Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593

Application 013/2015, *Robert John Penessis v United Republic of Tanzania*

Judgment, 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, CHIZUMILA and BENSAOULA

The Applicant was convicted and sentenced for illegal entry and presence in Tanzania despite claiming that he was Tanzanian by birth and had resided in Tanzania since birth. The Court held that since the Applicant had shown *prima facie* that he had Tanzanian nationality, the burden of proof was on the Respondent State to show otherwise. The Applicant's mother testified before the Court and a certified copy of a birth certificate was also produced. The Court held that the Applicant's right to nationality and his right not to be arbitrarily detained had been violated. He was granted moral damages as reparation. The Court also ordered that the Applicant should immediately be released from prison as he had been detained for more than six years after the end of his prison term. The Court also granted moral damages to his mother, who was deemed to be an indirect victim

Jurisdiction (form and content of Application, 29; examining relevant proceedings, 32)

Admissibility (form and content of Application, 48, 49; exhaustion of local remedies, 61, 62; submission within reasonable time, 69)

Interpretation (Universal Declaration forms part of customary international law, 85)

Dignity (nationality, 87)

Nationality (arbitrary denial, 88, 97, 103)

Evidence (burden of proof, 91-93, witness, 99)

Personal liberty and security (arbitrary arrest and detention, 110, 111)

Movement (arbitrary arrest and detention, 127)

Reparations (material damages, 144; moral damages for the Applicant, 148, 149; moral damages for the mother of the Applicant, 157, 158; release from prison, 163, 164)

Dissenting opinion: BENSAOULA (joined by NIYUNGEKO)

Admissibility (submission within reasonable time, 7)

I. The Parties

1. Mr Robert John Penessis (hereinafter referred to as "the Applicant") was convicted and sentenced to two (2) years in prison for "illegal

entry and presence in Tanzania" in Criminal Case 35/2010 before the Kagera Resident Magistrate's Court at Bukoba. The Applicant who claims to be a national of Tanzania, has been in prison since 10 January 2010.

2. The United Republic of Tanzania (hereinafter referred to as "the Respondent State") became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. The Respondent State deposited, on 29 March 2010, the Declaration prescribed 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.

II. Subject of the Application

3. The Application is in respect of the detention of the Applicant on the ground that he does not possess the necessary documentation to be legally present in the Respondent State. The Applicant alleges that the Respondent State has violated his rights to nationality, liberty and free movement.

A. Facts of the matter

4. It is apparent from the Application that, on 8 January 2010, Mr.John Robert Penessis was arrested by the Tanzanian immigration authorities. He was subsequently charged, convicted and sentenced on 17 January 2011 to a fine of eighty thousand Tanzanian Shillings (TZS 80,000) or in default, two (2) years in prison and ten (10) strokes of the cane by the Kagera Resident Magistrate's Court for illegal entry and irregular presence in the territory of the Respondent State.

5. The Applicant subsequently appealed before the High Court of Tanzania at Bukoba (hereinafter referred to as the "High Court") which, on 6 June 2011, upheld the conviction and sentence of imprisonment for the reason that the Applicant had not paid the eighty thousand Tanzanian Shillings (TZS 80,000) fine. The High Court also set aside the corporal punishment sentence. In addition, the High Court sentenced him to six (6) months in prison for contempt of court and issued an order for his expulsion from the territory of the Respondent State after serving the prison

sentence.

6. The Applicant then lodged an appeal before the Court of Appeal which, on 4 June 2012, upheld the two (2) years prison sentence. The Court of Appeal however set aside the six (6) months sentence for contempt of court and the expulsion order which, according to the Court, fell within the purview of the Minister of Home Affairs. Subsequently, on 4 December 2012, the Minister of Home Affairs issued the deportation and detention Orders.

7. The Applicant claims that he is Tanzanian by birth, that his father and mother are Tanzanians, and that he has been residing in Tanzania since his birth.

8. The Respondent State challenges this version of the facts and claims to have evidence showing that the Applicant was never a Tanzanian and possessed the nationality of two other countries, namely, South Africa and the United Kingdom.

B. Alleged violations

9. The Applicant alleges that his arrest and detention are unlawful and in breach of the Tanzanian Constitution, Article 59(1) of the Additional Protocol 1 to the Geneva Convention and Articles 1 to 4 of the 1949 Geneva Convention.

10. He further alleges the violation of Articles 1 and 12(1) and (2) of the Charter and of his right to nationality.

III. Summary of the procedure before the Court

11. The Court was on 2 June 2015 seized of the Application, which was served on the Respondent State on 15 September 2015, requesting it to file its Response to the Application within sixty (60) days of receipt thereof. On the same date, the Application was transmitted to the Executive Council of the African Union and all the State Parties to the Protocol, and through the Chairperson of the African Union Commission, to all the State Parties to the Protocol, pursuant to Rule 35(3) of the Rules of Court (hereinafter referred to as "the Rules").

12. The Court notes that the initial Application was filed on 2 June 2015 by Mrs Georgia Penessis, the Applicant's grandmother, on behalf of her grandson. However, all subsequent communications received by the Court emanated from the Applicant's Counsel and the Applicant himself. For this reason and to avoid confusion, the Court on 17 January 2018 issued an order to change the title of the Application and avoid a mix up of the names. The new Application was therefore retitled *Application 013/2015*

– *Robert John Penessis v United Republic of Tanzania* instead of *Application 013/2015 – Georgia J Penessis representing Robert J Penessis v United Republic of Tanzania.*

13. The Parties filed their pleadings within the time limit prescribed by the Court, and these were duly exchanged between the Parties. On 19 and 20 March 2018, the Court held a Public Hearing at which both Parties were represented.

14. Pursuant to the Court's decision at its 49th Ordinary Session held from 16 April to 11 May 2019, at which it decided to adjudicate concurrently on the merits and reparations, the Registry invited both Parties to file their submissions on reparations. On 1 August 2018, the Applicant filed his submissions and on 6 August 2018, a copy thereof was served on the Respondent State. There has since been no reaction from the latter.

15. In conformity with the decision taken at its 51st Ordinary Session held from 12 November to 7 December 2018, the Court decided to propose to the Parties to seek an amicable settlement of the matter pursuant to Rule 57 of the Rules.

16. The Parties accepted the Court's initiative for amicable settlement. The Applicant submitted issues to be considered for the amicable settlement and these were duly transmitted to the Respondent State for the latter's observations.

17. However, despite several reminders, the Respondent State did not respond to the Applicant's issues for amicable settlement. The Court consequently decided to proceed with consideration of the merits of the Application**.**

18. At its 54th Ordinary Session held from 2 to 27 September 2019, the Court decided to visit the Applicant at Bukoba prison and the coffee plantation that he claims belongs to his family, to obtain more information on the key issues.

19. On 1 October 2019, the Registry sent a letter to this effect to the Parties proposing to them to take part in the visit and giving them seven (7) days to respond to the proposal. On 7 October 2019, the Applicant's Counsel, in response, expressed his readiness to participate in the visit on the dates set by the Court. The Respondent State did not respond to the proposal.

20. In the absence of a response from the Respondent State, the Court cancelled the proposed visit and in lieu of that, on 17 October 2019, sent the Parties a list of questions to be answered within a period of ten (10) days to facilitate the work of the Court. Both Parties did not submit their answers to the questions posed by the Court.

21. On 8 November 2019, the Court notified the Parties in writing that pleadings were closed and that the Court would render judgment

on the basis of the documents at its disposal.

IV. Prayers of the Parties

22. The Applicant prays the Court to:

"i. Rule that he is a citizen of the Respondent State;

ii. Find that, for having kept him in prison in violation of his constitutional rights, the Respondent State acted in breach of Article 12(1) and (2) of the Charter;

iii. Order the Respondent State to release him for the reason that his continued detention is illegal".

