Wanjara & ors v Tanzania (judgment) (2020) 4 AfCLR 673

Application 033/2015, *James Wanjara & 4 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 serving a 30 year jail sentence for armed robbery, brought this action alleging that the Respondent State violated Charter protected rights to the extent the criminal proceedings affecting them before its domestic courts were not satisfactory. The Court found that only the Applicants' rights to free legal assistance had been violated.

Jurisdiction (appellate jurisdiction, 28; nature of jurisdiction, 29; personal jurisdiction, 32; continuing violations, 34)

Admissibility (exhaustion of local remedies, 42-43; extraordinary remedies, 43-44; fresh claims, 45; reasonable time to file, 49, 52-53; computation of reasonable time, 51)

Fair trial (right to free legal assistance, 66, 68-70; margin of appreciation, 78; evaluation of evidence of domestic courts, 79)

Reparations (grounds for reparation, 85; onus of justification, 85-86; purpose of reparations, 85; assessment of quantum, 86; currency of reparation 87; material prejudice, 89,93; supporting evidence of, 94; moral prejudice, 99-100; indirect victims, 106; restitutions, 108; guarantees of non-repetition, 114)

I. The Parties

1. Messrs James Wanjara, Jumanne Kaseja, Chrispian Kilosa, Mawazo Selemani and Cosmas Pius (hereinafter referred to as "the Applicants") are all nationals of the United Republic of Tanzania. At the time of filing the Application, the Applicants were serving a thirty (30) years sentence after having been convicted of armed robbery and unlawfully causing grievous harm.

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 "the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive

cases from individuals and Non-Governmental 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 that this withdrawal will have no effect on pending cases and will come into effect one year after its filing, namely 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. On 31 March 2001, the Applicants, together with a co-accused who is not before the Court, were arrested and charged with armed robbery and unlawfully causing grievous harm.

4. On 26 October 2001, the District Court at Magu convicted and sentenced each of the Applicants to thirty (30) years imprisonment on the first count of armed robbery and twelve (12) months imprisonment on the second count of unlawfully causing grievous bodily harm. The sentences were ordered to run concurrently.

5. On 5 February 2002, the Applicants, being dissatisfied with their conviction and sentence, appealed to the High Court of Tanzania at Mwanza but their appeal was dismissed on 3 June 2003. Subsequently, on 13 June 2003, the Applicants appealed to the Court of Appeal of Tanzania sitting at Mwanza which also dismissed their appeal on 27 February 2006.

6. The record before the Court confirms that the Applicants attempted to trigger the process for review of the Court of Appeal's decision even though no indication is given of the precise date when this was done. Nevertheless, on 11 March 2013, and subsequently, on 9 May 2014, respectively, the Court of Appeal struck out the Applicants' applications for extension of time within which to file an application for review of its judgment dismissing the Applicants' appeal.

B. Alleged violations

7. The Applicants submit that the Respondent State violated their basic rights as guaranteed under article 13(6) (c) of its Constitution by imposing an improper sentence of thirty (30)

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 § 38.

years imprisonment for the offence of armed robbery.

8. The Applicants also submit that the Respondent State violated their rights as guaranteed under Article 7(1)(c) of the Charter by failing to provide them with legal representation during the domestic proceedings.

9. It is further contended that "the evidence that was relied upon to convict the Applicants was not well-analysed by both courts; and this default caused the applicants being convicted while the prosecution evidence was not sufficient to sustain their conviction."

III. Summary of the Procedure before the Court

10. The Application was filed at the Registry on 8 December 2015 and served on the Respondent State on 11 February 2016.

11. After several extensions of time were granted to the Respondent State, it filed its Response on 16 May 2017.

12. On 21 June 2017, the Applicants filed their Reply to the Respondent State's Response and this was served on the Respondent State the same day.

13. On 1 February 2019, legal aid was granted to the Applicants.

14. The Parties' submissions on reparations were filed within the time allowed by the Court. These submissions were duly exchanged between the Parties.

15. Pleadings were closed on 8 July 2020 and the Parties were duly notified.

IV. Prayers of the Parties

16. The Applicants pray that the Court:

i. Grant them free legal representation.

ii. Intervene and quash both their conviction and sentence.

iii. Order reparations.

iv. Grant any other orders or reliefs as it may deem fit.

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

i. That the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate the Application.

ii. That the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court and should be declared inadmissible.

iii. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court and should be declared inadmissible.

iv. That costs of this Application be borne by the Applicants.

18. The Respondent State further prays the Court to make the following orders on the merits of the Application:

i. That the Government of the United Republic of Tanzania is not in violation of the Applicant' rights under Article 7(1)(c) of the African Charter on Human and Peoples' Rights.

ii. That the Government of the United Republic of Tanzania is not in violation of Applicant's rights stipulated under Article 13 (6) (c) of the Constitution of the United Republic of Tanzania, 1977.

iii. That the sentence of 30 years in prison for the offence of Armed Robbery is lawful.

V. Jurisdiction

19. 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 instruments ratified by the State concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

20. The Court further observes that in terms of Rule 39(1) of the Rules, "the Court shall ascertain its jurisdiction … in accordance with the Charter, Protocol and these Rules."

