister Anna Elinisa Swai,
- viii. Amount of seventeen thousand dollars (US\$17,000) payable to his younger brother John Thomas Mallya.

For Counsel's legal fees:

- ix. Legal aid fees for 400 hours of legal work: 300 hours for two Assistant Counsels and 100 hours for the lead Counsel. This is charged at two hundred dollars (US\$200) per hour for lead Counsel and one hundred and fifty dollars (US\$150) per hour for the Assistants. The total amount for all this being twenty thousand (US\$20,000) for the lead Counsel and forty-five thousand dollars (US\$45,000) for the two Assistants.
- x. Nine hundred and fifty two dollars (US\$952) as costs for the Advocate who assisted with the investigation and drafting and preparation of Affidavits.

Transport, fees and stationery:

- xi. Printing, photocopying and binding amounts to one thousand dollars (US\$1,000),
- xii. The lead Counsel and his assistant travelled to Addis Ababa, Ethiopia in December 2014 for the public hearing. The flights, taxi, hotel and per diem amounts to two thousand nine hundred and forty seven dollars (US\$2,947),
- xiii. The transportation costs to and from the Seat of the African Court from the PALU Secretariat amount to one hundred and thirty nine dollars (US\$139),
- xiv. Communication costs amount to one thousand dollars (US\$1,000),
- xv. Trips to and from Karanga prison amount to three hundred and eighty dollars (US\$380),

xvi. Transporting Alex Thomas's relatives to Arusha to swear Affidavits amounts to fifty two dollars (US\$52),

xvii. Any other reparations this Court shall deem necessary.

b. Restitution of Liberty

[T]hat the Court orders for the restitution of Mr. Alex Thomas' liberty.

c. Principle of proportionality

The Applicant prays that the Court applies the principle of proportionality when considering all the Applicant's submissions.

d. Measures of satisfaction and guarantees of non-repetition

[T]hat the government publishes in the national gazette the decision of 20 November, 2015 in both English and Swahili as a measure of satisfaction."

## B. Respondent State's Prayers

9. The Respondent State prays the Court to make the following orders and declarations:

- "1. That the Judgment that the Court delivered on 20 November 2015 is sufficient reparations (sic)...,
2. That the Applicant be ordered to submit to the Court and the Respondent verification and evidence of the amounts sought,
3. That the Applicant's claims for lawyers' fees should be set at the scale of the legal aid scheme which should be estimated by the Court for the main case and the subsidiary case on reparations,
4. That the prayer for restitution of the Applicant's liberty be denied as per the Judgment of the Court at paragraph 161 on merits at item viii,
5. That the prayer for restoration of the Applicant's liberty is contemptuous of the Judgment of this Court,
6. ....,
7. ....,
8. A declaration that the steps taken by the Government of Tanzania to remedy delays and endeavours towards the provisions of legal aid is sufficient reparation,
9. That the Applicant should not be granted reparations,
10. That the Applicant's claim for reparations be dismissed in its entirety with costs,
11. That the Court grants any other relief it deems fit."<sup>1</sup>

1 With regard to prayer (4) of the Respondent State's prayers, it should be noted that in Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania (hereinafter referred to as "Alex Thomas v Tanzania (Merits)"*), para 161 (viii) states that, "The Court holds...on the Merits... that the Applicant's prayer for release from prison be denied".

## V. Reparations

10. Article 27(1) of the Protocol provides, “If the Court finds that there has been violation of a human or peoples’ right it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation”.
11. The Court recalls its earlier judgments<sup>2</sup> and restates its position that, “to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim”.<sup>3</sup>
12. The Court also restates that, the purpose of reparation being *restitutio in integrum* it “...must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed”.<sup>4</sup>
13. Measures that a State must take to remedy a violation of human rights must include restitution, compensation and rehabilitation of the victim, satisfaction and measures to ensure non-repetition of the violations taking into account the circumstances of each case.<sup>5</sup>
14. The Court reiterates that with regard to material prejudice, the general rule is that there must be existence of a causal link between the alleged violation and the prejudice caused and the burden of proof is on the Applicant who has to provide evidence to justify his prayers.<sup>6</sup> Exceptions to this rule include moral prejudice, which need not be proven, presumptions are made in favour of the Applicant and the burden of proof shifts to the

2 Application 007/2013, Judgment of 3 June 2016 (Merits), *Mohamed Abubakari v United Republic of Tanzania* (hereinafter referred to as “Mohamed Abubakari v Tanzania (Merits)”), para 242 (ix).