23. The Respondent State, for its part, prays the Court to declare:

"i. That Mr. Robert John Penessis is also known by the name John Robert Penessis, Robert John Maitland, John Robert Maitland and Robert John Rubenstein;

ii. That Mr. Penessis is not a citizen of Tanzania;

iii. That Mr. Penessis has dual citizenship – that of South Africa and Great Britain and Northern Ireland;

iv. That the Prosecution proved its case against Mr. Penessis beyond reasonable doubt in Criminal Case No. 35/2010;

v. That the conviction and sentence pronounced in Criminal Case No. 35/2010 was lawful;

vi. That all aspects of the prosecution in Criminal Case No. 35/2010, Criminal Appeal No. 9/2011 and Criminal Appeal No. 179/2011 were conducted in accordance with the law;

vii. That the detention order issued against Mr. Penessis is lawful;

viii. That the deportation order issued against Mr. Penessis is lawful;

ix. That the Government of the United Republic of Tanzania has not violated Mr. Penessis' right to liberty;

x. That the Government of the United Republic of Tanzania has not violated Mr. Penessis' right to be heard;

xi. That the Government of the United Republic of Tanzania has not violated Mr. Penessis' right to defend himself;

xii. That the Application be dismissed."

V. Jurisdiction

24. 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 States concerned.

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

25. The Court further observes that in terms of Rule 39(1) of the Rules: "The Court shall conduct preliminary examination of its jurisdiction …".

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

A. Objection to material jurisdiction

27. The objections to the material jurisdiction of the Court raised by the Respondent State relates to two essential aspects, namely: the form and content of the Application, and the power of the Court to consider matters of evidence which had been finalized by domestic courts.

i. Objection based on the form and content of the Application

28. The Respondent State contends that the Court has no jurisdiction to entertain this Application for the reason that the document originally filed by the Applicant is not an application within the meaning of the Protocol.

29. The Court is of the opinion that the question of the form of the letter and its content relate to the issue of admissibility and hence, will address it later in the section on admissibility of the Application**.**

ii. Objection based on the power of the Court to evaluate the evidence

30. The Respondent State contends that the Application seeks to extend the jurisdiction of this Court beyond its mandate as set out under Article 3 of the Protocol and Rule 26 of its Rules and require it to sit as a supreme appellate court. In this regard, the Respondent State submits that the Application requires the Court to adjudicate on matters of evidence, already resolved and finalized by its highest court, that is, the Court of Appeal. The Respondent State therefore maintains that this Court has no jurisdiction to make a determination on matters of evidence already finalized by the highest tier of the Respondent State's justice system.

31. The Applicant, for his part, submits that this Court has jurisdiction, given that, according to its Rules, the Court is empowered to

evaluate the evidence on record concerning the Applicant's status and citizenship.

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32. This Court recalls that, as it has consistently held,[1] it is not an appeal court with respect to decisions rendered by national courts. However, as underscored in its case-law, this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in consonance with the standards set out in the Charter or any other applicable human rights instrument to which the Respondent State is a Party.[2]

33. The Court notes that, in the instant case, the complaints raised by the Applicant pertain to the question as to whether the domestic proceedings were in conformity with international fair trial standards guaranteed in the Charter and other international instruments ratified by the Respondent State. These are matters which, pursuant to Article 3 of the Protocol, fall within the purview of this Court's jurisdiction, regardless of the fact that they may relate to the assessment of evidence determined by the domestic courts.

34. Consequently, the Court dismisses the Respondent State's objection that the Court is acting, in the instant matter, as a supreme appellate court and finds that it has material jurisdiction to hear the matter.

B. Other aspects of jurisdiction

35. The Court notes that its personal, temporal and territorial

1 See Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* (*Armand Guehi v Tanzania* (Merits and Reparations), para 33. See also *Alex Thomas v Tanzania* (Merits), (2015) 1 AfCLR 465, paras 60-65; and Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (*Nguza Viking and Johnson Nguza v Tanzania* (Merits), para 35.

2 See *Armand Guehi v Tanzania* (Merits and Reparations), para 33; See also Application 024/2015. Judgment of 7 December 2018 (Merits), *Werema Wangoko Werema and Another v United Republic of Tanzania* (*Werema Wangoko Werema and Another v Tanzania* (Merits), para 29; *Alex Thomas v Tanzania* (Merits), para 130; Application 007/2013. Judgment of 3 June 2016 (Merits), *Mohamed Abubakari v United Republic of Tanzania* (*Mohamed Abubakari v Tanzania* (Merits), para 26; and *Ernest Francis Mtingwi v Malawi* (Admissibility) (2013) 1 AfCLR 190, para 14.

jurisdiction is not being challenged by the Respondent State. Besides, nothing on record indicates that the Court does not have personal, temporal and territorial jurisdiction. The Court, accordingly, holds that:

i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the Declaration prescribed under Article 34(6) thereof, allowing individuals to bring cases directly before it, pursuant to Article 5(3) of the Protocol;

ii. It has temporal jurisdiction insofar as the alleged violations occurred subsequent to the Respondent State's ratification of the Protocol establishing the Court but before making the Declaration required under Article 34(6).

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

36. In light of the foregoing, the Court holds that it has jurisdiction to hear the instant case.

VI. Admissibility

37. Pursuant to 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".

38. In terms of Rule 39 of its Rules: "The Court shall conduct preliminary examination of … the admissibility of the application in accordance with Article 50 and 56 of the Charter, and Rule 40 of these Rules".

39. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, sets out the admissibility conditions of applications 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."

A. Conditions of admissibility in contention between the Parties

40. The Respondent State raises two objections to the admissibility of the Application, namely, failure to exhaust local remedies, and the time frame for seizure of the Court. As indicated in paragraph 29 above, the Court will also consider here the objection concerning the form and content of the Application.

i. Objection based on the form and content of the Application

41. According to the Respondent State, the Application is in fact a letter from Georgia J Penessis to the Court, asking for directions as to how to pursue her complaints.

42. Still according to the Respondent State, this Application has not been properly filed before the Court in as much as "it is not in conformity with Rule 33(1) and (4) of the Rules".[3] It is argued that the Application contains neither a summary of the facts of the case nor the evidence that the author intends to adduce; nor does it specify the alleged violation, proof of exhaustion of local remedies or whether such remedies have been unduly prolonged. The Respondent State notes further that, the petition does not mention the prayers or injunctions requested, and this is simply because it was not intended to be an Application.

43. The Respondent State submits that the jurisdiction of the Court cannot be invoked by a letter requesting from the Court the procedure to be followed, particularly in so far as the letter contains no undertaking to pursue the case before the Court. The Respondent State argues that the Application must therefore be declared incomplete and, accordingly, dismissed.

44. The Applicant refutes the Respondent State's assertion that his grandmother wrote a simple letter to the Court and not a proper application. He argues that the grievances raised by his grandmother and the information given in the letter have the

3 The reference to Rule 33 by the Respondent State is mistaken; the applicable Rule should be Rule 34 of the Rules, which provides for the form and content of an application.

force of an application because all the necessary information is contained therein.

45. Still according to the Applicant, there are no technical details governing the filing of an application before the Court. For him, any form of referral is valid, the essential thing being that the referral brings the facts and the supporting arguments to the Court's attention.

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46. The Court notes that so far as the form or modality of seizure of the Court is concerned, it has adopted a flexible approach. For example, in the case of *Anudo Ochieng Anudo v United Republic of Tanzania,*[4] the Court decided to admit an application filed by a simple email and communicated as such. In this regard, the Court always takes into account the specific conditions of each Applicant and the circumstances surrounding the filing of the Application.

