Viking & anor v Tanzania (reparations) (2020) 4 AfCLR 3

Application 006/2015, *Nguza Viking (Babu Seya) & anor v United Republic of Tanzania*

Reparations, 8 May 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

In 2018, the Court delivered its judgment on the merits in the matter brought by the present Applicants. Based on the Court's finding that certain rights of the Applicants had been violated, the present request for reparations was brought. The Court granted part of the reparations sought by the Applicants.

Reparations (measures of, 14; material prejudice, 15, 26, 27; moral prejudice, 38, 41; indirect victims, 49-51; guarantees of non-repetition, 60-61; measures of satisfaction, 65-66)

I. Subject of the Application

1. Pursuant to the judgment of the Court on the merits of 23 March 2018, Messrs Nguza Viking and Johnson Nguza (hereinafter referred to as the first and second Applicant respectively)") filed on 23 August 2018, their written submissions for reparations. In the said judgment, this Court found that the United Republic of Tanzania (hereinafter referred to as "the Respondent State) had violated Articles 1 and 7(1)(c) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").

II. Brief background of the matter

2. In the Application 006/2015, the Applicants alleged that their right to a fair trial had been violated by the Respondent State by reason of failure to provide them with copies of witness statements and failure to call material witnesses as well as failure to facilitate the first Applicant to conduct a test as to his impotence. The Applicants submitted that this happened in the course of proceedings in the national courts. Further, that this resulted in their conviction for the offences of rape and unnatural acts and subsequent sentence to a term of life imprisonment.

3. On 23 March 2018, the Court rendered the judgement whose operative part read as follows:

"vii. Finds that the Respondent State has violated Article 7 (1) (c) of the Charter as regards: the failure to provide the Applicants copies of witness statements and to call material witnesses; the failure to facilitate the First Applicant to conduct a test as to his impotence; consequently finds that the Respondent State has violated Article 1 of the Charter; …

x. Orders the Respondent State to take all necessary measures to restore the Applicants' rights and inform the Court, within six (6) months from the date of this Judgment of the measures taken.

xi. Defers its ruling on the Applicants' prayer on the other forms of reparation, as well as its ruling on Costs; and

xii. Allows the Applicants, in accordance with Rule 63 of its Rules, to file their written submissions on the other forms of reparation within thirty (30) days from the date of notification of this judgment; and the Respondent State to file its Response within thirty (30) days from the date of receipt of the Applicants' written submissions."

4. This present application for reparations is based on the above mentioned judgment.

III. Summary of the procedure before the Court

5. On 27 November 2018, the Registry transmitted a certified true copy of the judgment on merits to the Parties.

6. On 23 August 2018, the Applicants filed their written submissions for reparations and this was served on the Respondent State on 24 August 2018. On 18 March 2020, the Respondent State filed its Response to the Applicants' submissions on reparations.

7. The Court also notes that the Respondent State filed a notice of withdrawal of its Declaration under Article 34(6) of the Protocol allowing Non-governmental organizations and individuals to file cases before the Court on November 21, 2019, at the African Union Commission. The Court recalls its decision in *Ingabire Victoire v Republic of Rwanda*[1] that the withdrawal of a Declaration does not have a retroactive effect and therefore has no bearing on an Application pending before it. The Court thus concludes from the above that the withdrawal of the Respondent State has no bearing on the present application.

8. Pleadings were closed on 16 December 2019 and the Parties were duly notified. On 10 February 2020, the pleadings were

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 540 § 67.

subsequently reopened upon the request of the Respondent State of 9 January 2020 for extension of time to file a Response to the submissions on reparations. The Respondent State filed its Response on 18 March 2020.

IV. Prayers of the parties

9. The Applicants pray the Court to grant them the following reparations:

" a. Pecuniary reparations

For Nguza Viking and Johnson Nguza as a Direct Victim:

i. Moral prejudice: the amount of twenty thousand dollars ($20,000) to each as a direct victim of moral prejudice suffered.

b. For indirect victims:

ii. Amount of five thousand dollars ($5,000) payable to Mr. Yannick Nguza;

iii. Amount of five thousand dollars ($5,000) payable to the Second Applicant's daughter, Asha Johnson Nguza;

iv. Amount of five thousand dollars ($5,000) payable to Nasri Ally,

v. Amount of five thousand dollars ($5,000) payable to Francis Nguza,

vi. Amount of five thousand dollars ($5,000) payable to the second Applicant's fiancé, Mariam Othman Bongi.