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

22. The Court notes that the Respondent State raises one objection to the Court's jurisdiction.

A. Objection to material jurisdiction

23. The Respondent State contends that:
The Court is not vested with jurisdiction to adjudicate the Application as the Application seeks the Honourable Court to sit as an appellate Court and pronounce itself on matters already considered and concluded by the Court of Appeal of the Respondent State.

24. According to the Respondent State:
Both Article 3(1) of the Protocol and Rule 26 of the Rules of Court only afford the Court jurisdiction to deal with cases or disputes concerning application and interpretation of the Charter, Protocol and any other relevant human rights instrument ratified by the State concerned hence the Court is not afforded unlimited jurisdiction to sit as an appellate Court.

25. The Applicants, in their Reply to the Respondent's State's Response, contend that the nature of the allegations contained in their Application raise "material elements which may constitute human rights violations and as such, [the Court] has competence *rationae materiae* and *rationae personae*" to determine the Application.

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26. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[2]

27. The Court notes that the crux of the Respondent State's objection is that the Applicants are inviting the Court to sit as an appellate court when it is not empowered to sit as one. The Court also notes that the Respondent State objects to the fact that the Applicants are asking it to evaluate the evidence and procedures already finalised by its domestic courts.

28. As regards the question whether the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's Court of Appeal, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts. At the same time, however, the Court emphasises the fact that even though it is not an appellate court vis a vis domestic courts, it retains the power to assess the propriety of domestic proceedings as against standards set out in international human rights instruments ratified by the State concerned.[3]

29. In considering the allegations made by the Applicants, the Court holds that the said allegations are within the purview of its jurisdiction given that they invoke rights protected under the Charter, specifically under Article 7 thereof. These allegations

2 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application 028/2015, Judgment of 26 June 2020 § 18.

3 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Werema Wangoko Werema & anor v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520 § 29 and *Alex Thomas v United Republic of Tanzania* (Merits) (20 November 2015) 1 AfCLR 465 § 130.

require the Court to determine whether the manner in which domestic proceedings were conducted was in compliance with international law. In conducting this function, the Court does not sit as an appellate court with regard to domestic courts but simply examines procedures and processes before national courts to determine whether they are in conformity with the standards set out in the Charter and any other human rights instrument ratified by the State concerned.[4]

30. In light of the above, the Court holds that it has material jurisdiction in this matter and the Respondent State's objection is, therefore, dismissed.

B. Other aspects of jurisdiction

31. The Court observes that none of the Parties has raised any objection in respect of its personal, temporal or territorial jurisdiction. Nonetheless, in line with Rule 39(1) of the Rules, the Court must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

32. In relation to its personal jurisdiction, the Court recalls that the Respondent State, on 21 November 2019, deposited with the Office of the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further 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 filing of the instrument withdrawing the Declaration, as is the case of the present Application.[5] The Court also confirms that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is filed.[6] In respect of the Respondent State, therefore, its withdrawal will take effect on 22 November 2020.

4 *Alex Thomas v Tanzania* (merits) § 130. See also, *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 29; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 28 and *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits) (24 November 2017) 2 AfCLR 165 § 54.

5 *Andrew Ambrose Cheusi v United Republic of Tanzania*, §§ 35-39.

6 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

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

34. In respect of its temporal jurisdiction, the Court notes that although the alleged violations commenced before the Respondent State became a party to the Protocol or made the Declaration under Article 34(6) of the Protocol, that is, on 27 February 2006 when the Court of Appeal dismissed the Applicants' appeal, the said violations were continuing as of 29 March 2010 when the Respondent State deposited its Declaration. The Application having been filed on 8 December 2015, the Court thus finds that it has temporal jurisdiction to examine it.

35. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicants happened within the territory of the Respondent State. In the circumstances, the Court holds that its temporal jurisdiction in this matter is established.

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

VI. Admissibility

37. Pursuant to Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter". In terms of Rule 39(1) of its Rules, "[t] he Court shall ascertain… the admissibility of an application in accordance with the Charter, the Protocol and these Rules."

38. Rule 40 of the Rules, which in substance restates the provisions 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 be 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; and
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.

39. While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies and the second objection relates to whether the Application was filed within a reasonable time.

A. Objections to the admissibility of the Application

i. Objection based on non-exhaustion of local remedies

40. The Respondent State contends that although the Applicants are alleging that their rights under its Constitution have been violated, there is no evidence showing that they filed a constitutional petition at its High Court. The Respondent State further contends that the Applicants should have exhausted local remedies by filing a constitutional petition instead of prematurely filing their Application before the Court.

41. The Applicants submit that their Application was filed after exhausting local remedies since it was filed after the Court of Appeal, which is the final appellate court in the Respondent State, dismissed their appeal. The Applicants further submit that after the Court of Appeal dismissed their appeal, they filed an application for review of the Court of Appeal's decision which was dismissed on 11 March 2013. The Applicants also point out that a further application for review was struck out by an order of the Court of Appeal dated 9 May 2014.