3 Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda* (hereinafter referred to as “*Ingabire Umuhoza v Rwanda* (Reparations)”), paras 19.

4 PCIJ, Chrozow Factory Case, *Germany v Poland*, Jurisdiction, Determination of Indemnities and Merits, Rec 1927, p 47.

5 *Ingabire Umuhoza v Rwanda* (Reparations), para 20.

6 Application 011/2011. Ruling of 13 June 2014 (Reparations), *Reverend Christopher R Mtikila v United Republic of Tanzania* (hereinafter referred to as “*Reverend Christopher R Mtikila v Tanzania* (Reparations)”), para 40; Application 004/2013. Judgment of 3 June 2016 (Reparations), *Lohé Issa Konaté v Burkina Faso* (hereinafter referred to as “*Lohé Issa Konaté v Burkina Faso* (Reparations)”), para 15.

Respondent State.

15. As a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.<sup>7</sup> Taking into account fairness and considering that an Applicant should not be made to bear the adverse fluctuations that are inherent in financial activities, the Court determines the quantum and currency of the award.
16. In the instant case, the Court notes that the Applicant requests to be paid compensation in United States Dollars (USD). The Court observes that since the Applicant is a Tanzanian national, resident in Tanzania where the violations occurred and the legal tender in Tanzania is Tanzanian Shillings, his claims of compensation in United States dollars is not justified. The Court therefore will award compensation in Tanzanian Shillings.
17. The Applicant prayed the Court to grant pecuniary reparations for (a) material loss he suffered, (b) moral prejudice for himself and indirect victims and non-pecuniary reparations in the form of (a) restitution of liberty (b) guarantees of non-repetition and (c) measures of satisfaction.

## **A. Pecuniary reparations**

### **i. Material loss-loss of income and life plan**

18. The Applicant states that even though the Judgment of 20 November 2015 is to an extent a form of reparation, the Court should consider granting him monetary compensation, based on the principle of equity to give him a feeling of a fair reparation for the prejudice he suffered.
19. In this regard, he avers that he was a businessman and provider for his son, wife, mother and siblings and were he to be released from prison, he would have no source of income and would have to learn how to survive in a world that is significantly different from what it was when he was imprisoned. He relies on the jurisprudence of the Inter-American Court of Human Rights in *Aloeboetoe v Suriname*<sup>8</sup> to support his argument that he should

<sup>7</sup> *Ingabire Umuhoza v Rwanda* (Reparations), para 45.

<sup>8</sup> Inter-American Court of Human Rights (IACTHR) *Case of Aloeboetoe et al v Suriname*, Judgment of 10 September 1993, (Reparations and Costs), para 68.

- be awarded reparations for loss of income.
20. Furthermore, the Applicant claims that his life plan has been severely disrupted and that he has been unable to achieve his plans and goals as a result of his arrest, trial and imprisonment. The Applicant relied on the Inter-American Court of Human Rights' case of *Loayza-Tamayo v Peru*,<sup>9</sup> to support the claim that he is entitled to reparations for the loss of his life plan.
  21. Consequently, he prays that the Court to award him United States Dollars Fifty Five Thousand Eight Hundred and Ninety (US\$55,890) as material damages for loss of income and life plan.
  22. The Respondent State disputes the Applicant's claim, and argues that he has failed to prove the material prejudice he suffered, and the amounts claimed are not based on any justifiable computation.
  23. The Respondent State argues that it would be unlawful to allow the Applicant to enrich himself for a crime that he committed, for which he is being lawfully held in custody. The Respondent State avers that this is against public policy, contrary to the principle of just compensation and that the principle of equity would not be applicable. The Respondent State states that life plans cannot be quantified in monetary terms. The Respondent State concludes that the loss of income and loss of life plans were consequences of the Applicant's lawful imprisonment and the Applicant's claim should be dismissed.

