Mlama & ors v Tanzania (judgment) (2020) 4 AfCLR 621

Application 019/2016, *Job Mlama & 2 ors v United Republic of Tanzania*

Judgment, 25 September 2020. Done in English and French, the English text being authoritative.

Judges: ORÉ; KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, and ANUKAM.

Recused under Article 22: ABOUD

The Applicants, each convicted and serving terms in prison for the sexual exploitation of a child, brought this action alleging that their trial and conviction amounted to a violation of their rights to equality, equal protection of law and fair trial. The Court held that the rights of the Applicants had not been violated.

Jurisdiction (material jurisdiction – nature of application, 23; personal jurisdiction, 28; continuing violation, 30)

Admissibility (exhaustion of local remedies, 40, 41; reasonable time to file, 48, 50, 51)

Fair trial (bias, 68; impartiality, 69, principle of legality, 79)

Liberty (restriction of, 88, 89)

Equality (essence of, 95)

I. The Parties

1. Job Mlama, Ancieth Edward and Shija Madata (hereinafter referred to as "the first, second and third Applicants respectively") are all nationals of Tanzania, who are currently serving a term of twenty (20) years' imprisonment, for the offences of sexual exploitation of a child.

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 the Protocol on 10 February 2006. It also deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court has held that this withdrawal will have no bearing on pending cases and will only

take effect one year after its filing, namely, 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. The record before this Court indicates that on 3 June 2008, the Applicants were jointly charged with three counts of sexual exploitation of a child in accordance with Section 138B (1) of the Respondent State's Penal Code for having allegedly forced a thirteen (13) year-old girl to engage in sexual intercourse with a dog. These counts involved: threatening to use violence towards a child in order to procure sexual intercourse; knowingly keeping a child in a premise for the purpose of sexual abuse and taking advantage of a relationship with a child to procure the child for sexual intercourse.

4. On 4 May 2009, the Resident Magistrate's Court at Mwanza convicted all the Applicants. They were each sentenced to twenty (20) years' imprisonment on the first two counts. Further, the third Applicant was sentenced to an additional term of fifteen (15) years imprisonment on the third count. The sentences were ordered to run concurrently.

5. Dissatisfied with the conviction and sentence, on 24 June 2009, the Applicants appealed to the High Court of Tanzania sitting at Mwanza. On 26 September 2012, the High Court quashed the conviction and sentence imposed on the Applicants in respect of the first count. It also quashed the conviction and sentence imposed on the third Applicant in respect of the third count. However, the High Court confirmed the conviction and sentence of all the Applicants in respect of the second count. Subsequently, on 15 October 2012, the Applicants filed an appeal to the Court of Appeal.

6. On 30 July 2013, the Court of Appeal dismissed the appeal in its entirety. Furthermore, it ordered each of the Applicants to pay to the complainant, compensation of Two Hundred Thousand Tanzanian Shillings (TZS 200,000).

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

B. Alleged violations

7. The Applicants allege the following:

i. That their conviction was based on partial evaluation of evidence;

ii. That they were convicted for an act that did not constitute an offence at the time it was committed;

iii. That they were denied bail pending their trial;

iv. That Section 138B(1)(e) as well as the entire section of the Penal Code on the offences against morality are "couched in terms contravening Article 13(1),(2),(3),(4) and (5) of the Constitution of Tanzania".

III. Summary of the Procedure before the Court

8. The Application was received on 5 April 2016 and served on the Respondent State on 10 May 2016. It was also transmitted to the entities listed under Rule 35(3) of the Rules on the same day.

9. The parties filed their pleadings on the merits and reparations within the time stipulated by the Court. The said pleadings were duly exchanged.