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42. The Court notes that pursuant to Rule 40(5) of the Rules, any application filed before it shall fulfil 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 within their jurisdictions before an international human rights body is called upon to determine the State's responsibility

for the same.[7]

43. The Court recalls that an Applicant is only required to exhaust ordinary judicial remedies.[8] The Court further recalls that in several cases involving the Respondent State it has repeatedly stated that the remedies of constitutional petition and review before the Court of Appeal, as framed in the Respondent State's judicial system, are extraordinary remedies that an Applicant is not required to exhaust prior to seizing this Court.[9] In the instant case, the Court observes that the Court of Appeal dismissed the Applicants' appeal on 27 February 2006. The Court further observes that on two separate occasions, to wit, 11 March 2013 and 9 May 2014, the Applicants' attempts to trigger the review of the decision of the Court of Appeal were dismissed.

44. In the circumstances, the Court holds that the Applicants were not required to file a constitutional petition before filing their Application with the Court, the same being an extraordinary remedy within the Respondent State's system.

45. Regarding those allegations that have allegedly been raised before this Court for the first time, namely, the illegality of the sentence imposed on the Applicants and the denial of free legal assistance; the Court observes that the alleged violations occurred in the course of the domestic judicial proceedings. They, accordingly, form part of the "bundle of rights and guarantees" that were related to or were the basis of their appeals, which the domestic authorities had ample opportunity to redress even though the Applicants did not raise them explicitly.[10] It would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for these claims.[11] The Applicants should thus be deemed to have

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) § 64. See also, *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

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

10 *Kennedy Owino Onyachi & anor v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54.

11 *Jibu Amir alias Mussa & anor v United Republic of Tanzania*, ACtHPR, Application 014/2015, Judgment of 28 November 2019 § 37; *Alex Thomas v Tanzania* (Merits), §§ 60-65, *Kennedy Owino Onyachi & anor v United Republic of Tanzania* (merits) § 54.

exhausted local remedies with respect to these allegations.

46. In light of the foregoing, the Court dismisses the Respondent State's objection based on non-exhaustion of local remedies.

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

47. The Respondent State points out that it took over five (5) years after the Court of Appeal dismissed the Applicants' appeal for them to file their Application with the Court. It thus submits that this period is not reasonable within the meaning of Rule 40(6) of the Rules. The Respondent State, relying on the decision of the African Commission on Human and Peoples' Rights in *Michael Majuru v Republic of Zimbabwe,* prays the Court to declare the Application inadmissible.

48. The Applicants contend that subsequent to the Court of Appeal dismissing their appeal, they filed applications for review in Criminal Application No 05A of 2011 and Criminal Application No 012 of 2014 before the Court of Appeal which were both unsuccessful. The Applicants thus urge the Court to find that their Application was filed within a reasonable time.

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49. The Court recalls that neither the Charter nor the Rules set a definite time limit within which an application must be filed before it. Rule 40(6), for example, simply alludes to the fact that applications must be filed within a reasonable time after the exhaustion of domestic remedies or "from the date the Commission is seized with the matter." In the circumstances, the reasonableness of a time limit for seizure will depend on the particular circumstances of each case and should be determined on a case by case basis. Some of the factors that the Court has used in its evaluation of the reasonableness of time are imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal and

the use of extra-ordinary remedies.[12]

50. In the present case, the Court notes that after the Court of Appeal dismissed the Applicants' appeal on 27 February 2006, the Applicants twice attempted to review the decision of the Court of Appeal through Criminal Application No.05A of 2011 which was struck out on 11 March 2013 and also through Criminal Application 12 of 2013 which was also dismissed on 9 May 2014. The Court also notes that the Applicants filed this Application on 8 December 2015. At the same time, the Court notes that the Respondent State deposited the Declaration permitting the Court to receive applications from individuals and Non-Governmental Organisations on 29 March 2010.

51. The Court finds, therefore, that the computation of the reasonableness of the time within which the Application should have been filed must commence from the date when the Respondent State deposited the Declaration under Article 34(6) of the Protocol. This is the earliest time that the Applicants could have brought their Application to this Court after having exhausted the ordinary local remedies.

52. The Court takes cognisance of the attempts by the Applicants to utilise the review procedure before the Respondent State's Court of Appeal. In line with its jurisprudence, this should be taken into account as a factor in the determination of the reasonableness of the time limit under Rule 40(6) of the Rules.[13] In this regard, the Court takes note that the Applicants filed their Application before this Court one (1) year and seven (7) months after the dismissal of their last attempt at reviewing the Court of Appeal's judgment.

53. The Court, therefore, holds that, considering the time the Applicants spent pursuing the remedy of review before the Court of Appeal, the time lapse of one year and seven (7) months before they filed their Application before the Court is reasonable within the context of Article 56(6) of the Charter. The Court is reinforced in this finding since the Applicants are lay and incarcerated and it was as a result of their situation, that the Court granted them legal

12 *Jibu Amir alias Mussa & anor v United Republic of Tanzania* §§ 49-50; *Ally Rajabu & ors v United Republic of Tanzania*, ACtHPR, Application 007/2015, Judgment of 28 November 2019 (merits and reparations) §§ 50-52; *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application 020/2015, Ruling of 28 November 2019 (jurisdiction and admissibility) §§ 52-54 and *Godfrey Anthony & anor v United Republic of Tanzania*, ACtHPR, Application 015/2015. Ruling of 26 September 2019 (jurisdiction and admissibility) §§ 46-49.