47. The Court also notes that Rule 34 and Rule 40(1) of the Rules provide some additional requirements as regards the form and general content of an application. Rule 34 of the Rules requires, among other things, that any application filed before it, shall contain a summary of the facts of the case and the evidence intended to be adduced; give clear particulars of the Applicant and of the party against whom the application is brought and specify the alleged violation, show evidence of exhaustion of local remedies or of the inordinate delay of such local remedies as well as the orders or the injunctions sought; and be signed by the Applicant or his/her representative(s). Rule 40(1) of the Rules further requires that the application shall disclose the identity of the Applicant.

48. In the instant Application, the Court notes from the record that the Application contains the identity of the author, that the facts are well elaborated, and the issues raised therein are fairly precise. In addition, the Application was signed and, in his Reply, the Applicant clearly specified the alleged human rights violations,

4 Application 012/2015. Judgment of 22 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* (*Anudo Ochieng Anudo v Tanzania* (Merits) para 52.

and asserted that he has exhausted all local remedies by attaching copies of the judgments of the local courts.

49. The Court accordingly holds that the instant Application fulfils the basic requirements of form and offers sufficient details for the Respondent State to understand the content of the Applicant's grievances and for the Court to consider the matter.

50. The Court thus dismisses the Respondent State's objection based on the form and content of the Application.

ii. Objection based on non-exhaustion of local remedies

51. The Respondent State submits that given that legal remedies exist to address the grievances raised by the Applicant but were not exercised, the latter failed to comply with the conditions of admissibility relating to exhaustion of local remedies stipulated under Rule 40(5) of the Rules.

52. The Respondent State further submits that the Applicant provided no explanation as to whether local remedies were not exhausted for reasons beyond his control or whether the said local remedies are merely ineffective, insufficient and impractical.

53. The Respondent State also avers that between 2013 and 2014, the Applicant filed before the High Court at Bukoba, three criminal applications for *habeas corpus* against the Minister of Home Affairs challenging his detention. He filed a similar application before the High Court at Dar-es-Salaam. Two (2) of the first three (3) applications were struck out on 30 April 2015. The third was dismissed by the High Court at Bukoba, which found that the Applicant's detention was lawful as he was awaiting deportation. The Applicant himself withdrew the application before the High Court in Dar-es-Salaam on the ground that the same petition was already before the High Court at Bukoba. According to the Respondent State, when the last application was dismissed, the Applicant could have appealed to the Court of Appeal but failed to do so.

54. The Respondent State further contends that if the Applicant felt aggrieved by the detention order, he was and still is legally entitled to apply for judicial review to quash the order on grounds of procedural irregularity, by invoking the Law Reform Act which provides for remedies to persons aggrieved by the actions of State administrative bodies or authorities.

55. Refuting these assertions by the Respondent State, the Applicant submits that significant efforts had been made to exhaust all available remedies. In this regard, he refers to the case of *Sir Dawda Jawara v The Gambia,* wherein the African Commission

on Human and Peoples' Rights (hereinafter referred to as "the Commission") held that all domestic remedies that need to be exhausted should be available, effective, adequate and sufficient.

56. The Applicant submits that it is an established fact in international human rights law that a domestic remedy is considered available if it can be exercised without hindrance; is effective if it offers the prospect of success; and is sufficient, if it is capable of remedying the violations raised. He also avers that "no appeal has ever prospered in favour of the Applicant in the United Republic of Tanzania".

57. The Applicant consequently contends that local remedies were unavailable, ineffective and inadequate in the Respondent State, and that for this reason, he had no other choice but to file this Application before this Court, praying the latter to declare the same admissible.

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58. The Court notes that exhaustion of local remedies is one of the requirements which an Application must meet to be declared admissible. However, as this Court has held in the matter of *Wilfred Onyango Nganyi and others v Tanzania*, the remedies to be exhausted in terms of Article 56(5) of the Charter are only those provided by law and are relevant to the case of the Applicant.[5] This understanding of the provision is to the effect that not all existing remedies have to be exhausted**.** Besides, the remedies to be exhausted must be ordinary judicial remedies.[6]

59. In the instant Application, the Court observes that the Applicant was arrested on 8 January 2010 on two counts, namely, unlawfully entering and residing in Tanzania, respectively. On 17 January 2011, the Kagera Resident Magistrate's Court in Bukoba convicted the Applicant on both counts and sentenced him to pay

5 *Wilfred Onyango Nganyi and others v Tanzania* (Merits) (2016) 1 AfCLR 507, paras 88-89; *Norbert Zongo and others v Burkina Faso* (Merits) (2014) 1 AfCLR 219, para 68.

6 *Alex Thomas v Tanzania* (Merits), para 64; Application 003/2015. Judgment of 28 September 2017 (Merits), *Kennedy Owino Onyachi and Another v United Republic of Tanzania (Kennedy Owino Onyachi v Tanzania* (Merits), para 56; *Nguza Viking v Tanzania* (Merits), para 52; Application 032/2015. Judgment of 21 March 2018, *Kijiji Isiaga v United Republic of Tanzania (Kijiji Isiaga v Tanzania (Merits)*, para 45.

a fine of eighty thousand Tanzanian Shillings (TZS 80,000) or two years' jail term in default. The Court of First Instance in Kagera, Bukoba, also handed down a sentence of ten strokes of the cane.

60. In a judgment handed down on 6 June 2011, the Bukoba High Court upheld the Applicant's sentence of two (2) years imprisonment while quashing the sentence of corporal punishment. The Court also ordered his deportation from the territory of the Respondent State. Dissatisfied with this, the Applicant lodged an appeal before the Court of Appeal of Tanzania, which on 4 June 2012, upheld the conviction. The latter Court however, held that it was not the proper body to issue the deportation order since the matter fell within the jurisdiction of the Minister of Home Affairs.

61. The Court however notes the Respondent State's argument that the Applicant did not exhaust all the available remedies because he should have filed an appeal before the Court of Appeal and requested judicial review of the detention order. The Court observes in this regard that the domestic procedure relating to the Applicant's residence and deportation, and that involving his detention are so intertwined that they cannot be detached for the purposes of exhausting local remedies. This is so because the detention was in implementation of an order that ensued from judicial proceedings in respect of the Applicant's residence and deportation. The rights involved therefore form part of a bundle of rights and guarantees, which the domestic courts were necessarily aware of.

62. In addition, the Court notes from the record that the Court of Appeal, the highest court in the Respondent State, has already indicated in its judgment of 4 June 2012 that ordinary courts were not competent to issue deportation orders. As such, it would be superfluous to ask the Applicant to appeal against the detention order signed by the Minister with a view to his deportation.

63. In view of the aforesaid, the Court is of the opinion that local remedies have been exhausted and hence, the Respondent State's objection in this regard is dismissed.

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

64. The Respondent State alleges that the Application was not filed within a reasonable time contrary to Rule 40(6) of the Rules, arguing that the Applicant seized the Court three (3) years after the decision of the Court of Appeal of Tanzania in Criminal Appeal

No. 179/2011.

65. The Respondent State also contends that, although the Charter and the Rules do not define 'reasonable time' to file an Application, international human rights jurisprudence interprets "reasonable time to mean six months from the date of the final decision which is being challenged". This is also the position adopted by the African Commission on Human and Peoples' Rights in the matter of *Michael Majuru v Zimbabwe*.[7]

66. The Applicant, for his part, submits that reasonable time ought to be assessed against the circumstances of each case. He pleads that in this case, he is still being held in Bukoba Central Prison, and that the case of *Michael Majuru v Zimbabwe* cited by the Respondent State is distinguishable from the instant case.