c. For Counsel's legal fees:

vii. Legal aid fees for 300 hours of legal work: 200 hours for two Assistant Counsels and 100 hours for the lead Counsel. This is charged at one hundred dollars ($100) per hour for lead Counsel and fifty dollars ($50) per hour for the Assistants. The total amount for all this being ten thousand ($10,000) for the lead Counsel and ten thousand dollars ($10,000) for the two Assistants.

d. Transport, fees and stationery:

viii. Postage amounting to two hundred dollars ($200),

ix. Printing and photocopying amounting to two hundred dollars ($200).

e. Principle of proportionality

x. The Applicants pray that the Court applies the principle of proportionality when considering all the Applicants' submissions.

f. Measures of satisfaction

xi. [T]hat the government publishes in the national gazette the decision on the merit of the main Application within one month of delivery of judgment as a measure of satisfaction.

g. Guarantees of non-repetition

xii. The Applicants pray that the Respondent guarantees non-repetition of these violations to them and that they are requested to report back to this Honourable Court every six months until they satisfy

the orders this Court shall make when considering submissions for reparations."

10. The Respondent State prays the Court to dismiss the Application in its entirety and to order any other relief in its favour that the Court deems fit.

V. Reparations

11. Article 27(1) of the Protocol provides that, "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".

12. The Court recalls its earlier judgments 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."[2]

13. The Court also restates that reparation "…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."[3]

14. Measures that a State would take to remedy a violation of human rights include, notably, 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.[4]

15. 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/her prayers.[5] Exceptions to this rule include moral prejudice, which need not be proven, since presumptions are

2 Application 005/2013. Judgment of 4/07/2019 (Reparations), ***Alex Thomas v United Republic of Tanzania*** ("***Alex Thomas v Tanzania (Reparations)***"), § 11, ***Umuhoza v Republic of Rwanda***, (reparations) (2018) 2 AfCLR 202, § 19.

3 ***Mohamed Abubakari v Tanzania*** (Reparations), § 20, ***Alex Thomas v Tanzania*** (Reparations), § 12, ***Wilfred Onyango v Tanzania***, § 16. ***Ingabire Umuhoza v Rwanda*** (Reparations), § 20, ***Lucien Ikili v Tanzania*** (Merits and Reparations), § 118.

4 ***Mohamed Abubakari v Tanzania*** (Reparations), § 21, ***Alex Thomas v Tanzania*** (Reparations) § 13, ***Ingabire Umuhoza v Rwanda*** (Reparations), § 20.

5 ***Tanganyika Law Society, the Legal and Human Rights Centre v Tanzania,*** Application 009/2011, ***Reverend Christopher R. Mtikila v United Republic of***

made in favour of the Applicant and the burden of proof shifts to the Respondent State.

16. The Court having found violations of Articles 1 and 7(1)(c) of the Charter in the judgment on the merits of 23 March 2018, the Applicants, pray for pecuniary reparations for (i) material loss, (ii) moral prejudice for themselves 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

a. Loss of income and life plan

17. The Applicants submit that their music careers were disrupted as a consequence of their accusation of "rape and gang rape" which led to their arrest and imprisonment for fourteen (14) years.

18. According to the Applicants, they sold their "family house" in order to pay for the legal fees accrued during their appeal before the Court of Appeal of Tanzania. They further argue that prior to their imprisonment, they had musical instruments which they used during their performances but the said instruments "are now unusable due to the conditions they were in."

19. The Applicants further aver that their life plan was disrupted and that they have been unable to achieve their plans and goals as a result of their arrest, trial and imprisonment. They submit that they had plans to start their own school of music and open a music studio to develop the talents of the youths in Tanzania.

20. The Applicants submit that they were the "financial providers" for their indirect victims and that after their arrest, their indirect victims lived in deplorable conditions which would not have happened had they not been in detention.

21. Consequently, citing *Lohé Issa Konate v Burkina Faso*, they request that "…in the absence of documentary evidence supporting a financial monetary claim brought as a direct violation of the Charter, then it would be appropriate to consider the matter in terms of equity in awarding…" the material damages for loss of

Tanzania, 011/2011 (Consolidated Applications) (Reparations) (2014), 1 AfCLR 72, § 40; *Mohamed Abubakari v Tanzania* (Reparations), § 22.

income and life plan.