13 *Jibu Amir alias Mussa & anor v United Republic of Tanzania* § 49 and *Ally Rajabu & ors v United Republic of Tanzania* § 51.

assistance through its legal aid scheme.

54. The Court, therefore, dismisses the Respondent State's objection based on failure to file the Application within a reasonable time.

B. Other conditions of admissibility

55. The Court notes, from the record, that the Application's compliance with the requirements in Article 56 sub articles (1),(2),(3),(4) and (7) of the Charter, which requirements are reiterated in sub-rules (1),(2), (3), (4), and (7) of Rule 40 of the Rules, is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

56. Specifically, the Court notes that, according to the record, the condition laid down in Rule 40(1) of the Rules is fulfilled since the Applicants have clearly indicated their identity.

57. The Court also finds that the requirement laid down in Rule 40(2) of the Rules is also met, since no request made by the Applicants is incompatible with the Constitutive Act of the African Union or with the Charter.

58. The Court also notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 40(3) of the Rules.

59. Regarding the condition contained under Rule 40(4) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

60. Finally, with respect to the requirement laid down in Rule 40(7) of the Rules, the Court finds that the present case 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.

61. As a consequence of the foregoing, the Court finds that the Application fulfils all the admissibility requirements set out under Article 56 of the Charter as restated in Rule 40 of the Rules, and accordingly declares it admissible.

VII. Merits

62. The Applicants make three allegations: firstly, they allege a violation of their right to free legal assistance; secondly, they question the legality of their sentence for armed robbery, and, lastly, they question the assessment of the evidence relied upon to convict them.

A. Alleged violation of the right to free legal assistance

63. The Applicants submit that during their trial before the District Court as well as during their second appeal to the Court of Appeal they were not afforded free legal assistance. According to the Applicants, this amounts to a violation of Article 7(1)(c) of the Charter.

64. The Respondent State disputes this allegation and submits that during the Applicants' trial before the District Court as well as during their appeals, legal aid was available and could have been extended to the Applicants under the Legal Aid (Criminal Proceedings) Act of 1969 but that the Applicants did not request for the same. The Respondent State submits that it has always recognised and adhered to the right to legal representation and that, therefore, the Applicants' allegation lacks merit and should be dismissed.

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65. The Court notes that Article 7(1)(c) of the Charter provides that "[e]very individual shall have the right to have his cause heard. This right comprises: (c) the right to defence, including the right to be defended by counsel of his choice."

66. The Court is mindful that Article 7(1)(c) of the Charter does not explicitly provide for the right to free legal assistance. The Court recalls, however, that it has previously interpreted Article 7(1)(c) in light of article 14 (3) (d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") and determined that the right to defence includes the right to be provided with free legal assistance.[14]

67. The Court notes that the Applicants were not accorded free legal assistance during proceedings before the Magu District Court as well as before the Court of Appeal. The record, however, shows that the Applicants were represented by counsel during their first appeal before the Respondent State's High Court. This is

14 *Jibu Amir alias Mussa & anor v United Republic of Tanzania* § 75; *Alex Thomas v Tanzania* (merits) § 114 and *Kennedy Owino Onyachi & anor v United Republic of Tanzania* (merits) § 104. The Respondent State acceded to the ICCPR on 11 June 1976 - https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

not disputed by the Respondent State, which simply contends that there is no "evidence anywhere in this application to show the Applicants applied for the free legal aid from the certifying authority."

68. The Court reiterates that an individual charged with a criminal offence is entitled to free legal assistance even if he/she does not specifically request for the same provided that the interests of justice so demand.[15] The interests of justice will inevitably require that free legal assistance be extended to an accused person where he/she is indigent and is charged with a serious offence which carries a severe penalty.

69. In the instant case, the Applicants were charged with a serious offence, that is, robbery with violence, carrying a severe punishment - a minimum sentence of thirty (30) years' imprisonment. In addition, the Respondent State has not adduced any evidence to challenge the contention that the Applicants were lay and indigent, without legal knowledge and technical legal skills to properly conduct their case in person during the original trial as well as during the appeal before the Court of Appeal. In the circumstances, the Court finds that the interests of justice warranted that the Applicants should have been provided with free legal assistance during their trial before the District Court and also during their second appeal before the Court of Appeal. The fact that the Applicants never requested for legal assistance did not absolve the Respondent State from its responsibility.

70. In view of the above, the Court finds that the Respondent State has violated Article 7(1)(c) of the Charter, as read together with article 14(3)(d) of the ICCPR, due to its failure to provide the Applicants with free legal assistance during their trial before the District Court at Magu as well during their appeal before the Court of Appeal at Mwanza.

B. Allegation relating to the legality of the Applicants' sentence

71. The Applicants argue that according to section 286 of the Respondent State's Penal Code, the legal sentence for armed robbery, at the time when they were convicted, was fifteen (15) years imprisonment. The Applicants thus submit that their sentence of thirty (30) years imprisonment was unconstitutional

15 *Jibu Amir alias Mussa & anor v United Republic of Tanzania* § 77 and *Mohamed Abubakari v United Republic of Tanzania* (merits) §§ 138 -139.

and also violated their rights under Article 7(2) of the Charter.