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24. The Court recalls its position in the *Zongo* case, where it stated that: "in accordance with international law, for reparation to accrue, there must be a causal link between the wrongful act that has been established and the alleged prejudice".<sup>10</sup>
25. The Court also recalls its jurisprudence in the *Mtikila* case where it stated that:  
"It is not enough to show that the Respondent State has violated a provision of the Charter; it is also necessary to prove the damage that the Respondent State is being required by the Applicant to indemnify. In

9 IACtHR *Case of Loayza-Tamayo v Peru*, Judgment of 17 September 1997, para 150.

10 Application 013/2011. Judgment of 05 June 2015 (Reparations), *Norbert Zongo and others v Burkina Faso* (hereinafter referred to as "*Norbert Zongo and others v Burkina Faso (Reparations)*") para 24.

principle, the existence of a violation of the Charter is not sufficient *per se*, to establish a material damage".<sup>11</sup>

26. The Court notes that the Applicant has not established the link between the violations established in the Judgment on the merits and the material loss which he claims he suffered. Moreover, he has neither elaborated on his occupation nor provided evidence of his earnings before his arrest.
27. The Applicant has not justified his claim for United States Dollars, Five Thousand Eight Hundred and Ninety (US\$55,890) for material prejudice resulting from the loss of income and life plan.
28. In light of this consideration, the prayer regarding material damages is dismissed.

## ii. Moral prejudice

### a. Moral prejudice suffered by the Applicant

29. The Applicant claims that he has suffered a long imprisonment following an unfair trial and emotional anguish during his trial, appeals and application for review which bore no fruit. He states that he has lost relations with his wife who has since remarried and his son whom he has not seen since the year 2002. The Applicant further states that he lost the relationship with his mother and his family and he has been tortured terribly by the inability to be there for them and provide for them as the head of the family and sole provider following his father's death.
30. The Applicant avers that he has lost contact with his relatives and that his life plan was disrupted and lost. The Applicant also states that his health has deteriorated while in prison due to the prison conditions and he suffers ailments not limited to, bronchial asthma with constant attacks, back pains, degenerative joint disease, plantar warts, atopic eczema, allergic rhinitis, deteriorating eye sight and breathlessness. The Applicant further complains that he has lost his social status.
31. The Applicant prays that the Court, in calculating the moral damages, should apply equity and take into account the severity of the violations, the impact these have had on him and the overall damage to his health. He further asks the Court to consider the period he has been imprisoned and grant reparations that would

11 *Christopher Mtikila v Tanzania* (Reparations), para 31.



- alleviate the suffering he has endured.
32. Consequently, the Applicant urges the Court to grant him an award of United States Dollars Two Hundred and Thirty Thousand (US\$ 230,000) as reparation for the moral prejudice he suffered for the violations established.
  33. The Respondent State submits that there is no proof that the Applicant suffered from emotional harm. The Respondent State contends that the Applicant's incarceration followed his lawful conviction and sentencing and this necessarily results in discomfort and anguish to the prisoner. The Respondent State argues that it cannot refrain from prosecuting persons for fear that the accused would be emotionally hurt. The Respondent State submits that the Applicant has no pending appeals.
  34. The Respondent State further avers that the Applicant's loss of relations and contact with his wife, son, mother, family and other relatives are private rather than legal matters. The Respondent State contends that there is no guarantee that the Applicant would still be with his wife, were he not imprisoned and his son and relatives could visit him in prison at any time. The Respondent State contends that the disruption of the Applicant's relations with his mother and relatives and loss of his social status was as a result of his own illegal act.
  35. The Respondent State argues that the Applicant suffered from illness even before his conviction and sentencing and there is no proof that his ill health is attributable to the conduct of the Respondent State. On the contrary, the Respondent State has ensured that the Applicant gets medical attention at its expense.
  36. The Respondent State submits that there is no proof that it caused the Applicant any loss of earnings, suffering, hardship or emotional stress. The Applicant's crime is what has placed him in the position he is in and the Respondent State was merely implementing its laws by holding him in lawful custody. The Respondent State argues that there is no basis for computation for the amounts claimed and they should be dismissed.