10. Pleadings were closed on 12 February 2019 and the Parties were duly notified.

IV. Prayers of the Parties

11. The Applicants pray the Court to grant the following orders:

a. That the Respondent State has violated the Applicants' right provided under Article 2 of the African Charter on Human and Peoples' Rights;

b. That the Respondent State has violated the Applicants' right provided under Article 3(1) and (2) of the African Charter on Human and Peoples' Rights;

c. That the Respondent State has violated the Applicants right provided under Article 7(1), (b), (d) and 7(2) of the African Charter on Human and Peoples' Rights;

d. That the Application be admitted and granted in totality;

e. That the Applicants' prayers be granted;

f. That the Respondent be notified ***(sic)*** to quash the Applicants' sentence of 20 years imprisonment per capita to restore justice;

g. Reparations to the first and second Applicants in the amount of Four Hundred Thousand United States Dollars each and the third Applicant, Three Hundred Thousand United States Dollars for the violations of their rights;

h. That the Respondent State bears the costs.

12. The Respondent State prays the Court to grant the following orders:

i. That the Honourable Court is not vested with jurisdiction to adjudicate the Application;

ii. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;

iii. That the Applicants' prayers be dismissed;

iv. That the Applicants continue to serve their lawful sentences;

v. That the Applicant not be granted reparations;

vi. That the Application be dismissed in totality for lack of merit.

vii. That the Respondent State has not violated any of the rights alleged by the Applicant.

V. Jurisdiction

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

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

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

14. In accordance with Rule 39(1) of the Rules, "the Court shall ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

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

16. The Respondent State raises an objection to the material jurisdiction of the Court on two grounds.

A. Objections to material jurisdiction

17. The Respondent State objects to the material jurisdiction of the Court as follows: firstly, that the Applicants have raised two allegations before this Court for the first time; and secondly, that the Court is being asked to sit as an appellate court.

18. According to the Respondent State, the allegations raised for the first time are the:

a. Allegation that the Applicants were denied bail, and;

ii. Allegation that the Applicants were convicted on the basis of a non-existent offence.

19. Citing the Court's decision in the matter of *Ernest Mtingwi v Republic of Malawi*, the Respondent State also contends that this Court is not a court of appeal and thus it cannot consider issues already finalised by its national courts.

20. The Applicants argue that freedom, equality, justice and dignity are cardinal principles of the Charter as indicated in the Charter's preamble and that their Application is a result of the denial of "freedom and dignity" by the national courts and thus the Court has jurisdiction to consider it.

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21. As regards the objection that the Court lacks jurisdiction since it is not a court of first instance, the Court recalls that it has jurisdiction as long as the rights alleged by an Applicant as having been violated, fall under a bundle of rights and guarantees invoked at the national courts.

22. In the instant case, the Court notes that the Applicants have alleged the violation of rights guaranteed by the Charter and by other international human rights instruments. It therefore rejects the Respondent State's objection on this point.

23. On the objection by the Respondent State, that the Court is being asked to sit as an appellate court, the Court notes in accordance with its established jurisprudence: "…that it is not an appellate body with respect to decisions of national courts.[2] However, the Court emphasised in the matter of *Alex Thomas v United Republic of Tanzania,* that: … this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[3]

2 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14.

3 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) *ibid*; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application 25/2016, Judgment of 28 March 2019 (merits and reparations) § 26; *Armand Guehi v United Republic of Tanzania* (merits and reparations) 7 December 2018, 2 AfCLR 247 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287 § 35.

24. In this connection, the Court notes that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.

25. The Court notes that the present Application raises allegations of violations of the human rights enshrined in Articles 2, 3 and 7 of the Charter, the examination of which falls within the Court's jurisdiction. The Respondent State's objections in this respect are therefore dismissed.

26. Consequently, the Court holds that it has material jurisdiction.

B. Personal jurisdiction

27. While the Respondent State has not raised any objection to the personal jurisdiction of the Court, the Court notes that, on 21 November 2019, it deposited with the Chairperson of the African Union Commission, a notice of withdrawal of the Declaration, as referred to in paragraph 2 of this Judgment.