72. The Respondent State contends that the sentence of thirty (30) years imprisonment for the offence of armed robbery has always been provided for in sections 285 and 286 of its Penal Code. The Respondent State further contends that sections 285 and 286 of the Penal Code must be read together with the Minimum Sentences Act. The Respondent State thus submits that the Applicants have misdirected themselves on the interpretation of sections 285 and 286 and that their allegation lacks merit and should be dismissed.

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73. The Court recalls that Article 7(2) of the Charter provides that:

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

74. The Court notes that the applicable law for the sentencing of convicts of armed robbery at the time the Applicants were convicted was section 286 of the Respondent State's Penal Code and the Minimum Sentences Act of 1972, as amended in 1989 and 1994. Reading the applicable law together, it is clear that the minimum sentence for armed robbery was thirty (30) years imprisonment at the time the Applicants were convicted. The Court further notes that it has previously taken judicial notice of these developments in the Respondent State's criminal law.[16] In the circumstances, the Court finds, therefore, that the Respondent State has not violated any provision of the Charter in sentencing the Applicants to this term of imprisonment.

C. Allegation that the evidence relied on to convict the Applicants was defective

75. The Applicants submit that the evidence that was relied upon

16 *Christopher Jonas v United Republic of Tanzania* (Merits and Reparations) § 86; *Anaclet Paulo v United Republic of Tanzania* 21 September 2018 2 AfCLR 446 § 99 and *Muhamed Abubakari v United Republic of Tanzania* § 210

to convict them was not well-analysed by the District Court and the appellate courts and it is this that led to their conviction. The Applicants further submit that the District Court erroneously relied on the doctrine of recent possession to convict them and this was upheld by the appellate courts.

76. The Respondent State contends that, apart from the doctrine of recent possession, the Applicants' conviction was also supported by visual identification by individuals who were at the scene of crime. According to the Respondent State credible witnesses were brought by the prosecution who identified the Applicants to have been at the scene of the crime. According to the Respondent State, therefore, the allegation lacks merit and should be dismissed.

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77. The Court notes that Article 7(1) of the Charter provides that "[e]very individual shall have the right to have his cause heard."

78. The Court reiterates its position that:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence, and as an international court, this court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings. [17]

79. The Court notes that it intervenes in the assessment of evidence by domestic courts only if such domestic assessment resulted in a miscarriage of justice.[18] The Court recalls that its role with regard to evaluation of the evidence on which the conviction by the national judge was grounded is limited to determining whether, generally, the manner in which the latter evaluated such evidence is in conformity with the relevant provisions of applicable international human rights instruments or not.[19]

80. From its perusal of the record, the Court finds that the District Court fairly evaluated the evidence before it before convicting the Applicants and that the appellate courts also fairly considered all the grounds of appeal raised by the Applicants. Specifically in

17 *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 65.

18 *Nguza Viking & anor v Tanzania* (merits) § 89.

19 *Mohamed Abubakari v United Republic of Tanzania* (Merits) § 26.

relation to the application of the doctrine of recent possession, the Court notes that the Court of Appeal dealt with this issue and concluded that the Applicants' conviction was not solely based on the doctrine of recent possession but also by positive identification on the scene of the crime by the victims.

81. In the circumstances, the Court finds that the evidence in the Applicants' trial was evaluated in conformity with the requirements of fair trial and the procedures followed by the national courts in dealing with the Applicants' appeals did not violate Article 7(1) of the Charter. The Court, consequently, dismisses the Applicants' allegation on this point.

VIII. Reparations

82. By their Amended Submissions for Reparations, the Applicants pray the Court to grant the following remedies and reparations;

i. Setting aside the custodial sentence

ii. Restoration of the Applicants' liberty by their release from prison

iii. Payment of reparation in the amount of USD 257,775 to the Applicants on account of moral damage suffered.

iv. Payment of reparations in the amount of USD 10,000 to the Applicants on account of loss of income

v. Payment of reparations in the amount of six thousand dollars (USD 6,000) for each indirect victim on account of moral damage suffered

vi. Payment of reparations in the amount of USD 1,000 for transport and stationery costs

vii. That this Court makes an order that the Respondent guarantees non-repetition of these violations against the Applicants. The Respondent State should also be requested to report back to this Court every six months until they satisfy the orders this Court shall make when considering the submissions for reparations.

83. The Respondent State prays the Court for the following:

i. A Declaration that the interpretation and application of the Protocol and African Charter does not confer jurisdiction to the Court to set the applicants at liberty.

ii. A Declaration that the Respondent State has not violated the African Charter or the Protocol and the Applicants were treated fairly and with dignity by the Respondent.

iii. An Order to dismiss this Application.

iv. Any other order this Hon. Court may deem right and just to grant under the prevailing circumstances.

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84. Article 27(1) of the Protocol provides that "[i]f the Court finds that there has been violation of human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation."