67. The Applicant argues that the Charter has no provision specifying the exact definition of reasonable time, and that in the absence of such provision, the Commission and the Court have been flexible, treating each case on the basis of its context, the arguments adduced, the peculiar circumstances and the notion of reasonable time. The Applicant, for this reason, prays the Court to rely on the foregoing observations and rule that the Application has been filed within a reasonable time.

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68. The Court has held in its previous judgments that the reasonableness of the period for it to be seized depends on the particular circumstances of each case and must accordingly be determined on a case-by-case basis.[8]

69. In the instant case, the Court notes that the Court of Appeal, the highest Court in the Respondent State**,** delivered its judgment on 4 June 2012 and the Applicant seized this Court on 2 June 2015. Between the date the judgment was rendered by the Court of Appeal and the date of seizure of this Court, there was a time lapse of two (2) years, eight (8) months and twenty-eight (28) days. The

7 Communication 308/2005, *Michael Majuru v Zimbabwe*.

8 ***Alex Thomas v Republic of Tanzania*** (Merits), para 73, ***Mohamed Abubakari v of Tanzania*** (Merits), para 91; Application 011/2015. Judgment of 28 September 2017, ***Christopher Jonas v United Republic of Tanzania***, para 52; See ***Norbert Zongo and others v Burkina Faso*** (Preliminary Objections) (2013) 1 AfCLR 197, para 121.

Court, however, notes that between 2013 and 2015, the Applicant filed four *habeas corpus* applications before the High Court at Bukoba and at Dar es Salaam, to challenge the lawfulness of his detention. The Court is of the view that the Applicant cannot be penalised for attempting these remedies. Taking all these facts into consideration, the Court thus considers that the time frame of two (2) years, eight (8) months and twenty-eight (28) days in filing the Application has been explained and is reasonable in terms of Rule 40(6) of the Rules.

70. The Court therefore dismisses the Respondent State's objection that the Application was not filed within a reasonable time.

B. Conditions of admissibility not in contention between the parties

71. The Court notes that compliance with sub-rules 1, 2, 3, 4, and 7 of Rule 40 of the Rules are not in contention, and that nothing on record indicates that the requirements of the said sub-rules have not been complied with.

72. In view of the foregoing, the Court finds that the admissibility conditions have been met, and hence, the Application is admissible.

VII. Merits

73. The Court notes that the instant Application raises two main issues: first, whether or not the right of the Applicant to Tanzanian nationality has been violated; and second, whether or not his arrest and detention were in conformity with the Charter.

i. Alleged violation of the Applicant's right to Tanzanian nationality

74. The Applicant submits that pursuant to the Tanzania Citizenship Act of 1995, an individual may acquire Tanzanian nationality either by birth or by naturalisation. A Tanzanian by birth is someone who was born in the Mainland Tanzania or Zanzibar before the Union (Section 4) or anyone born in the United Republic of Tanzania on Union Day or after (Section 5 of the Act).

75. The Applicant contends that he is a citizen of Tanzania by birth, adding that he holds a valid Tanzanian birth certificate which shows that he was born in Tanzania in 1968.

76. The Applicant also avers that he has never renounced his citizenship, nor has he been deprived of the same by the

Tanzanian authorities as per Section 13(1) and 14 of the Tanzania Citizenship Act (Chap 357).

77. The Applicant further submits that he was born at Buguma Estate, Muleba District in the United Republic of Tanzania, and that both his parents are Tanzanians. He states that, as a citizen, he had initiated the process to obtain a passport. While waiting for the said passport to be issued, the competent authorities of the Respondent State issued him with a temporary travel document which he still had, adding that, as a citizen, he is legally entitled to a Tanzanian passport.

78. The Applicant also argues that according to Section 3(1) of the Tanzania Citizenship Act,[9] persons born to Tanzanian parents on Tanzanian territory after the date of the Union are Tanzanians by birth. He added that he is in possession of a birth certificate which proves that he was born in the United Republic of Tanzania in 1968 that is after the creation of the Union, which makes him a Tanzanian by birth. He claims that he never obtained the nationality of another foreign country, which would have led him to lose his Tanzanian nationality, knowing that Tanzania does not recognize dual nationality.

79. The Respondent State, for its part, contends that the Applicant is not a Tanzanian citizen, invoking the fact that during the Applicant's trial in Criminal Case 35/2010, the Prosecution tendered certified true copies of the Applicant's passports issued by the United Kingdom and the Republic of South Africa. The Respondent State submits that the United Kingdom passport bore his name as Robert John Rubenstein and indicated that he is a British citizen with his place of birth being Johannesburg, South Africa, where he was born on 25 September 1968. It further argues that a copy of the Applicant's South African passport issued by the Department of Home Affairs in South Africa reflected the Applicant's nationality as South African, his place of birth as Johannesburg and date of birth as 1968.

80. The Respondent State also submits that the copies of the afore-mentioned documents were presented by the Applicant in support of his application for a Tanzanian Residence Permit, thus, raising the question as to why a Tanzanian would need a residence

9 Article 3(1) of the Tanzania Citizenship Act: "A citizen by birth is any person who is a citizen of the United Republic of Tanzania under the following conditions: by virtue of the operation of section 4 which provides that persons born in Mainland Tanzania or Zanzibar are Tanzanian. Such persons must be born before Union Day by virtue of Section 5. Any person born in the United Republic of Tanzania on or after Union Day, by virtue of his birth in Zanzibar and of the Article 4(2) ".

permit to reside in his own country.

81. The Respondent State avers that the initial criterion to prove a Tanzanian nationality or citizenship by birth, that is, to be born in Tanzania, has not been met by the Applicant in as much as the copies of passports tendered in evidence during local proceedings clearly testify to the Applicant's nationality and place of birth as being South Africa.

82. The Respondent State further submits that the Applicant has failed to discharge his burden of proof that he is Tanzanian. It argues that rather than producing unequivocal evidence of his Tanzanian nationality, the Applicant provided conflicting and contradictory information on his birth and nationality. On various occasions during the proceedings at domestic level, the Applicant failed to produce certified true copies or an original of his Tanzanian passport, which he alleges he has; rather, he produced a copy of a temporary emergency travel document.

83. The Respondent State finally asserts that, as regards nationality, the laws of Tanzania do not permit dual citizenship and once an individual, who has dual nationality, has attained the age of eighteen (18) years, he or she has to make a choice to retain or renounce his/her Tanzanian nationality. Therefore, regardless of the Applicant's claim that he is a Tanzanian citizen, the mere fact that he possesses passports of other countries proving that he is a citizen of those countries, while he is far beyond the age of eighteen (18), nullifies any contention that he is a Tanzanian.

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84. The Court notes that neither the Charter nor the International Covenant on Civil and Political Rights (ICCPR) contains any provision specifically dealing with the right to nationality. However, Article 5 of the Charter provides that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status ..."