28. The Court recalls that, the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the deposit of the instrument withdrawing the Declaration, as is the case with the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is filed. In respect of the Respondent State, therefore, its withdrawal will take effect on 22 November 2020.[4]

29. In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

C. Other aspects of jurisdiction

30. The Court notes that the temporal and territorial aspects of its jurisdiction are not disputed by the Respondent State and that nothing on the record indicates that the Court lacks such jurisdiction. The Court, accordingly, holds that:

i. that it has temporal jurisdiction on the basis that the alleged violations are continuing in nature, in that the Applicants remain convicted

4 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67; *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 35-39.

and are serving a sentence of twenty (20) years' imprisonment on grounds which they consider are wrong and indefensible;[5]

ii. It has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

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

VI. Admissibility

32. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter." Pursuant to Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of …the admissibility of the application in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and Rule 40 of these Rules."

33. Rule 40 of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. Comply with the Constitutive Act of the Union and the Charter;
3. Not contain any disparaging or insulting language;
4. Not based exclusively on news disseminated through the mass media;
5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter;
7. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

5 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71 - 77.

A. Conditions of admissibility in contention between the Parties

34. The Respondent State submits that the Application does not comply with Rules 40(5) and (6) of the Rules in relation to admissibility requirements, namely; regarding exhaustion of local remedies and on the requirement to file applications within a reasonable time after exhaustion of local remedies.

i. Objection based on non-exhaustion of local remedies

35. The Respondent State, citing the decision of the African Commission on Human and Peoples' Rights (hereinafter referred to as "African Commission") in *Southern African Human Rights NGO Network & ors v Tanzania*[6] submits that the exhaustion of local remedies is an essential principle in international law and that the principle requires a complainant to "utilise all legal remedies" in the domestic courts before seizing an international body like the Court.

36. It submits that there were domestic legal remedies available to the Applicants which they should have exhausted before approaching this Court. The Respondent State contends that it enacted the Basic Rights and Duties Enforcement Act, to provide the procedure for the enforcement of constitutional and basic rights as set out in Section 4 thereof.

37. According to the Respondent State, the rights claimed by the Applicants are provided for under Article 13(6)(a) of the Constitution of Tanzania of 1977. Noting that, even though the Applicants are alleging violation of various rights under the Constitution; they did not refer the alleged violations to the High Court as required under Section 9(1) of the Basic Rights and Duties Enforcement Act. The Respondent State thus argues that it was denied the chance to redress the alleged violations.

38. The Applicants argue that they exhausted local remedies because their trial began at the Resident Magistrate's Court and having been convicted, they filed appeals in both the High Court and the Court of Appeal, the highest and final appellate court in the Respondent State. There was thus a final decision from the highest court in the Respondent State.

6 *Southern African Human Rights NGO Network & ors v Tanzania*, Communication No. 333/2006.

39. The Applicants further contend that the national courts ought to have considered the issues that they had not raised "on their own initiative" as they have "the authority and it is their duty to do so" and thus it is their submission that the Application has fulfilled the requirement of exhaustion of local remedies.

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40. The Court notes that pursuant to Rule 40(5) of the Rules an application filed before the Court shall meet the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations.[7]

41. In its established jurisprudence, the Court has consistently held that an Applicant is only required to exhaust ordinary judicial remedies.[8] Furthermore, in several cases involving the Respondent State, the Court has repeatedly stated that the remedy of constitutional petition in the Tanzanian judicial system is an extraordinary remedy that an Applicant is not required to exhaust prior to seizing this Court.[9]

42. The Court notes from the record that the Applicants filed an appeal against their conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 30 July 2013, the Court of Appeal upheld the judgment of the High Court, which had earlier upheld the judgment of the District Court. The Respondent State therefore, had the opportunity to redress their violations. It is thus clear, that the Applicants exhausted all the available domestic remedies.