22. The Applicants did not submit a specific amount in this regard except for a request for five thousand United States Dollars (US$5,000) to Joffrey Gondwe's family for material prejudice suffered.

23. Citing *Christopher Mtikila v Tanzania* (reparations),[6] the Respondent State argues that it is not enough that a violation was found but rather the Applicants must prove the damages that the State is required to repair.

24. The Respondent State argues that the Applicants neither provided any sale agreement to prove the sale of their house nor did they provide any documentary evidence of ownership of musical instruments as alleged.

25. The Respondent State also argues that life plans must be expressed in terms of projects and not just in terms of thoughts. In this regard, the Respondent State submits that the Court should dismiss this prayer.

***

26. 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/her prayers.

27. The Court notes that the Applicants have not established the link between the violations found in the judgment on the merits and the material loss they claim to have suffered. Moreover, they have neither provided proof of the ownership of a house or its sale, or proved that the musical instruments were unusable nor have they brought any evidence of plans to establish a school of music. Lastly, they have not adduced any documentary evidence of their earnings before their arrest.

28. The Court therefore holds that the Applicants have not justified their claim for compensation for material prejudice resulting from the loss of income and life plan and dismisses the prayer thereof.

6 *Mtikila v Tanzania supra* note 5.

b. Legal fees at the national courts

29. The Applicants submit that they should be granted United States' Dollars twenty thousand (US$ 20,000) for legal fees that they incurred during their trial and because they had to sell their house to pay for legal fees at the Court of Appeal.

30. The Respondent State avers that the Applicants have not proved that they sold their house to pay for the legal fees and thus prays the Court to dismiss this prayer.

***

31. The Court notes that the Applicants have not justified their claim for compensation for material prejudice resulting from the legal fees incurred at the national courts and thus rejects the claim.

32. In light of the foregoing, the Court dismisses the Applicants' prayer for reparations resulting from the alleged material loss.

ii. Moral prejudice

a. Moral prejudice suffered by the Applicants

33. The Applicants claim that they suffered undue stress from the lack of provision of copies of the witness statements by the Respondent State. And the first Applicant claims that he suffered mental and emotional anguish as a result of the failure of the Respondent State to conduct his test for impotence. Furthermore, the first Applicant claims that he suffered a wide range of illnesses such as hypertension, diabetes and tuberculosis while the second Applicant submits that he contracted tuberculosis due to prison food, sleeping conditions and how the inmates were treated.

34. According to the Applicants, the nature of the offences they were charged with, that is, "rape and gang rape" also caused them undue stress especially as they were at the peak "… of their music careers and they were respected in the music industry and in the society in general." They claim that "their names were tarnished in the newspapers and televisions all across East and Central Africa and they were labelled as rapists". Further, the Applicants contend that they "lost their social status in the community due to

their imprisonment and have, in turn, lost their social standing."

35. The Applicants pray that the Court, in calculating the moral damages, should apply the principle of equity and take into account the severity of the violations, the impact these had on them and the overall damage to their health. They further ask the Court to consider the period they were imprisoned and grant reparations that would alleviate the suffering that they endured.

36. Consequently, the Applicants urge the Court to grant them an award of United States Dollars Twenty Thousand (US$20,000) each in equity as reparation for the moral prejudice they suffered for the violations established.

37. The Respondent State submits that the quantification of moral prejudice should be done in equity on a case to case basis as decided in *Norbert Zongo et al. v Burikna Faso*. In this regard, it contends that the Applicants requested for moral prejudice in United State Dollars even though they were working in Tanzania before their arrest and thus earning in Tanzanian shillings. Therefore, the Respondent State argues that the prayer for moral prejudice in United States Dollars is unjustified and should be dismissed.

***

38. 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.

39. The Court further notes that the Applicants have invoked its equitable jurisdiction and made a claim for compensation amounting to United States Dollars Twenty Thousand ($20,000) each.

40. In its judgment on the merits, the Court concluded that there was a violation of the Applicants' right to defence. This is in relation to the failure of the Respondent State to provide the Applicants with copies of witness statements and failure to call material witnesses as well as failure to facilitate the first Applicant to conduct a test as to his impotence. This invariably caused the Applicants anguish and despair.

41. The Court finds that this entitles the Applicants to compensation for moral prejudice. 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. In such

instances, affording lump sums would generally apply as the standard.