85. The Court also notes that the Universal Declaration of Human Rights (UDHR) which is recognized as part of customary international law provides in its Article 15 that "Everyone shall have a right to nationality" and "No one shall be arbitrarily deprived of

his/her nationality...".[10] The Court recalls, as it has held in the case of *Anudo Ochieng Anudo v United Republic of Tanzania,* that the right to nationality as provided under the UDHR can apply as a binding norm to the extent to which the instrument has acquired the status of a rule of customary international law.[11] The Court in the same judgment noted that while deprivation of nationality has to be done in a manner that avoids statelessness, international law recognises that "… the granting of nationality falls within the ambit of the sovereignty of States and, consequently, each State determines the conditions for attribution of nationality".[12]

86. The Court further notes that the nationality provision in the UDHR has crystallised in several subsequent international law instruments whether universal or African. Such instruments include the United Nations Conventions of 1954 and 1961 devoted to preventing and reducing statelessness, which essentially obligate States to determine the granting of nationality always bearing in mind the utmost need of avoiding statelessness.[13] Under the aegis of the African Union, the African Charter on the Rights and Welfare of the Child explicitly provides in its Article 6(3) that "every child has the right to acquire a nationality".[14]

87. The Court holds that the right to nationality is a fundamental aspect of the dignity of the human person. The protection of the dignity of the human person is recognised as a cardinal principle under international law. Apart from the recognition of the norm in most international human rights instruments such as ICCPR and UDHR, the principle of respect for human dignity is enshrined in most constitutions of modern states in the world.[15] The protection of human dignity is therefore considered as a fundamental human

10 See the Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States v Iran) [1980].* ICJ page 3. Collection 1980. See also, The question of South West Africa (*Ethiopia v South Africa; Liberia v South Africa)*. (Preliminary Objection). (Separate Opinion of Judge Bustamante) ICJ, Collection 1962, page 319, Section 9(f) of the Constitution of the United Republic of Tanzania, 1977.

11 *Anudo Ochieng Anudo v Tanzania* (Merits), para 76.

12 *Ibid*, para 77-78.

13 See UN Convention Relating to the Status of Stateless Persons (1954); and UN Convention on the Reduction of Statelessness (1961).

14 Entered into force on 29 November 1999. Ratified by the United Republic of Tanzania on 16 March 2003.

15 See, for example, Art 12(2), Constitution of the United Republic of Tanzania (1977); Art 28 Constitution of Kenya (2010); Art 24, Constitution of the Federal Democratic Republic of Ethiopia (1994); Art 10, the Constitution of the Republic of South Africa (1996).

right.

88. The Court further notes that a person's arbitrary denial of his/her right to nationality is incompatible with the right to human dignity, reason for which international human instruments, including the Charter, provide that "Everyone shall have the right to have his legal status recognized everywhere"[16] and international law requires States to take all necessary measures to avoid situations of statelessness.[17]

89. The Court notes that the expression 'legal status' under Article 5 of the Charter encompasses the right to nationality**.** The same understanding is provided by the Commission in the matter of *Open Society Justice Initiative v Côte d'Ivoire*. In that case, the Commission took the view that: "The specific right protected under Article 5 of the Charter is therefore the guarantee of an obligation incumbent on every State Party to the Charter to recognize for an individual, a human being, the capacity to enjoy rights and exercise obligations ... nationality is an intrinsic component of this right, since it is the legal and socio-political manifestation of the right, as are, for example, the status of refugee or of resident granted by a State to an individual for the purpose of enjoying rights and exercising obligations".[18]

90. The Court notes that, in the instant case, the Parties' dispute over the issue as to whether the Applicant is a Tanzanian by birth. The Applicant maintains that he is a Tanzanian national while the Respondent State argues that he is not. Thus, in these circumstances, it is important to determine who bears the burden of proof.

91. In its case-law on the burden of proof, this Court has adopted the general law principle of *actor incumbit probatio* by which anyone who alleges a fact must prove it. That principle was applied for instance in the case of *Kennedy Owino Onyachi v United Republic of Tanzania* where the Court held that "it is a fundamental rule of law that anyone who alleges a fact must provide evidence to prove it"[19].

92. It flows from the foregoing that the burden of proof lies with the alleging party and shifts to the other party only when discharged. Having said that, the Court is of the view that this principle is not

16 See Art 5 of the Charter and Article 6 of the UDHR.

17 UN Convention on the Reduction of Statelessness (1961).

18 Communication 318/06, *Open Society Justice Initiative v Republic of Côte d'Ivoire*, paras 95-97.

19 *Kennedy Owino Onyachi v United Republic of Tanzania* (Merits), para 142.

static and may be subject to exceptions especially in circumstances where the alleging party is not in a position to access or produce the required proof; or where the evidence is manifestly in the custody of the other party or the latter is entrusted with the means and prerogatives to discharge the burden of proof or counter the alleging party. In such circumstances, the Respondent State may be required to rebut a *prima facie* allegation.

93. Indeed, the Court has recognized exceptions to the rule by holding for instance in the above referenced case of *Kennedy Owino Onyachi v Tanzania that* "when it comes to human rights, this rule cannot be rigidly applied" and there must be an exception among other circumstances, where "… the means to verify the allegation are likely to be controlled by the State"[20]. In such cases, the "… the burden of proof is shared and the Court will assess the circumstances with a view to establishing the facts." In the context of nationality, the Court has held in the matter of *Anudo Ochieng Anudo v Tanzania* that where "… the Applicant maintains that he is of Tanzanian nationality" and "… since the Respondent State is contesting the Applicant's nationality … the burden is on the Respondent State to prove the contrary."[21]

94. In respect of the exception to the above stated principle on the burden of proof, it is also worth referring to the case of *IHRDA* (*Nubian Community) v Kenya*[22] where the African Commission took the view that it lies with the Respondent State to prove that the Applicants were not Kenyan nationals, contrary to their claim. Owing to the restrictions imposed by the Respondent State, the Commission observed that it was virtually impossible for the Applicants to provide proof of their nationality.[23] The Commission also took a similar position in the case of *Amnesty International v Zambia*.[24]

95. The International Court of Justice (ICJ) in the *Nottebohm* Case *(Liechtenstien v Guatemala)*[25] also held that to determine a nationality link, it is necessary to take into account the very important social factors which bind the Applicant to the Respondent

20 *Kennedy Owino Onyachi v United Republic of Tanzania* (Merits), para 143.

21 *Anudo Ochieng Anudo v United Republic of Tanzania* (Merits), para 80.

22 *Institute for Human Rights and Development in Africa (On behalf of the Nubian Community in Kenya) v Kenya*, Communication, page 31, para 151

23 *Idem,* para 150

24 *Amnesty International v Zambia,* Communication 212/98, para 41.

25 *Nottebohm* Case*, Liechtenstien v Guatemala,* second phase of the judgment, April 1955, paras 22 -24.

State. Nationality must be "an effective and solid link" such as the Applicant's habitual residence, family ties and participation in public life.

96. The Court notes that, in view of the foregoing, the Applicant who alleges that he holds a certain nationality bears the onus to prove so. Once he has discharged the duty *prima facie*, the burden shifts to the Respondent State to prove otherwise. It is against these standards that the Court will settle the issue of proof of nationality in the present case, including by weighing the evidence adduced by both Parties.

97. The Court also notes that the Applicant has always maintained that he is Tanzanian by birth just like his parents. At the time of his arrest, he presented a copy of his birth certificate showing that he was born in the territory of the Respondent State and an emergency temporary travel document was issued to him, pending issuance of his passport. The Court notes that these two documents were provided by the authorities of the Respondent State, and even if the latter describes them as fraudulent, it has not adduced evidence to the contrary.

98. The Court further notes that, according to the 1995 Citizenship Act, at the time of the Applicant's birth, that is, 1968,[26] a person could acquire Tanzanian nationality by birth if that person was born in the United Republic of Tanzania after Union Day, provided either of his parents is Tanzanian.[27]

99. In the present Application, the Respondent State has challenged the Applicant's nationality by disputing his place of birth. However, a witness named Anastasia Penessis who claimed to be the Applicant's mother appeared before the Court and testified that her son, the Applicant, was born in Buguma Estate, Tanzania, in 1968, where the family has property**.** The Court notes that the same name of Anastasia Penessis is on the certified copy of the birth certificate indicated as the mother of the Applicant and recognized as Tanzanian**.** This coupled with the fact that the same birth certificate clearly shows that he was born in Tanzania, in the opinion of this Court, establishes a presumption that the Applicant is a Tanzanian by birth, and it is for the Respondent State to refute this presumption**.** Accordingly, the burden of proof has to shift to the Respondent State, which has to prove that the Applicant, in

26 The Tanzania Citizenship Act, 1961 Chap. 512, and the British Nationality Act, 1948.

27 See Article 6 of the Tanzania Immigration Act.

spite all the evidence adduced above, is not a Tanzanian national.