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

8 *Alex Thomas v Tanzania* (merits) op.cit.§ 64; *Wilfred Onyango Nganyi & ors v Tanzania* (merits) 18 March 2016, 1 AfCLR 507 § 95.

9 *Alex Thomas v Tanzania* (merits) op. cit. § 65; *Mohamed Abubakari v Tanzania* (merits) *op. cit.* §§ 66-70; *Christopher Jonas v Tanzania* (merits) *op. cit* § 44

43. For this reason, the Court dismisses the objection that the Applicants have not exhausted local remedies.

ii. Objection based on the Application not having been filed within a reasonable time

44. According to the Respondent State, the Applicants have not complied with the requirement under Rule 40(6) of the Rules; that an application must be filed before the Court within a reasonable time after the exhaustion of local remedies. It asserts that the Applicants' case at the national courts was concluded on 30 July 2013, and it took two (2) years and eight (8) months for the Applicants to seize this Court.

45. Noting that Rule 40(6) of the Rules does not prescribe the time limit within which individuals are required to file an application, the Respondent State draws this Court's attention to the fact that the African Commission[10] has held a period of six (6) months to be the reasonable time.

46. The Respondent State argues that two (2) years and eight (8) months is beyond reasonable time as suggested by the *Majuru v Zimbabwe* case. The Respondent State thus submits that the Application should be declared inadmissible.

47. The Applicants argue that they only became aware of the Court "late in the year 2015 and early in 2016". They contend that the Court's assessment of whether they complied with the reasonable time requirement should take into consideration the fact that they are "mere prisoners who have no legal assistance and representation".

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48. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before it. Rule 40(6) of the Rules, restates Article 56(6) of the Charter, simply requires that application be filed 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

10 *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

which it shall be seized with the matter."

49. The record before this Court shows that the local remedies were exhausted on 30 July 2013 when the Court of Appeal delivered its judgment. Therefore, this should be the date from which time should be reckoned regarding the assessment of reasonableness as envisaged in Rule 40(6) of the Rules and Article 56(6) of the Charter. The Application was filed on 5 April 2016, that is, two (2) years, eight (8) months and (10) days after exhaustion of local remedies. Therefore, the Court shall determine whether this time is reasonable.

50. The Court recalls its jurisprudence in which it concluded that: "… the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[11] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[12] indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal[13] and the use of extra-ordinary remedies.[14]

51. From the record, the Applicants are incarcerated, restricted in their movements and with limited access to information and they have also submitted that they were unaware of the Court until "late in the year 2015". Ultimately, the above mentioned circumstances delayed the Applicants in filing their claim to this Court. Thus, the Court finds that the two (2) years and eight (8) months and (10) days taken to file the Application before this Court is reasonable.

52. Accordingly, the Court dismisses the objection relating to the non-compliance with the requirement of filing the Application within a reasonable time after exhaustion of local remedies.

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

12 *Alex Thomas v Tanzania* (merits), op. cit. § 73; *Christopher Jonas v Tanzania* (merits) op.cit, § 54; *Ramadhani v Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83.

13 *Association Pour le progrès et la Defense des droit des Femme Maliennes and the Institute for Human Rights and Development in Africa v Republic of Mali* (merits) (11 May 2018), 2 AfCLR 380 § 54.

14 *Armand Guehi v Tanzania* (merits and reparations) op.cit. § 56; *Werema Wangoko v United Republic of Tanzania* (merits) 7 December 2018, 2 AfCLR 520 § 49; *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application 001/2017, Judgment of 28 June 2019 (merits) §§ 83-86.

B. Other conditions of admissibility

53. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 40(1), (2), (3), (4) and (7) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.

54. From the record, the Court notes that, the Applicants have been clearly identified by name in fulfilment of Rule 40(1) of the Rules.

55. The Application is in compliance with the Constitutive Act of the African Union and the Charter because it raises alleged violations of human rights in fulfilment of Rule 40(2) of the Rules.

56. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 40(3) of the Rules.

57. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment with Rule 40(4) of the Rules.

58. Further, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 40(7) of the Rules.

59. The Court, therefore, finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

60. The Applicants allege that their rights guaranteed in the Charter under Article 2, on the right not to be discriminated against; Article 3, on the right to equality before the law and to equal protection of the law and Article 7 on the right to a fair trial were violated.

61. The Applicants also allege the violations of Articles 3(1) and (2), 7(1)(d), 7(2) of the Charter and Article 13(1), (2), (3), (4) and (5) of the Respondent State's Constitution; in relation to the following allegations:

i. Conviction based on the partial evaluation of evidence;

ii. Conviction of the Applicants based on a non-existent offence;

iii. Applicants' denial of bail pending trial;

iv. Section 138 B(1)(e) and the Penal Code section on offences against morality promotes sexism.

62. In so far as the allegations of violations of Articles 2 and 3 of the Charter are linked to the allegation of violation of Article 7 of the Charter, the Court will first consider the latter allegation.[15]

A. Allegation that the Applicants' conviction was based on partial evaluation of evidence

63. The Applicants contend that the "recording, assessment and determination" of their trial was "premeditated" by the Resident Magistrate who they claim "influenced the entire evidence by unfairness, dishonesty and partiality" thereby violating their rights under Article 7(1)(d) of the Charter.

64. They further allege that the Resident Magistrate gave "undeserved credence" to PW1, the victim and other prosecution witnesses who according to the Applicants provided "weak" evidence which did not prove the charges against them.

65. According to the Respondent State, the Applicants had the option of requesting the Resident Magistrate to recuse himself if they were unhappy with his conduct of the trial. The Respondent State also argues that the Applicants are raising their distrust of the Resident Magistrate for the first time. The Respondent State thus submits that the Application lacks merit and should therefore be dismissed

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66. The Court notes that the issue in question is whether the Resident Magistrate was biased and thus convicted the Applicants on the basis of what was considered as weak evidence.

67. Article 7(1)(d) of the Charter provides: "Every individual shall have the right to have his cause heard. This comprises: […] d) [t] he right to be tried […] by an impartial court or tribunal."

68. The Court observes that according to the Commentary on the Bangalore Principles on Judicial Conduct, "A judge's personal values, philosophy, or beliefs about the law may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify

15 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398 § 122.

the judge from sitting. Opinion, which is acceptable, should be distinguished from bias, which is unacceptable."[16]

69. The Court considers that, to ensure impartiality, any Court must offer sufficient guarantees to exclude any legitimate doubt.[17] The Court restates that, "the presumption of impartiality carries considerable weight, and the law should not carelessly invoke the possibility of bias in a judge"[18] and that "whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question. The Court must, therefore, consider the matter very carefully before making a finding".[19]

70. In the instant case, the Applicants allege that the Resident Magistrate displayed bias by convicting them on the basis of insufficient evidence. They also made general statements such as, they are not sure whether the victim met with the judge outside or whether the judge was moved by the "drama dramatized by the victim" but have not demonstrated exactly how the conduct of the judge displayed bias which eventually led to their conviction. In any case, the High Court and Court of Appeal, upon assessment of the Applicants' appeals, held that they were rightly convicted and sentenced.

71. Furthermore, the Court notes from the record that there was neither a motion at the Resident Magistrate's Court for the Magistrate to recuse himself nor was this issue raised with the appellate courts in relation to the evaluation of the evidence which led to their conviction. This allegation is therefore dismissed.

72. In light of the foregoing, the Court holds that the Respondent State has not violated the Applicants' right to be heard by an impartial tribunal guaranteed under Article 7(1)(d) of the Charter.

16 United Nations Office on Drugs and Crime, "Commentary on the Bangalore Principles of Judicial Conduct", September 2007. Available:https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf. (accessed on 14 September 2020) § 60.