42. Consequently, and based on discretion, the Court awards the first Applicant an amount of Tanzanian Shillings Twenty Million (TZS 20,000,000) given that he was denied a test as to his impotence in addition to the other violations. The Court further, awards the second Applicant, an amount of Tanzanian Shillings Five Million (TZS 5,000,000) as moral damages.

b. Moral prejudice to indirect victims

43. Relying on the Zongo case, the Applicants seek compensation for their dependents as indirect victims as follows:

"i. Amount of five thousand dollars ($5,000) payable to Mr. Yannick Nguza;

ii. Amount of five thousand dollars ($5,000) payable to the Second Applicant's daughter, Asha Johnson Nguza;

iii. Amount of five thousand dollars ($5,000) payable to Nasri Ally,

iv. Amount of five thousand dollars ($5,000$) payable to Francis Nguza,

v. Amount of five thousand dollars ($5,000) payable to the second Applicant's fiancé, Mariam Othman Bongi."

44. The Applicants submit that the above mentioned persons who are "sons, daughters, brothers, grandchildren and nephews to the Applicants" were emotionally distressed by the physical condition that they were forced to endure throughout their arrest and incarceration. That the indirect victims depended on the Applicants for financial support and also that they acted as their role models.

45. According to the Applicants, the indirect victims also suffered emotional distress when they sold their house so as to pay for their legal fees as the indirect victims were forced to move from place to place in search of shelter.

46. According to the Applicants, Mariam Bongi who is the second Applicant's fiancé had to raise their daughter – Asha Johnson Nguza alone without the emotional and social support of the second Applicant. Further, that their close friend, Mr. Jofrey Gondwe (now deceased) assisted the Applicants with payment of the legal fees during their trial and suffered emotional distress after hearing of the "…worsening mental and emotional condition of the Applicants…"

47. The Respondent State submits that the Applicants have not provided proof to demonstrate that they had dependants. It further argues that "an abrupt introduction of Mr. Yannick Nguza, Asha Johson Nguza, Nasri Ally, Francis Nguza and Mariam Othman

Bongi without documentary proof does not establish their status as indirect victims."

48. The Respondent State further argues that the introduction of Asha Johnson Nguza as the second Applicant's daughter is not proof of filiation. Moreover, referring to the matter of *Aslakhanova v Russia* and the Basic Principles and Guidelines on the Right to a Remedy and Reparation of International Human Rights law and serious violations of International Humanitarian Law, it submits that; "for a person to enjoy the status of indirect victim, he must be a relative to the direct victim with documentary proof thereof." It thus argues that fiancées and friends do not fall within the threshold of persons accorded status as indirect victims. Consequently, it prays for the Court to dismiss the prayer herein.

***

49. The Court recalls that compensation for non-material loss also applies to relatives of the victims of human rights violation as a result of the indirect suffering and distress. As it 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".

50. In this regard, the Court, in its jurisprudence has noted that spouses, children and parents may claim the status of indirect victims.

51. The Court has also 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.

52. The Court recalls that even after reopening of pleadings twice that is on 10 February 2019 and on 9 March 2020 and requesting for the parties to file further evidence, the Applicants failed to do so.

53. The Court further notes that the Applicants have not provided any explanation or document indicating who the indirect victims are and their actual relation to them with the exception of Mariam Othman Bongi and Asha Johnson Nguza who are described as the fiancé and daughter of the second Applicant respectively.

54. Consequently, the Court finds that the Applicants' claims for moral damages for Mr. Yannick Nguza, Nasri Ally and Francis Nguza

as indirect victims have not been established and therefore dismissed.

55. With regard to the second Applicant's fiancé, Mariam Othman Bongi and daughter – Asha Johnson Nguza, the Court notes that he has not provided a copy of the daughter's birth certificate or any other document attesting that she is his daughter. There is also no documentary evidence showing filiation between Mariam Othman Bongi and the second Applicant.

56. Therefore, the Court dismisses the second Applicant's claim for moral damages for Mariam Othman Bongi and Asha Johnson Nguza as indirect victims.

57. In light of the foregoing, the Court dismisses the claims for moral prejudice in relation to the indirect victims.

B. Non-pecuniary reparations

i. Guarantees of non-repetition and report on implementation

58. The Applicants pray the Court to make an order that the Respondent State guarantees the non-repetition of violation of their rights. They also request 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.