85. The Court considers that for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where granted, reparation should cover the full damage suffered. It is also clear that it is always the Applicant that bears the onus of justifying the claims made.[20] As the Court has stated previously, the purpose of reparations is to place the victim in the situation he/she would have been in but for the violation.[21]

86. In relation to material loss, the Court recalls that it is the duty of an applicant to provide evidence to support his/her claims for all alleged material loss. In relation to moral loss, however, the Court restates its position that prejudice is assumed in cases of human rights violations and the assessment of the quantum must be undertaken in fairness looking at the circumstances of the case.[22] The practice of the Court, in such instances, is to award lump sums for moral loss.[23]

87. At the outset, the Court observes that the Applicants' claims for reparation are all quantified in United States Dollars. As a general principle, however, the Court awards damages in the currency in which the loss was incurred.[24] In the present case, the Court will apply this standard and monetary reparations, if any, will be

20 See, *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) § 157. See also, *Norbert Zongo & ors v Burkina Faso* (Reparations) (5 June 2015) 1 AfCLR 258 §§ 20-31; *Lohé Issa Konaté v Burkina Faso* (Reparations) (3 June 2016) 1 AfCLR 346 §§ 52-59 and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (Reparations) (13 June 2014) 1 AfCLR 72 §§ 27-29.

21 *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application 009/2015, Judgment of 28 March 2019 (Merits and Reparations) § 118 and *Norbert Zongo & ors v Burkina Faso* (Reparations) § 60.

22 *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) § 55; and *Lucien Ikili Rashidi v United Republic of Tanzania* (Merits and Reparations) § 58.

23 *Norbert Zongo & ors v Burkina Faso* (Reparations) §§ 61-62.

24 *Lucien Ikili Rashidi v United Republic of Tanzania* (Merits and Reparations) § 131 and *Ingabire Victoire Umuhoza v Republic of Rwanda (*reparations) (7 December 2018) 2 AfCLR 202 § 45.

assessed in Tanzanian Shillings.

A. Pecuniary reparations

88. As the Court has found, the Respondent State violated the Applicants' right to free legal assistance guaranteed under Article 7(1)(c) of the Charter. Based on this finding, the Respondent State's responsibility and causation have been established. The prayers for reparation are, therefore, being examined against this finding.

i. Material prejudice

89. The Court notes that all the Applicants except Chrispian Kilosa filed affidavits in support of their claims for reparations. In their affidavits, the Applicants claim that they were engaged in the business of selling fish and other entrepreneurial activities and that they lost income from the same as a result of their incarceration. Specifically, James Wanjara claims that he was able to make Two Hundred Thousand Tanzanian Shillings (TZS 200 000) per month from selling fish and about Three Hundred Thousand Tanzanian Shillings (TZS 300 000) from carpentry activities. Cosmas Pius claims that he was making One Hundred and Fifty Thousand Tanzanian Shillings (TZS 150 000) per week from selling fish. Mawazo Selemani claims that he was making at least One Million Tanzanian Shillings (TZS 1 000 000) per month from selling fish. Jumanne Kaseja claims that he was making Five Hundred Thousand Tanzanian Shillings (TZS 500 000) per month from selling fish.

90. The Applicants further claim that their incarceration made it impossible for them to continue providing for their families resulting in their children dropping out of school and their families suffering. It is the Applicants' submission, therefore, that the indirect victims that they have listed in their affidavits also suffered by reason of their incarceration since the Applicants were all sole bread winners in their families.

91. The Applicants thus submit that given that each one of them had his own business which generated income, the Court should award each of them the sum of Ten Thousand United States Dollars (USD 10,000) for loss of income.

92. The Respondent State argues that the Applicants bear the burden of proving their claims for reparations and also of establishing a causal connection between the alleged wrongful conduct and the prejudice they claim to have suffered. The Respondent State

submits that the Applicants have failed to provide proof that they were breadwinners for their families or any documentation in support of their claims in relation to the economic activities that they claim to have engaged in. It is the Respondent State's prayer, therefore, that the claim for loss of income be dismissed.

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93. As the Court has acknowledged, "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."[25]

94. The Court notes that although affidavits were filed in support of the Applicants' claims for reparation, the claims that each of the Applicants had his own business that generated an income were not accompanied by supporting evidence. The Court, thus, finds that the Applicants have failed to substantiate their claims for loss of income. Additionally, the Court notes that the claims for material reparations are all based on the conviction, sentencing and subsequent incarceration of the Applicants, which the Court has not found to be unlawful. In the circumstances, therefore, reparations are not warranted.[26]

95. In light of the foregoing, the Applicants' claims for United States Dollars Ten Thousand (USD 10,000) per individual as loss of income are dismissed.

ii. Moral prejudice

a. Moral prejudice suffered by the Applicants

96. The Applicants submit that the long judicial process leading to their conviction and sentence drained them emotionally, physically and also financially. They also submit that they have suffered emotional and physical distress due to lack of conjugal rights as a result of their imprisonment. It is also the Applicants'

25 *Norbert Zongo & ors v Burkina Faso* (reparations) § 24.

26 See, *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) § 186.

submission that they have suffered embarrassment and lost their social status within their communities due to their imprisonment.

97. The Applicants have also highlighted the fact that they have been in custody since 31 March 2001, which is a period of over nineteen (19) years. For all the moral prejudice suffered, the Applicants pray the Court to award them the sum of Two Hundred and Fifty-seven Thousand, Seven Hundred and Seventy- five and twenty cents United States Dollars (USD 257, 775.20) each.