100. In this regard, the Court takes note of the contention of the Respondent State that the said birth certificate was fraudulent and that the Applicant has British and South African passports, attesting to the fact that he is a citizen of those countries. The Respondent State has adduced copies of those passports but the Court notes that these documents bore different names and the Respondent State has not provided compelling evidence to substantiate its averment that both passports belong to the Applicant. The Court notes also that the Applicant refused knowledge of those passports.

101. The Court further notes the Respondent State's argument that the Applicant submitted an application for residence permit and, for that purpose, used a British passport. At the public hearing held on 19 and 20 March 2019, the Court asked the Applicant whether he had actually applied for a residence permit. The Applicant's Counsel stated that his client had never undertaken such a step because he is Tanzanian and therefore does not need the permit. The Court also asked the Respondent State to provide a copy of the said application for residence permit, but the latter was not able to do so, contending that the said application was in the Applicant's possession.

102. At this juncture, the Court further notes that all the documents tendered by both Parties are copies or certified copies and that neither of the parties adduced originals of the documents used as evidence. In the circumstance, the Court is of the opinion that the Respondent State, as a depository and guarantor of public authority and custodian of the civil status registry, has the necessary means to correctly establish whether the Applicant was a Tanzanian, South African or a British citizen. The Respondent State could also have obtained and produced concrete evidence to support its assertion that the Applicant has other nationalities.

103. In view of the aforesaid, the Court considers that there is a body of documents especially the certified copy of the birth certificate and the certified temporary travel document issued by the competent authorities pending finalization of the passport, establishing that the Applicant is Tanzanian by birth and that the Respondent State has not been able to prove the contrary**.** It therefore finds in conclusion that the Applicant's right to Tanzanian nationality has been violated, contrary to Article 5 of the Charter and Article 15 of UDHR.

ii. Alleged violation of the Applicant's right to liberty

104. The Applicant contends that as a citizen of the Respondent State, he has the right to enjoy his right to liberty and not to be arrested and detained illegally. He alleges however that he was arrested and detained illegally and continues to be in prison even after having served his sentence of two years, following his conviction by the courts of the Respondent State for the offences of illegal entry and unlawful presence in Tanzania.

105. For its part, the Respondent State argues that the detention of the Applicant is consistent with its law for the reason that he does not have any documents allowing him to remain in Tanzania. In this regard, the Applicant was prosecuted and sentenced in accordance with the law.

106. The Respondent State submits further that the Applicant is still in detention because he refuses to cooperate with the authorities for his deportation order to be executed. It notes in this respect that South African authorities are willing to welcome their national, the Applicant, but could not carry out the deportation since there are certain procedural measures to be implemented, and the said measures can be applied only with the cooperation of the Applicant.

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107. The Court notes that Article 6 of the Charter guarantees the right to liberty as follows:

"Every 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 law. In particular, no one may be arbitrary arrested or detained."

108. The Court notes that the right to liberty and security as enshrined above strictly prohibits any arbitrary arrest or detention. An arrest or detention becomes arbitrary if it is not in accordance with the law, lacks clear and reasonable grounds or is conducted in the absence of procedural safeguards against arbitrariness.[28]

109. In the instant case, the Court notes from the record that the Applicant was initially detained on the basis of the Respondent

28 *Kennedy Owino Onyachi and Another v Tanzania* (Merits), para 131.

State's criminal laws for having allegedly entered and stayed in its territory unlawfully. The Applicant's conviction for the same was premised on the assumption that he was not a Tanzanian national. However, the Court recalls its earlier finding above that the Respondent State has not provided evidence to substantiate that the Applicant is not a Tanzanian before or at the time of his arrest or conviction. In the opinion of the Court, this renders his arrest, conviction and detention unlawful.

110. The Court notes that the Applicant has remained in prison to date notwithstanding that he fully served two (2) years' imprisonment sentence as far back as 2012. In this regard, the Court finds that his alleged refusal to cooperate for the purpose of his expulsion is not a reasonable justification for keeping him in prison indefinitely.

111. In view of the aforesaid, the Court finds that the Respondent State has violated the Applicant's right to liberty contrary to Article 6 of the Charter.

iii. Alleged violation of the Applicant's right to freedom of movement

112. The Applicant avers that the right to freedom of movement is a fundamental human right recognised under international human rights instruments such as the UDHR, ICCPR and other human rights instruments, including the Charter. He maintains that this right involves not only movement within the country but also protection from forced expulsion or displacement.

113. The Applicant also submits that according to Article 12(1) and (2) of the Charter, every individual has the right to move freely within a country, the right to leave the same, including his or hers, and return to it, subject only to restrictions provided by law and required for the protection of national security. The Applicant avers that he has neither threatened the Respondent State's public order nor breached Article12 of the Charter.

114. In this respect, the Applicant cites the matter of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* wherein the Commission stressed that Article 12 of the Charter imposes an obligation on the contracting State to secure the rights protected under the Charter for all parties within their jurisdiction, nationals or non-nationals alike.

115. The Applicant submits that while he is a Tanzanian national by birth and thus, has the right to freedom of movement, including the right to leave and return to his country**,** the law, as reflected in the Commission's decisions in the above-mentioned case, protects both nationals and non-nationals. He also asserts that as

a citizen of the Respondent State, he is entitled to enjoy fully his rights and should not have been arrested or unlawfully detained. He avers further that his conviction and sentence to two (2) years in prison, that is, from 2010 to 2012 and his continued detention to this date, are illegal and in violation of his right to freedom of movement.

116. The Applicant further submits that the Respondent State has the primary responsibility to respect, protect and promote his right to freedom of movement; and having failed to do so, the Respondent State violated this right by unlawfully arresting and detaining him on his entry into the country.

117. The Respondent State, for its part, contends that the Applicant filed an application for residence at the Regional Immigration Bureau in Kagera using a British passport. While treating this application, the immigration officers discovered that he was also in possession of a South African passport and had no legal document justifying his presence in the territory of Tanzania.

118. According to the Respondent State, subsequent investigations led to his arrest and detention. He was sentenced by the Court for illegal entry and presence in its territory and his detention came about only after he was arrested, charged and convicted in accordance with the laws governing criminal proceedings in the Respondent State.

119. The Respondent State further submits that just as was the case before the immigration officers, the Applicant failed to tender any document to show that he entered the country lawfully. Since he did not have any class of residence permit and is not a citizen of the Respondent State, his presence in Tanzania was unlawful.

120. Consequently, the Respondent State contends that it did not violate the Applicant's right to freedom of movement.

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121. The Court notes that Article 12 of the Charter stipulates the right to freedom of movement as follows:

"1. Every individual shall have the right to freedom of movement and residence ...

2. Every individual shall have the right to leave any country, including his own, and to return to his country ..."

122. Similarly, Article 12 (1) of ICCPR provides that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence".

123. The Court thus notes that the right to freedom of movement as enunciated under Article 12 of the Charter is guaranteed to "every individual" lawfully present within the territory of a State regardless of his national status, that is, regardless of whether or not he or she is a national of that State. According to Article 12 of the Charter and of ICCPR, this right "may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

124. The Court underscores that nationals of a State, by virtue of their citizenship, are presumed to be "lawfully in the territory" of that State. However, as far as non-nationals are concerned, "the question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations".[29]

125. The Court notes that in the instant case, it has already established that the Applicant is presumed to be a national of the Respondent State. Accordingly, the Applicant is considered to have been lawfully present in the territory of the Respondent State and thus, has the right to exercise his right to freedom of movement.