\* \* \*

37. The Court notes that, moral prejudice is that which results from the suffering, anguish and changes in the living conditions for the

victim and his family.<sup>12</sup>

38. In its judgment on the merits, the Court concluded that there was a violation of the Applicants' right to a fair trial as a result of the Respondent State's decision to continue with the defence case during the trial in the Applicant's absence and without providing him free legal representation during those proceedings.<sup>13</sup>
39. The Court notes however, that the conclusion of the Applicant's trial in his absence and the non-provision of legal aid caused him anguish and despair due to the resulting unfairness. This caused moral prejudice to the Applicant.
40. The Court finds that this entitles the Applicant to compensation. The Court has also held that the assessment of quantum in cases of moral prejudice must be done in fairness and taking into account the circumstances of the case.<sup>14</sup> In such instances, affording lump sums would generally apply as the standard.<sup>15</sup>
41. The Court considers that the Applicant's claim for compensation amounting to United States Dollars Two Hundred and Thirty Thousand (US\$ 230,000) is excessive.
42. In light of these considerations and based on discretion, the Court therefore awards the Applicant an amount of Tanzanian Shillings Two Million (TZS 2,000,000).

**b. Moral prejudice to indirect victims**

43. Relying on *Zongo* case, the Applicant seeks compensation for his family as indirect victims as follows:
  - i. United States Dollars twenty five thousand dollars (US\$25,000) payable to his son, Emmanuel Alex Mallya,
  - ii. United States Dollars forty two thousand dollars (US\$42,000) payable to his wife,
  - iii. United States Dollars seventeen thousand dollars (US\$17,000) payable to his mother, Ester Marmo Maley,
  - iv. United States Dollars seventeen thousand dollars (US\$17,000) payable to his sister Flora Amos Mallya,
  - v. United States Dollars seventeen thousand dollars (US\$17,000) payable to his sister Anna Elinisa Swai, and
  - vi. United States Dollars seventeen thousand dollars (US\$17,000) payable to his younger brother John Thomas Mallya.

12 *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 34.

13 *Alex Thomas v Tanzania* (Merits) paras 86-99 and paras 114-124.

14 See *Norbert Zongo and others v Burkina Faso* (Reparations), para 61.

15 *Ibid*, para 62.

44. The Applicant requests that the Court should consider the fact that his son was barely two (2) years old when he was arrested, and his son was denied the opportunity to be raised by his father, know him and enjoy his company. The Applicant states that he is currently not aware of his son's whereabouts and that his son suffers the stigma of having a father who is associated with criminal activities and lacked a good education due to his father's imprisonment. The Applicant states that his wife was also heavily affected by the sudden loss of her husband.
45. As regards the Applicant's mother, he states that she lost almost twenty (20) years with her son, suffered the anguish and social stigma of knowing he has been implicated in something criminal, lost his financial support and suffered great financial strain as a result. The Applicant claims that his siblings suffered tremendously as a result of losing their brother, friend and confidant and had to travel severally to visit the Applicant in prison. The Applicant's brother, John Thomas, was left without a mentor in the conduct of business, he has had to incur expenses to buy the Applicant's medication which is not available in prison and had to provide the Applicant with money to use while in prison. The Applicant states that his brother has suffered the stigma of being related to a convict. With regard to the Applicant's sisters, Anna Elinisa Swai and Flora Amos, he claims that they had to stop their education following the Applicant's arrest since he was the one educating them and they also suffered the stigma of being associated with a convict.
46. Relying on Inter-American Court of Human Rights' case of *Aloeboetoe v Suriname*,<sup>16</sup> the Applicant prays that the Court, in assessing the moral prejudice suffered by the indirect victims, should take into consideration that the nature of relationship between the Applicant and the indirect victims provides a basis for the assumptions that the support he provided to them would have continued had he not been imprisoned.
47. The Respondent State disputes the claim for reparations for indirect victims and states that it has not been proven how the alleged victims are related to, or were being supported by the Applicant for them to be able to claim the amounts indicated.
48. The Respondent State also disputes the amounts claimed because the Applicant is unaware of the whereabouts of his alleged son, his wife is no longer in his life and broken family relations may

16 *Case of Aloeboetoe et al v Suriname* Judgment of 10 September 1993, (Reparations and Costs).

have existed prior to his conviction. The Respondent State avers that there is also no proof that the Respondent State is in any way responsible for the disruption of the Applicant's family relations as alleged by the Applicant. The Respondent State concludes that there is no basis for the computation of the amount sought.