17 *Findlay v UK* (1997) 24 EHRR 221 § 73. See also Nsongurua J Udombana, 'The African Commission on Human and Peoples' Right and the development of fair trial norms in Africa' 2006 *African Human Rights Law Journal* Vol 6/2.

18 *Alfred Agbesi Woyome v the Republic of Ghana* (merits) op. cit, § 128.

19 *Ibid* § 126.

B. Allegation regarding the non-existence of an offence

73. The Applicants contend that they were convicted of an offence that was non-existent at the time of their trial in the Resident Magistrate's Court. Particularly, the Applicants assert that the provision of the law, that is, Section 138(B)(1)(e) of the Penal Code does not define the offence as they were charged.

74. According to the Applicants, Section 138(B)(1)(e) of the Penal Code creates the offence of sexual exploitation of a child by "a human being." In essence, the Applicants contend that the above section of the law does not cover instances where an animal is used in the sexual exploitation of the child. They, thus argue that they were convicted and sentenced on the basis of a non-existent offence in violation of Article 7(2) of the Charter.

75. The Respondent State submits that the offences the Applicants were charged with, were already in its Penal Code at the time of their trial, that is, 7 August 2008.

76. Furthermore, the Respondent State submits that if the Applicants' contention were true then their advocates would have raised the issue in the municipal courts as it is such a preliminary issue. Similarly, the Respondent State argues that its municipal courts would have brought the issue to the fore if it were true.

77. Therefore, the Respondent State submits that the allegation is "misconceived, lacks merit and should be dismissed".

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78. Article 7(2) of the Charter provides that:

> No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

79. The Court notes that Article 7(2) of the Charter reflects a key principle of criminal law, according to which, an offence must be clearly defined by law and the law should not be applied retroactively. It is a "safeguard against arbitrary prosecution,

conviction and sentencing."[20] Also, it guarantees the principle of legality by proscribing the extension of the scope of existing offences and penalties.

80. Even so, one cannot ignore the inevitable requirement of judicial interpretation of ambiguous points of the law to adapt it to the circumstances of the case; "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."[21]

81. In the instant case, the Court observes that Article 138(B)(1) (a) and (e) of the Tanzanian Penal Code, provides:

> Any person who (a) knowingly permits any child to remain in any premises for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show; (b) acts as a procurer of a child for the purposes of sexual intercourse or for any form of sexual abuse, or indecent exhibition or show; … (e) threatens, or uses violence towards, a child to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show; … commits an offence of sexual exploitation of children and is liable upon conviction to imprisonment for a term of not less than five years and not exceeding twenty years.

82. The Court also notes that at the time of the commission of the incriminating acts, this Article 138 of the Penal Code relating to the sexual exploitation of a child already existed; and that the interpretation of this text by the courts of the Respondent State to include the use of a dog for the purposes of sexual exploitation of a child, indeed, was within the judicial discretion of the interpretation of the constituent elements of the selected offence.

83. Furthermore, the Court observes that, the Resident Magistrate in his summation of the offence indicated that, "the sections in which the accused persons are charged concern sexual exploitation of a child and this is no more than Section 138(B)(1)(a), (e) and (d) of the Penal Code." He also alluded to the evidence provided by the prosecution witnesses as enough to have proven the elements of the charge against the accused. Moreover, on appeal, the High Court judge also held that the elements of the crime of sexual exploitation of a child had been proven in this case.

84. Therefore, the allegation that the Applicants were convicted of a non-existent offence in violation of Article 7(2) of the Charter is unfounded.

20 ECtHR, *Coëme & ors v Belgium*, Appl. nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 22 June 2000 § 145.

21 ECtHR, *Streletz, Kessler and Krenz v Germany*, Appl. nos 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001 § 50.

C. Allegation on the denial of bail pending trial

85. The Applicants allege that they were denied bail pending trial thereby violating the Constitution of the Respondent State.