126. However, as indicated above, the Applicant has been convicted, detained and sentenced for illegal entry and still continues to be in prison even after having served the two (2) years' prison sentence that was meted out to him in 2010. The Respondent State has not provided any justification for restrictions that would fall under the provision of Article 12(2) of the Charter such as protection of national security, law and order, public health or morality warranting the restriction of the Applicant's freedom of movement.

127. In view of the aforesaid, the Court holds that the Applicant's arrest and continued detention constitute a violation of Article 12 of the Charter.

iv. Alleged violation of Article 1 of the Charter

128. The Applicant submits that the Respondent State violated Article

29 United Nations Human Rights Committee, *General Comment 27: Article 12 (Freedom of Movement)*. See also Communication 456/1991, *Celepli v Sweden*, para 9.2.

1 of the Charter.

129. According to the Applicant, Article 1 confers on the Charter its legally binding character, and therefore a violation of any right under the Charter automatically means a violation of this Article.

130. He avers that the Commission has found that Article 1 had been violated even where a complainant himself had not invoked a violation of that particular Article. In this regard, the Applicant made specific mention of the case of *Kevin Mgwanga Gunme et al v Cameroon* wherein the Commission stated that, according to its well-established jurisprudence, a violation of any provision of the Charter automatically constitutes a violation of Article 1 thereof, as it depicts a failure on the part of the State Party concerned to take adequate measures to give effect to the provisions of the Charter.[30]

131. The Respondent State did not make any submissions in this respect.

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132. The Court recalls its previous decisions wherein it held that "when the Court finds any of the rights, duties and freedoms set out in the Charter is curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated."[31]

133. In the instant case, having found that the Applicant's right to liberty, nationality**,** to security of his person and the right not to be unlawfully detained have been violated, the Court holds that the Respondent State has violated its obligations under Article 1 of the Charter.

VIII. Reparations

134. The Court notes that Article 27(1) of the Protocol provides that: "If the Court finds that there has been a violation of a human and peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or

30 Communication 266/03. *Kevin Mgwanga Gunme et al v Cameroon.*

31 *Alex Thomas v Tanzania* (Merits), para 135; *Norbert Zongo and others v Burkina Faso* (Merits) (2014) 1 AfCLR 219, page 54, para 199.

reparation**".**

135. In this respect, Rule 63 of the Rules of Court provides that: "The Court shall rule on the request for reparation ... by the same decision establishing a human or peoples' right or, if the circumstances so require, by a separate decision."

136. In the instant case, the Court has already found that the Applicant's rights under Articles 1, 5, 6, and 12 of the Charter and Article 15 of the Universal Declaration of Human Rights, have been violated.

A. Pecuniary reparations

137. The Applicant alleges that his arbitrary detention led to a loss of his socio-economic activities by which he provided the needs of his family. To that end, he seeks reparation for the reason that his life plans have been shattered and that his sources of income have not only been interrupted but also definitively lost.

i. Material prejudice

138. The Applicant is claiming the sum of two hundred and eighty-three thousand three hundred and thirty-three United States Dollars (US$ 283,333) as compensation for the prejudice suffered.

139. The Respondent State for its part submitted its response to the Applicant's request for reparation on 17 January 2019; and relying on this Court's jurisprudence particularly in *Mtikila v Tanzania*, argues that the Applicant must provide evidence of his entitlement to compensation as well as of the form and estimated amount of the remedy. It also argued that the Applicant has adduced no evidence to justify such compensation.

140. The Respondent State also invokes the "burden of proof" principle according to which the Applicant must show "that it is more probable than not" that he is entitled to the remedies sought, which in its view is not the case in this matter.

141. The Respondent State also emphasizes the established principle in international law whereby there must be a link between an alleged violation and the prejudice suffered. It must be shown that the damage would never have occurred without the alleged violation. For the Respondent State, the Applicant did not provide the needed proof of a causal link in as much as the Respondent State did not commit any act, omission or negligence that would have resulted in a violation of the Applicant's rights, adding that the Applicant was instead a victim of his own attitude.

142. In view of the foregoing, the Respondent State avers that the Applicant has not provided any evidence of pecuniary or

non-pecuniary damage allegedly caused by the Respondent State, and therefore prays the Court to dismiss the Applicant's request and grant him no compensation.

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143. The Court notes that for the reparation of any material prejudice arising from the violation of any right, there must be evidence establishing a causal link between the facts and the prejudice suffered.[32]

144. In the instant case, the Court also notes from the record that the Applicant has failed to adduce evidence on his alleged material losses and does not explain how he arrived at the figures being claimed. Consequently, the Court does not grant his request.

ii. Moral prejudice

a. Prejudice suffered by the Applicant

145. The Applicant seeks reparation as direct victim for reasons of the following facts:

i. long detention after serving the prison term;
ii. a morally exhausting appeals process which yielded no fruit;
iii. long separation from his family because of the long detention;
iv. his life plans are in shambles;
v. his sources of income have not only been disrupted but definitively lost;
vi. the deterioration of his health while in prison;
vii. loss of social status;
viii. limited contact with his parents.

146. The Applicant also contends that since his arrest, until 8 August 2018, the date he filed his submissions on reparations, he has been in detention for a "period of one hundred and two (102) months". Relying on this Court's jurisprudence in *Issa Konaté v Burkina Faso,* he claims entitlement to a total amount of

32 *Reverend Christopher R Mtikila v United Republic of Tanzania* (2014) AfCLR page 24, para 30.

US$113,333 (one hundred and thirteen thousand three hundred and thirty-three dollars) in respect of moral damage.

147. The Respondent State, for its part, reiterates its contention that a link between the alleged violation and the prejudice suffered must be established and that the Applicant must bear the burden of proof in this regard.

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148. The Court notes that the Applicant has indeed been in detention since 2010 and that this is not disputed by the Respondent State. As such, the Court recalls its earlier finding that the said detention was illegal and constitutes a breach of the Applicant's right to liberty and freedom of movement. There is no doubt that such a long detention not only disrupts the normal life of a person and jeopardizes his social status but also causes him serious physical and moral anguish.

149. Accordingly, the Court grants the Applicant's prayer for reparation pursuant to Article 27(1) of the Protocol for the moral prejudice suffered during his detention. The Court considers it appropriate to award him compensation in the amount of ten million Tanzanian Shillings (TZS 10,000,000) for the moral damage he suffered to date, and three hundred thousand Tanzanian Shillings (TZS 300,000) for every month he remains in detention after this judgment is notified to the Respondent State until the date he is released.

b. Prejudice suffered by the Applicant's mother

150. The Applicant also indicated that his mother as an indirect victim suffered as a result of her son's absence on account of the unlawful detention. According to the Applicant, "it was he who managed the family's coffee plantation, BUGUMA COFFEE, which was illegally seized and exploited for other purposes during his absence. His mother suffered physical, mental and moral distress for losing her illegally imprisoned son. The moral suffering of knowing that he was involved in a criminal case is a nightmare. The social stigma of having a son labelled a criminal is morally exhausting. The financial implications of his arrest were heavy. She spent a lot of money seeking justice for her son, frequenting various ministries,

especially, that of Home Affairs".

151. The Applicant accordingly requests the Court to grant two hundred and sixty-one thousand one hundred and eleven United States Dollars (US $261,111) to his mother, Georgia Penessis, as an indirect victim.

152. For the Respondent State, the Applicant has not provided any evidence of a relationship between him and any indirect victim, and thus that there is also no evidence showing that indirect victims suffered as a result of his detention.