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49. The Court recalls that compensation for non-material loss also applies to relatives of the victims of a human rights violation as a result of the indirect suffering and distress. As held in the *Zongo* case, "It is apparent that the issue as to whether a given person may be considered as one of the closest relatives entitled to reparation has to be determined on a case-by-case basis, depending on the specific circumstances of each case".<sup>17</sup>
50. In this regard, the Court, in the *Zongo* case, noted that spouses, children and parents may claim the status of indirect victims.<sup>18</sup> On this basis, the persons who might be entitled to claim for moral damages are the Applicant's son, Emmanuel Alex Mallya, his wife<sup>19</sup> and his mother, Ester Marmo Maley.
51. The Court has stated that spouses should produce marriage certificates or any equivalent proof, children are to produce their birth certificates or any other equivalent evidence to show proof of their affiliation and parents must produce an attestation of paternity or maternity or any other equivalent proof.<sup>20</sup>
52. The Court notes with regard to the Applicant's wife that, her identity has not been indicated anywhere in the submissions. The Applicant states that he lost his wife who has since remarried. Furthermore, in a letter dated 27 November 2015 to PALU, which was annexed to his submissions on reparations, the Applicant elaborates that he lost contact with his wife since the year 2000 when his first appeal was dismissed by the High Court. In view of these circumstances, the Applicant cannot therefore maintain that

17 *Norbert Zongo and others v Burkina Faso* (Reparations), para 49.

18 *Norbert Zongo and others v Burkina Faso* (Reparations), para 50(i)-(iii).

19 The Applicant's wife's identity is not indicated anywhere in the Applicant's submissions.

20 *Norbert Zongo and others v Burkina Faso* (Reparations), para 50(i)-(iii).

his wife suffered moral prejudice as a result of the violations found and his incarceration. This claim is consequently dismissed.

53. The Applicant provided a certified true copy of a birth certificate for his son, Emmanuel Alex Mallya. In his submissions however, the Applicant stated that he last saw his son in the year 2002 and does not know his whereabouts. In these circumstances, the Applicant cannot therefore maintain that his son suffered moral prejudice as a result of the violations found and his incarceration. This claim is consequently dismissed.
54. With regard to the Applicant's mother, Ester Marmo Maley, the Court notes that the Applicant has not provided a copy of his birth certificate or any other document attesting that she is his mother.
55. The Court notes however, that the Applicant's mother swore an affidavit on 26 February 2016 attesting that, following the death of her husband, Thomas Mallya in 1984, the Applicant, being their first child, became the family's breadwinner taking care of her and his four (4) siblings. In addition to this affidavit, the Applicant filed a certified true copy of his mother's Voter Registration Card. The Respondent State did not contest the veracity of this evidence. The Court is of the view that the certified true copy of the Voter Registration Card proves the Applicant's mother's identity and that the affidavit she swore is sufficient proof as regards her affiliation to the Applicant.
56. Having determined that the Applicant has proven that Ester Marmo Maley is his mother, the Court is of the view that she endured emotional anguish arising from the violations endured by the Applicant and which inherently and naturally follows the incarceration of a child, as was the case with the Applicant. This suffering was exacerbated by the fact that the Applicant's mother was widowed and relied on his emotional support, being the eldest child in the family.
57. With regard to the issue of quantum of the damages to be awarded for the moral prejudice suffered by the Applicant's mother, the Court therefore considers that an amount of Tanzanian Shillings One Million and Five Hundred Thousand (TZS 1,500,000) is fair compensation.
58. On the issue of the moral prejudice suffered by the Applicant's two (2) sisters, Flora Amos Mallya and Anna Elinisa Swai and brother, John Thomas Mallya, the Court recalls its position that their victimhood must be established to justify damages.<sup>21</sup> They all swore affidavits dated 26 February 2016 attesting to their fraternal

21 *Norbert Zongo and others v Burkina Faso (Reparations)*, paras 45-54.

relationship to the Applicant. The Applicant also provided certified true copies of their Voter Registration Cards. The Respondent State did not contest the veracity of these documents. The Court notes that the certified true copies of the Voter Registration Cards prove the Applicant's siblings' identity and the affidavits they swore are sufficient proof of their fraternal relationship with the Applicant.