98. The Respondent State submits that the Applicants were lawfully convicted and sentenced, and they are, therefore, victims of their own wrongdoing. According to the Respondent State, the claim for reparations by the Applicants as direct victims of a violation should be dismissed.

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99. The Court recalls that moral prejudice involves the suffering, anguish and changes in the living conditions of an Applicant and his family.[27] As such, the causal link between the wrongful act and moral prejudice "can result from the human rights violation, as a consequence thereof, without a need to establish causality as such".[28] As the Court has previously recognised, the evaluation of the quantum in cases of moral prejudice must be done in fairness taking into account the circumstances of each case.[29] In such instances, awarding lump sums would generally apply as the standard.[30]

100. The Court having found that the Respondent State violated the Applicants' right to free legal assistance, contrary to Article 7(1)(c) of the Charter, there is a presumption that the Applicants suffered some form of moral prejudice.

101. The above notwithstanding, the Court notes that the Applicants have claimed the sum of Two Hundred and Fifty-seven Thousand,

27 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) § 34.

28 *Norbert Zongo & ors v Burkina Faso* (reparations) § 55; and *Lohé Issa Konaté v Burkina Faso* (reparations) § 58.

29 *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 157 and *Norbert Zongo & ors v Burkina Faso* (reparations) § 61.

30 *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations) §§ 116-117.

Seven Hundred and Seventy- five and twenty cents United States Dollars (USD 257, 775.20) as reparation for violation of Article 7(1) (c) of the Charter. The Court holds, however, that there is nothing on the record which would justify awarding the sum claimed by the Applicants for the moral prejudice they suffered.

102. In assessing the quantum of damages, the Court bears in mind that it had adopted the practice of granting applicants an average amount of Three Hundred Thousand Tanzanian Shillings (TZS 300.000) in instances where legal aid was not availed by the Respondent State especially where the facts reveal no special or exceptional circumstances.[31] In the circumstances, and in the exercise of its discretion the Court awards each of the Applicants the amount of Three Hundred Thousand Tanzanian Shillings (TZS 300.000) as fair compensation[32].

b. Moral prejudice to indirect victims

103. Each of the Applicants has submitted a list of indirect victims that were allegedly affected by the violation of the Applicants' rights. James Wanjara has indicated the indirect victims as his wife, Mubweli Sote, and his children Kamese James, Mukwaya James, Loyce James, Masatu James, Mushangi James, Mwima James and Nyamumwi James. Jumanne Kaseja has indicated the following: his two wives Texra Jumanne and Ester Jumanne together with his children Halia Jumanne, Mekitilida Jumanne, Haji Jumanne, Zuhena Jumanne and Jacline Jumanne. Mawazo Selemani has listed his wife Ester Mawazo and his child John Mawazo Selemani. Cosmas Pius has listed his wife Getruza Siza and his children Rebeca Cosmas and Pius Cosmas.

104. It is the Applicants' submission that the indirect victims were "heavily affected following the imprisonment of their beloved ones." The Applicants also submit that their trials were emotionally draining for the indirect victims and that their convictions resulted in stigmatisation for their wives and children. The Applicants thus pray the Court to award each of the indirect victims the sum of Six Thousand United States Dollars (USD6 000) as reparations.

105. The Respondent State opposes the prayer for reparation to indirect victims. According to the Respondent State, the Applicants

31 See *Minani Evarist v Tanzania* (merits), (21 September 2018) 1 AfCLR 402 § 90; and *Anaclet Paulo v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 111.

32 *Minani Evarist v Tanzania* (merits), § 85.

were lawfully convicted and sentenced and any suffering by their families was "self-imposed and caused by their acts and not that of the Respondent." It is the Respondent State's submission that the Applicants have failed to prove their relationship to their alleged children and wives. It is the prayer of the Respondent State, therefore, that the Applicants' claims on behalf of the indirect victims should be dismissed.

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106. With regard to the moral prejudice suffered by indirect victims, the Court recalls that, as a general rule, for indirect victims to be entitled to reparation, they must prove their filiation with the Applicant.[33] Consequently, spouses should produce marriage certificates or any equivalent proof, birth certificates or any other equivalent evidence should be produced for children and parents must produce attestation of paternity or any other equivalent proof.[34] It is not sufficient to simply list the alleged indirect victims.[35]

107. The above notwithstanding, the Court notes that in the present case, all the claims by the indirect victims are premised on the conviction, sentencing and incarceration of the Applicants, which, as earlier alluded to, was not unlawful. In the circumstances, therefore, the Court finds that there is no basis for making an award of reparations in favour of the indirect victims. The Court, accordingly, dismisses the claims for reparations on behalf of the indirect victims.

33 *Norbert Zongo & ors v Burkina Faso* (reparations) § 54 and *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations) § 135.

34 *Alex Thomas v United Republic of Tanzania*, ACtHPR, Application 005/2013, Judgment of 4 July 2019 (reparations) § 51 and *Armand Guehi v United Republic of Tanzania* (merits and reparations) §§ 182 and 186.

35 *Andrew Ambrose Cheusi v United Republic of Tanzania* §§ 158-159.

B. Non-pecuniary reparations

i. Restitution

108. The Applicants submit that "in the present case [they] cannot be returned to the state they were before their incarceration but, as a starting point, their liberty can be restored as the second best measure taking into account passage of time since the alleged offence was committed."