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153. The Court notes that according to its established jurisprudence, members of an applicant's family who suffered either physically or psychologically from the prejudice suffered by the victim are also considered as "victims" and may also be entitled to reparation.[33]

154. In the instant case, the Applicant contends that his mother suffered as a result of his prolonged detention resulting in the loss of their family coffee plantation which was their sole source of income. He also avers that she too suffered from physical, mental and moral distress as a result of the detention of her son.

155. The Court notes that in the natural and normal order of family relationships, it is reasonable to assume that a mother would suffer psychologically as a result of the arrest and long detention of her son. As long as the relationship is established, the Court will rely on this presumption, to consider and grant compensation for such suffering.

156. In the present Application, the Court takes note of the Respondent State's contention that the Applicant has not provided any evidence of relationship between him and an indirect victim. However, the Court recalls that during the public hearing, a woman named Anastasia Penessis who claimed to be the mother of the Applicant appeared before the Court.

157. The Court further notes that during the public hearing, it was indicated by the Applicant's Counsel that the woman in question was ready to undertake a DNA test to prove that she is the mother of the Applicant. The Respondent State did not take up the offer to

33 *Norbert Zongo and others v Burkina Faso* (Reparations) (2015) 1 AfCLR 258 para 46.

undertake a DNA test, pointing out that a DNA test was not proof of the Applicant's nationality or citizenship. In the circumstance and taking into account the mention of the witness's name on the Applicant's birth certificate as his mother and as a citizen of Tanzania, the Court finds that the woman who appeared before it is the mother of the Applicant and accordingly is entitled to compensation.

158. The Court is of the opinion that the unlawful and prolonged detention of the Applicant has undoubtedly had consequences on the moral condition of his mother. Consequently, Court grants the Applicant's prayers for reparation for his mother as an indirect victim and orders the Respondent State to pay her the sum of Five Million Tanzanian Shillings (TZ 5,000,000).

B. Non-monetary reparations

i. Request for release

159. Citing the unlawful nature of his detention, the Applicant prays the Court to order his release.

160. The Respondent State submits that the Applicant's detention has been in accordance with the law as it was based on a Court Order and an expulsion Order issued by the competent authority.

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161. The Court refers to its jurisprudence wherein it indicated that a measure such as the release of the Applicant may be ordered only in exceptional or compelling circumstances.[34]

162. The Court is of the opinion that the existence of such circumstances must be determined on a case-by-case basis, taking into account mainly the proportionality between the reparation sought and the extent of the violation established.

163. In the instant case, the Court notes that the fact that the Applicant is still in detention more than six (6) years after the end of his prison term, is not disputed by the Respondent State. For the Court, this unlawful detention constitutes proof of the existence of

34 *Alex Thomas v Tanzania* (Merits), *op cit* para 157.

compelling circumstances.

164. Accordingly, the Court grants the Applicant's request and orders the Respondent State to immediately release him from prison.

IX. Costs

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

166. In the instant Application, the Parties did not make any submissions on costs.

167. Based on the foregoing, the Court rules that each Party shall bear its own costs.

X. Operative part

168. For these reasons,

The Court,

Unanimously:

On jurisdiction

i. *Dismisses* the objection to its material jurisdiction;

ii. *Declares* that it has jurisdiction to hear this case.

On admissibility

iii. *Dismisses* the objections to admissibility;

iv. *Declares* the Application admissible.

On the merits

By a majority of 6 votes for and 2 against, Judges Gérard Niyungeko and Chafika Bensaoula having voted against,

v. *Declares* that the Respondent State has violated the Applicant's right to Tanzanian nationality as guaranteed by Article 5 of the Charter and Article 15 of the Universal Declaration of Human Rights;

By a majority of 7 votes for and 1 against, Judge Chafika Bensaoula having voted against,

vi. *Declares* that the Respondent State has violated Article 6 of the Charter on "the right to liberty and to the security of the person"**;**

vii. *Declares* that the Respondent State has violated Article 12 of the Charter on the "right to freedom of movement and residence" on account of the Applicant's arrest and detention;

viii. *Declares* that the Respondent State has violated Article 1 of the Charter.

On reparations

By a majority of 7 votes for and 1 against, Judge Chafika Bensaoula having voted against,

ix. *Dismisses* the Applicant's request regarding material prejudice, for lack of evidence;

x. *Orders* the Respondent State to pay the Applicant a lump sum of ten million (10,000,000) Tanzanian Shillings for his illegal detention to date and a further sum of three hundred thousand (300,000) Tanzanian Shillings for each month of illegal detention from the date of notification of this Judgment until his release;

xi. *Orders* the Respondent State to pay the Applicant's mother a lump-sum of five million (5,000,000) Tanzanian Shillings for the moral prejudice suffered;

xii. *Orders* the immediate release of the Applicant;

xiii. *Orders* the Respondent State to pay the amounts indicated under (x) and (xi) tax free, effective six (6) months from the date of notification of this Judgment, failing which it will pay interest on the 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;

xiv. *Orders* the Respondent State to submit to it, within six (6) months from the date of notification of this judgement, a report on the status of implementation of this judgment;

On costs

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

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Dissenting opinion: BENSAOULA

1. I share the opinion of the majority of the Judges as regards the admissibility of the Application and the jurisdiction of the Court.

2. However, in my opinion, the manner in which the Court treated admissibility with regard to the objection raised by the Respondent State on the filing the Application within a reasonable time, runs counter to the provisions of Article 56 of the Charter, Article 6(2)

of the Protocol and Rules 39 and 40 of the Rules.

3. Under Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 6, it is clearly stated that applications must be "submitted *within a reasonable time from the date local remedies were exhausted* or from *the date set by the Court* as being the commencement of the time limit within which it shall be seized with the matter".

4. It is clear from the aforesaid that the legislator laid down two (2) options as to how to determine the starting point of reasonable period:

i. the date of exhaustion of local remedies: in the instant case, this date was set by the Court at 4 June 2012 – date of the judgment of the Court of Appeal. Between this date and that of referral of the matter to the Court, there was a time lapse of two (2) years, eight (8) months and twenty-eight (28) days.

ii. the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter: It is noteworthy in this regard that although the Court took into account the date of exhaustion of local remedies to determine the reasonableness of the time limit,[1] the Court nevertheless noted that between 2013 and 2015, the Applicant filed four (4) *habeas corpus* applications to challenge the lawfulness of his detention. The Court also noted that the Applicant could not be penalized for attempting these remedies and that, besides, he was under detention. It held in conclusion that the period cited above was reasonable.

5. This reasoning on the part of the Court runs counter to the very logic of the exception made by the legislator as to the second prerogative conferred on the Court to set a date as being the commencement of the time limit within which it shall be seized with a matter.

6. Indeed, whereas with regard to local remedies, the Court has held that Applicants are obliged to exercise only ordinary remedies, there would be no contradiction with this position had the Court, based on the fact that the Applicant filed for extraordinary remedies or "*habeas corpus*" as in the present case, retained the date of these remedies as being the commencement of the time limit within which it shall be seized with the matter, instead of determining the reasonable period relying on these remedies as facts.

7. The Court should have justified this option in the following manner: "Notwithstanding the fact that it has considered that local remedies have been exhausted as evidenced by the Court of Appeal Judgment of

1 Para 69 of the Judgment.

04/06/2012, the Court, in the spirit of fairness and justice, would take as element of assessment, the date on which the *habeas corpus* application was filed, that is 2015", which would have given a more reasonable time as it is shorter.

8. By ignoring the aforesaid date and simply citing additional elements such as the Applicant's detention to justify reasonable time[2], the Court failed to correctly apply Rule 40(6) of the Rules.

2 Para 67 of the Judgment.