59. Similar to the Applicant's mother, his sisters and brother suffered emotional anguish and their social conditions deteriorated following the Applicant's imprisonment. This occasioned them moral prejudice which entitles them to compensation.
60. The Court therefore considers that an amount of Tanzanian Shillings One Million (TZS 1,000,000) is fair compensation to be awarded to each of his siblings, namely, Flora Amos Mallya, Anna Elinisa Swai and John Thomas Mallya.

## **Non-pecuniary reparations**

### **i. Restoration of Applicant's liberty**

61. Relying on the jurisprudence of the Inter-American Court of Human Rights that, where a victim has been convicted as a result of an unfair trial, his right to reparation includes an obligation for the State to declare all records of the trial and conviction "null and void", the Applicant prays the Court to make orders for the restitution of his liberty.<sup>22</sup>
62. The Applicant cites the decision of the African Commission on Human and Peoples' Rights that, where conditions of the trial are found to be unfair, the State can be ordered to release detainees<sup>23</sup> and argues that this should be applicable in the instant case.
63. The Applicant further states that restitution of liberty in cases involving arbitrary arrest and detention is an important measure of reparation that can also assist in the prevention of further violations. The Applicant submits that the violations are of a continuous nature because he is still being held on the basis of a conviction which was based on several violations of his human

22 Case of *Loayza-Tamayo v Peru* Judgment of 17 September 1997.

23 Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Views of 1 March 2011, para 233(VI).

rights.

- 64.** The Respondent State contests the Applicant's request for the restitution of his liberty. The Respondent State argues that the Applicant is in prison for a justifiable reason, that is, the commission of a serious offence and that where an individual such as the Applicant has caused suffering to victims by committing armed robbery and he is lawfully tried, convicted and sentenced, then he is not entitled to restitution since any prejudice he has suffered is of his own doing. The Respondent State argues that since the Court did not order the Applicant's release in the Judgment on merits, then such a request has been overtaken by events and is actually in contempt of the Court's orders.

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- 65.** Regarding the prayer for the Applicant's release from prison, the Court notes from the Applicant's correspondence to the Court received on 3 December 2018, that the Applicant was released from prison on 2 June 2018 following the completion of his sentence. Consequently, the prayer to be released is moot.

**ii. Guarantees of non-repetition and report on implementation**

- 66.** The Applicant requests that the Court make an order that the Respondent State guarantees the non-repetition of violation of his rights. He also requests that the Court should order the Respondent State to report on measures taken to implement the orders of the Court, every six (6) months, until it satisfies the orders the Court shall make in this regard.
- 67.** The Respondent State disputes the Applicant's requests and submits that it is not clear which violations are being referred to, since the findings on the rights alleged to have been violated were made by the Court when it delivered its Judgment on 20 November 2015. Furthermore, the Respondent State submits that the Court already ordered the Respondent State to take necessary measures to remedy the violations found, precluding the reopening of the Applicant's defence or his retrial.

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68. The Court considers that, as it has held in the matter of *Armand Guehi v Tanzania*, while guarantees of non-repetition generally apply in cases of systemic violations,<sup>24</sup> these remedies would also be relevant in individual cases where the violations will not cease, are likely to reoccur or are structural in nature.<sup>25</sup>
69. Considering that the Applicant has already been released, the Court does not deem it necessary to issue an order regarding non-repetition of the violations of the Applicant's rights since there is no possibility of such violations being repeated in relation to the Applicant.<sup>26</sup> The Court also notes the Respondent State's report on implementation of the Judgment on merits, filed on 3 January 2017, that the Respondent State has through the preparation of a Legal Aid Bill taken measures to establish a comprehensive legal aid framework for indigent litigants, in both civil and criminal matters. The Legal Aid Bill was enacted by the Respondent State's Parliament on 21 February 2017 and published in the Official Gazette in March 2017. The Court notes that this is a remedy which guarantees non-repetition of failure to provide legal aid to indigent litigants. The claim is therefore dismissed.
70. With respect to the order for report on implementation of this Judgment, the Court reiterates the obligation of the Respondent State as set out in Article 30 of the Protocol. The Court notes that such an order is inherent in its judgments when it directs the Respondent State or any other party to carry out a specific action.