109. The Respondent State opposes the Applicants' prayer and prays for "a declaration that the interpretation and application of the Protocol and African Charter does not confer jurisdiction to the Court to set the applicants at liberty."

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110. With respect to the Applicants' prayer that they be set at liberty, which entails quashing their sentence and ordering their release, the Court wishes to emphasise that it does not, ordinarily, examine details of matters of fact and law that national courts are entitled to address.[36] Nevertheless, the quashing of the sentence and the release of an applicant may be ordered in special and compelling circumstances.[37] The Court has held that this would be warranted only in cases where the violation found was such that it had necessarily vitiated the conviction and sentence. This would be the case "if an Applicant sufficiently demonstrates or the Court itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued imprisonment would occasion a miscarriage of justice."[38]

36 *Mohamed Abubakari v United Republic of Tanzania* (merits) § 28 and *Minani Evarist v United Republic of Tanzania* (merits) § 81.

37 *Alex Thomas v United Republic of Tanzania* (merits) § 234; *Armand Guéhi v United Republic of Tanzania* (merits and reparations) § 160; *Kijiji Isiaga v United Republic of Tanzania* (merits) § 96 and *Thomas Mang'ara Mango & anor v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314 § 156.

38 *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550 § 84 and *Diocles William v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426 § 101.

111. In the instant case, the Court notes that it has only found a violation of the Applicants' right to free legal assistance and that it has not otherwise found fault with the proceedings leading to the Applicants' conviction, sentence and incarceration. In the circumstances, the Court holds that the Applicants have not proven the existence of any circumstances to warrant the restoration of their liberty, and neither has the Court, *proprio motu*, established the existence of such circumstances. The Court, therefore, dismisses the Applicants' prayer for release.

ii. Guarantees of non-repetition

112. The Applicants pray the Court to make an order that the Respondent State guarantees non-repetition of the violations against them. The Applicants further pray that the Respondent State should also be ordered to report back to the Court every six (6) months until full satisfaction of the Court's orders.

113. The Respondent State prays for an order to dismiss the Application.

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114. The Court recalls that the objective of ordering guarantees of non-repetition is to prevent future violations. As a result, guarantees of non-repetition are usually ordered in order to eradicate structural and systemic violations of human rights.[39] Such measures are, therefore, not generally intended to repair individual prejudice but rather to remedy the underlying causes of the violation. Nevertheless, guarantees of non-repetition may also be relevant in individual cases where it is established that the violation will not cease or is likely to reoccur. This could be in instances where the Respondent State has challenged or has not complied with the previous findings and orders of the Court.

115. In the instant case, the Court notes that the nature of the violation found, that is, the Applicants' right to free legal assistance is unlikely to recur in respect of the Applicants as the proceedings in respect of which it arose have already been completed.

39 *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 191 and *Ally Rajabu & ors v United Republic of Tanzania* § 162.

Furthermore, the Court has already awarded compensation for the moral prejudice that the Applicants suffered as a result of the said violation. The Court, therefore, finds that the request is not justified in the present case and the same is, therefore, dismissed.

116. With respect to the prayer for an order for reporting 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 thus holds that the Respondent State shall file its reports on the implementation of this judgment within six (6) months of its notification.

IX. Costs

117. The Applicant prays the Court to grant "reparations for transport and stationary costs: postage, printing and photocopying to the tune of one thousand United States Dollars (USD1 000)".

118. The Respondent State prays that the costs of this Application be borne by the Applicants.

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119. The Court notes that Rule 30 of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs".

120. The Court recalls that "expenses and costs form part of the concept of reparation." The Court considers that transport costs incurred for travel within Tanzania, and stationery costs fall under the "categories of expenses that will be supported in the Legal Aid Policy of the Court". Since, in the present case, the East Africa Law Society, represented the Applicants on a *pro bono* basis, the Court finds that the claims for costs by the Applicants are unjustified and are accordingly dismissed.

121. The Court, therefore, orders that each Party shall bear its own costs.

X. Operative part

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

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

On the merits
v. *Finds* that the Respondent State has not violated Article 7 of the Charter as regards the treatment of the evidence before the domestic courts during the Applicants' trial;
vi. *Finds* that the Respondent State has not violated Article 7(2) of the Charter as regards the Applicants' sentence of thirty (30) years imprisonment for armed robbery;
vii. *Finds* that the Respondent State has violated the Applicants' right to fair trial, provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, by failing to provide them with free legal assistance.

On reparations
Pecuniary reparations
viii. *Does not* grant the Applicants' prayer for reparations arising from material loss of income and for legal costs incurred during proceedings before the Court;
ix. *Orders* the Respondent State to pay each of the Applicants the sum of Three Hundred Thousand Tanzanian Shillings (TZS 300 000) free from tax as fair compensation for a violation of their right to free legal assistance to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid;
x. *Does not* grant the Applicants' prayer for reparations for moral prejudice suffered by the alleged indirect victims;

Non-pecuniary reparations
xi. *Dismisses* the Applicant's prayer for release from prison.

On implementation and reporting

xii. Orders the Respondent State to submit to the Court, 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

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