86. The Respondent State argues that the reason given for the denial of bail was that, if released, the Applicants would pose a danger to the victim, especially because she was a child. It further argues that the Applicants did not contest the denial of bail in the Resident Magistrate's Court. The Respondent State thus prays the Court to dismiss this allegation.

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87. Article 6 of the Charter which guarantees the right to liberty provides: "[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by the law…"

88. The Court reiterates its position that, the restriction of liberty which aims to "preserve public security, protect the rights of others and avoid possible repetition of the offence…"[22] is justified.

89. From the record, the Court notes that bail was denied by the Resident Magistrate's Court in order to protect the victim, who was a minor from possible attacks by the Applicants. The Court further notes that this is a justifiable limitation of the right to liberty given that it is also provided for by law, that is Section 148(4) of the Respondent's State's Criminal Procedure Act and it is necessary and proportionate for the attainment of the objective of preserving security of a witness. Consequently, the Court dismisses this allegation.

90. For the above reasons, the Court holds that the Respondent State has not violated Article 6 of the Charter with respect to denial of bail pending trial.

22 *Anaclet Paulo v Tanzania* (merits) (21 September 2018) 2 AfCLR 446 §§ 66-67.

D. Allegation that the impugned provisions of the Penal Code promotes sexism

91. The Applicants allege that Section 138(1)(B)(e) of the Penal Code as well as the entire section of the Penal Code on the offences against morality "are couched in sexist terms" in violation of Articles 2 and 3 of the Charter, without giving any details.

92. The Respondent State did not respond to this allegation.

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93. Article 2 of the Charter provides that

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

94. Article 3 of the Charter stipulates that "(1) Every individual shall be equal before the law" and that "(2) Every individual shall be entitled to equal protection of the law."

95. The Court notes that the essence of Articles 2 and 3 of the Charter is to proscribe differential treatment to individuals found in the same situation on the basis of unjustified grounds. In the instant Application, the Applicants make a general allegation that the provision of the law perpetuates discrimination and inequality before the law. They neither explain the circumstances of this differential treatment nor provide evidence to substantiate their allegation.

96. For the above reasons, the Court holds that the Respondent State has not violated Articles 2 and 3 of the Charter with respect to the allegation that Section 138(B)(e) and the Penal Code section on morality offences promotes sexism.

VIII. Reparations

97. The Applicants pray that the Court quash their convictions and sentences and order their release. Further, they pray that the Court grant them reparations for the violations they suffered.

98. The Respondent State prays the Court to deny the Applicant's request for reparations.

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99. 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.

100. In the instant case, no violation has been established and thus the issue of reparation does not arise. The Court, therefore, dismisses the Applicants' prayer for reparations.

IX. Costs

101. The Applicants pray the Court to order the Respondent State to bear the costs. The Respondent State did not respond to this prayer.

102. Pursuant to Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

103. In view of the above provision, the Court rules that each party shall bear its own costs.

X. Operative part

104. For these reasons:
The Court
Unanimously,
On jurisdiction
i. *Dismisses* the objection to its jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objections on admissibility;
iv. *Declares* the Application admissible;

On the merits
v. *Finds* that the Respondent State has not violated Article 7(1)(d) of the Charter as regards the basis of the Applicants' conviction being partial evidence;
vi. *Finds* that the Respondent State has not violated Article 7(2) as

regards the Applicants' conviction on the basis of a non-existent law;

vii. *Finds* that the Respondent State has not violated Article 6 of the Charter as regards the denial of bail pending trial.

viii. *Finds* that the Respondent State has not violated Articles 2 and 3 of the Charter as regards Section 138(B)(e) of the Penal code and the Penal Code section on morality offences promotes sexism.

On reparations

ix. *Dismisses* the Applicants' prayer for reparations;

On costs

x. *Orders* each party to bear its own costs.