### iii. Measures of satisfaction

71. The Applicant requests an order that the Respondent State publish in the national Gazette in both English and Swahili, the Judgment of 20 November 2015 as a measure of satisfaction.
72. The Applicant contends that the Respondent State should be ordered to report to the Court every six (6) months until it satisfies the orders this Court shall make when considering the submissions for reparations.
73. The Respondent State argues that the Judgment issued by the Court was a just measure of satisfaction and the Applicant is

24 *Armand Guehi v Tanzania* (Merits and Reparations), para 191; See also *Norbert Zongo and others v Burkina Faso* (Reparations), paras 103-106;

25 *Armand Guehi v Tanzania* (Merits and Reparations), para 191 and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 43.

26 *Armand Guehi v Tanzania* (Merits and Reparations), paras 191 and 192.



therefore not entitled to further measures of satisfaction.

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74. Though the Court considers that a judgment, *per se*, can constitute a sufficient form of reparation,<sup>27</sup> it can, *suo motu*, order further measures of satisfaction as it deems fit. The circumstances warranting the Court to make such further orders in the instant case are the need to emphasise on and raise awareness of the Respondent State's obligations to make reparations for the violations established with a view to enhancing implementation of the judgment. In order to ensure that the Judgment is publicised as widely as possible, the Court therefore, finds that the publication of the Judgment on merits and this Judgment on reparations on the websites of the Judiciary and the Ministry of Constitutional and Legal Affairs to remain accessible for at least one (1) year after the date of publication, is an appropriate additional measure of satisfaction.

## **VI. Costs**

75. In the judgment on merits, the Court held that it would decide on the issue of costs when dealing with reparations.<sup>28</sup>
76. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."
77. The Court recalls that, in line with its earlier judgments, reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.<sup>29</sup> The Applicant must provide justification for the amounts claimed.<sup>30</sup>

## **A. Legal fees related to proceedings before this Court**

- 78.** The Applicant prays that the Court grants the following reparations for legal fees:
- i. Legal fees for 400 hours of legal work: 300 hours for two Assistant Counsels and 100 hours for the lead Counsel. This is charged at United States Dollars Two Hundred (US\$200) per hour for lead Counsel and United States Dollars One Hundred and Fifty Dollars (US\$150) per hour for the Assistant Counsels. The total amount being United States Dollars Twenty Thousand (US\$20,000) for the lead Counsel and Forty-Five Thousand Dollars (US\$45,000) for the two Assistant Counsels
  - ii. Legal costs of the Advocate who assisted with investigation and drafting and preparation of Affidavits sworn by the Applicant's mother and siblings amounting to United States Dollars Nine Hundred and Fifty Two Dollars (US\$952)
  - iii. The total amount for legal fees (for lead Counsel, assistant Counsels and the Advocate) is United States Dollars Sixty Five Thousand, Nine Hundred and Fifty Two (US\$65,952)
- 79.** The Respondent State disputes the claim for counsel's legal fees on the basis that the Applicant's counsel was provided by the Court and therefore this claim is misplaced.

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- 80.** With regard to legal fees, this Court, in the *Zongo* case, stated that "...the reparation paid to the victims of human rights violations may also include the reimbursement of lawyers' fees".<sup>31</sup>
- 81.** The Court notes that PALU represented the Applicant on a *pro bono* basis under the Court's current legal aid scheme.<sup>32</sup> This claim is therefore unjustified and is hereby dismissed.

## **B. Transport and stationery costs**

- 82.** Using the precedent in the *Zongo* case, the Applicant prays the Court to grant the following reparations with regard to transport and stationery costs incurred:
- i. Printing, photocopying and binding costs amounting to United States Dollars One Thousand Dollars only (US\$1,000)
  - ii. Travel costs for the lead Counsel and his assistant who travelled to Addis Ababa, Ethiopia in December 2014 for the public hearing. The costs for flights, taxi, hotel and per diem amounting to United

States Dollars two thousand nine hundred and forty seven dollars (US\$2,947), transportation costs to and from the Seat of the African Court from the PALU Secretariat amounting to United States Dollars one hundred and thirty nine dollars (US\$139,00) and communication costs amounting to one thousand dollars (US\$1,000)

- iii. Travel costs for trips to and from Karanga prison amounting to United States Dollars three hundred and eighty dollars (US\$380)
  - iv. Transporting the Applicant's relatives to Arusha to swear Affidavits amounting to fifty two dollars (US\$52).
- 83.** The Respondent State disputes these claims and relying on the *Mtikila* case, argues that the Applicant was represented on a *pro bono* basis and as such the transport fees and stationery costs claimed would be unjustified. The Respondent State further states that when representing a client on a *pro bono* basis the Court pays the legal representative sufficient funds to cover the costs incurred and the legal fees and the legal representative is based at the seat of the Court in Arusha.
- 84.** The Respondent State maintains, albeit erroneously, that since the Court ordered, in its judgment on 20 November 2015, that the Applicant should bear his own costs, the Court should issue the same order regarding reparations.