59. The Respondent State contends that the Applicants have already been released and thus the prayer for guarantees of non-repetition is unfounded.

***

60. The Court observes 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, these remedies would also be relevant in individual cases where the violations will not cease, are likely to reoccur or are structural in nature.

61. The Court does not deem it necessary to issue an order regarding non-repetition of the violations of the Applicants' rights since there is no possibility of such violations being repeated in relation to them and since they have already been released. The claim is

therefore dismissed.

62. 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 further notes that the Respondent State has not filed any reports of implementation in line with the Court's judgment on merits despite the time for the filing of the report having elapsed on 23 September 2018 and thus holds that the Respondent State shall file its reports on the implementation of this judgment within six (6) months of its notification of thereof.

ii. Measures of satisfaction

63. The Applicants' request an order that the Respondent State publishes, in the national Gazette, the judgment of 23 March 2018 as a measure of satisfaction.

64. The Respondent State submits that the judgment will be published in the Court's website which is accessible to everyone and thus there is no need for it to publish the same in its national gazette as that would amount to duplication.

***

65. Though the Court considers that a judgment, per se, can constitute a sufficient form of reparation, it can 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 profile of the Applicants, the nature of their proceedings in the national courts, the media coverage of the Applicants' trials in the national courts and 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.

66. 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 of the Respondent State to remain accessible for at least one (1) year after the date of publication is an appropriate additional measure of satisfaction.

VI. Costs

67. In its judgment on the merits, the Court held that it would decide on the issue of costs when dealing with reparations.

68. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

69. 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. The Applicant must provide justification for the amounts claimed.

A. Legal fees related to proceedings before this Court

70. The Applicants in their initial submissions on reparations prayed the Court to grant them costs in respect of legal fees incurred during the proceedings before this Court as follows: 300 hours of legal work: 200 hours for two Assistant Counsels and 100 hours for the lead Counsel. This is charged at one hundred dollars (US$100) per hour for lead Counsel and fifty dollars (US$50) per hour for the Assistants. The total amount for all this being ten thousand (US$10,000) for the lead Counsel and ten thousand dollars (US$10,000) for the two Assistants.

71. In their Reply, the Applicants withdrew this prayer "based on the Court's recent jurisprudence."

72. The Respondent State submits that the Applicants enjoyed free legal representation by the Pan African Lawyers' Union before this court and thus this prayer is unfounded and should be dismissed.

***

73. The Court notes that the Applicants withdrew this prayer and thus it will no longer pronounce itself on the same.

B. Communication and stationery costs

74. Citing the precedent of the Zongo case, the Applicants in their initial submissions on reparations prayed the Court to grant the following reparations with regard to communication and stationery costs incurred:

i. Postage amounting to United States Dollars Two hundred (US$ 200);

ii. Printing and Photocopying amounting to United States Dollars Two hundred (US$ 200);

iii. Communication costs amounting to United States Dollars one hundred (US$100).

75. In their Reply, the Applicants withdrew this prayer "based on the Court's recent jurisprudence."

76. The Respondent State reiterates that the Applicants were represented by PALU under the Court's legal aid scheme and thus did not incur any costs. It therefore prays that the prayer is dismissed.

***

77. The Court notes that the Applicants withdrew this prayer and thus it will no longer pronounce itself on the same.

78. Consequently, the Court decides that each Party shall bear its own costs.

VII. Operative part

79. For these reasons:

The Court,

Unanimously:

Pecuniary reparations

i. Does not grant the Applicants' prayer for material damages for loss of income, life plan and legal fees at the national courts;

ii. Does not grant the Applicants' prayer for damages for moral prejudice suffered by the indirect victims;

iii. Grants the Applicants' prayer for damages for the moral prejudice they suffered and awards the first Applicant the sum of Tanzanian Shillings Twenty Million (TZS 20,000,000) and the second Applicant the sum of Tanzanian Shillings Five Million (TZS 5,000,000);

iv. Orders the Respondent State to pay the amounts indicated under (ii) 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.

Non-pecuniary reparations

v. Does not grant the Applicant's prayer for an order regarding non-repetition of the violations;

vi. Orders the Respondent State to publish, as a measure of satisfaction, this judgment on reparations and the judgment of 23 March 2018 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

vii. 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

viii. Decides that each Party shall bear its own costs.