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- 85.** The Court recalls its position in the *Mtikila* case where it noted that “expenses and costs form part of the concept of reparation”.<sup>33</sup>
- 86.** The Court considers that transport costs incurred for travel within Tanzania, and stationery costs are fall under the “Categories of expenses that will be supported in the Legal Aid Policy of the Court”.<sup>34</sup> Since PALU represented the Applicant on a *pro bono* basis, the claims for these costs are unjustified and are therefore dismissed.
- 87.** With regard to the transport and accommodation costs for the Applicant's Counsels' travel to Addis Ababa, Ethiopia, to attend the hearing of the matter, the Court recalls its position in *the Zongo* case that “the reparation payable to victims of human rights violation can also include reimbursement of the transport

33 *Lohe Issa Konate v Burkina Faso* (Reparations), para 39.

34 African Court on Human and Peoples' Rights *Legal Aid Policy* 2013-2014, Legal Aid Policy 2015-2016, and Legal Aid Policy from 2017.

fares and sojourn expenses incurred for the purposes of the case by the representatives at the Seat of the Court”.<sup>35</sup>

- 88.** The Court scheduled the public hearing of the case at the session held in Addis Ababa, Ethiopia, and these costs were necessary and were actually incurred as evidenced by the proof of payments and supporting documentation provided by the Applicant’s Counsel amounting to United States Dollars Two Thousand Nine Hundred and Forty Seven (US\$2,947). The Court finds that in these circumstances, these expenses, amounting to United States Dollars Two Thousand Nine Hundred and Forty Seven (US\$2,947) should be covered under the Legal Aid Scheme of the Court rather than by the Respondent State.
- 89.** As a consequence of the above, the Court decides that each Party shall bear its own costs.

## **VII. Operative part**

**90.** For these reasons:

The Court,

*Unanimously:*

*On pecuniary reparations*

- i. *Does not grant* the Applicant’s prayer for material damages for loss of income and life plan.
- ii. *Does not grant* the Applicant’s prayer for damages for moral prejudice to his son, Emmanuel Alex Mallya and wife as indirect victims.
- iii. Grants the Applicant’s prayers for moral damages suffered by him and the indirect victims and awards compensation to them as follows:
  - a. Tanzanian Shillings Two Million (TZS 2,000,000) to the Applicant
  - b. Tanzanian Shillings One Million, Five Hundred Thousand (TZS 1,500,000) to the Applicant’s mother, Ester Marmo Maley
  - c. Tanzanian Shillings One Million (TZS) each to the Applicant’s sisters, Flora Amos Mallya and Anna Elinisa Swai and brother John Thomas
- iv. *Orders* the Respondent State to pay the amounts indicated *under (iii) (a), (b) and (c)* free from taxes, effective six (6) months from the date of notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of the United Republic of Tanzania throughout the period of delayed payment until the amount is fully paid.

35 *Norbert Zongo and others v Burkina Faso* (Reparations), para 91.

*On non-pecuniary reparations*

- v. *Does not grant* the Applicant's prayer for his release from prison as this is moot.
- vi. *Does not grant* the Applicant's prayer for an order regarding non-repetition of the violations.
- vii. *Orders* the Respondent State to publish, as a measure of satisfaction, this judgment on reparations and the judgment of 20 November 2015 on the merits of the case within three (3) months of notification of the present judgment on the official websites of the Judiciary and the Ministry of Constitutional and Legal Affairs and ensure that the judgments remain accessible for at least one (1) year after the date of such publication.

*On implementation and reporting*

- viii. *Orders* the Respondent State to submit to it within six (6) months of the date of notification of this judgment, a report on measures taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*On costs*

- ix. *Does not grant* the Applicant's prayer related to legal fees, costs and other expenses incurred in the proceedings before this Court.
- x. *Decides that* each Party shall bear its own costs.