Karatta & Ors v Tanzania (judgment) (2021) 5 AfCLR 465

Application 002/2017, *Ernest Karatta, Walafried Millinga, Ahmed Kabunga and 1744 Others v United Republic of Tanzania*

Judgment, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicants, nationals of the Respondent State, were all formerly employed in various institutions and organs of the defunct East African Community. The Applicants unsuccessfully litigated, before the domestic courts, for payment of alleged balances of their terminal benefits by the Respondent State. They brought this Application claiming that the dismissal of their domestic claim was a violation of their human rights. The Court held that the Respondent State had not violated any rights of the Applicants.

Jurisdiction (material jurisdiction, 30-35; temporal jurisdiction, 38-40)

Admissibility (exhaustion of local remedies, 54-60; submission within a reasonable time, 63-66)

Non-discrimination (imperative for enjoyment of other rights, 78; distinction without justification, 79; link to equality and equal protection before the law, 80; burden of proof, 81)

Equal protection of law (differentiated treatment, 86; burden of proof, 87)

Property (elements of right, 93-94)

Work (remuneration as critical component, 102)

I. The Parties

1. Ernest Karatta, Walafried Millinga, Ahmed Kabunga and 1744 others (hereinafter referred to as "the Applicants) are all Tanzanian nationals and former employees of institutions of the East African Community (hereinafter referred to as "the EAC") that was dissolved in 1977. They bring this Application alleging various violations of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ESCR") due to Tanzania's failure to pay their service terminal benefits following the dissolution of the EAC.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became

a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It further 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 this withdrawal has no effect on pending cases as well as all new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one (1) year after its deposit. [1]

II. Subject of the Application

A. Facts of the matter

3. The Applicants state that they were all employed by the EAC in the following institutions: the General Fund Services, the East African Cargo Handling Services Limited, the East African Harbours Corporation, the East African Posts and Telecommunications Corporation, the East African Railways Corporations and the East African Airways Corporation. They further state that they are entitled to their service terminal benefits "to be determined in accordance with the laws of the defunct EAC and as per said Staff's respective EAC employment records …"

4. The Applicants further state that on 9 May 2003 they commenced action before the High Court, Dar es Salaam (Civil Cause No. 95 of 2003) against the Respondent State claiming their terminal benefits. Although this action was initially contested by the Respondent State, in 2005, the Parties reached an out-of-court settlement which culminated in the Applicants' withdrawal of the suit before the High Court**.** In terms of the out-of-court settlement, the Respondent State agreed to pay the Applicants, and other former EAC employees who were not part of Civil Cause No. 95 of 2003, their terminal benefits totalling One Hundred and Seventeen Billion Tanzania Shillings (TZS 117 000 000 000).

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) § 38.

5. The Parties' agreement to settle Civil Cause No. 95 of 2003 (the Deed of Settlement)[2] was executed on 20 September 2005 and presented for filing with the High Court on 21 September 2005. The Deed of Settlement (hereinafter referred to as "the Deed") formed the basis of a consent judgment that was drawn up and entered for the Applicants. The consent judgment was endorsed by the High Court sitting at Dar es Salaam on the same 21 September 2005. The consent judgment, in turn, became the basis of a Decree (hereinafter referred to as "the decree") entered in favour of the Applicants. The Decree is also dated 21 September 2005.

6. It is apparent from the Parties' pleadings that subsequent to the filing of the consent judgment, the Respondent State commenced paying the Applicants their dues.

7. In 2010, however, some of the beneficiaries of the Deed alleged that there was a discrepancy between the amounts being paid by the Respondent State and what was ordered in the consent judgment. As a result of the foregoing, on 15 October 2010, the Applicants applied to the High Court for a certificate of order to issue against the Respondent State in respect of the payment of the balance of their entitlements. On 9 November 2010, the High Court, sitting at Dar es Salaam, dismissed the Application.

8. On 15 December 2010, the Respondent State's Court of Appeal, exercising its powers of revision, in Civil Revision Case 10 of 2020, quashed the decision of the High Court of 9 November 2010 and directed that the Applicants' case be re-heard before a different judge.

9. Following from the Court of Appeal's determination, the Applicants' claim for a certificate of order against the Respondent State was re-heard by the High Court but it was dismissed on 23 May 2011.

10. Aggrieved with the High Court's finding, the Applicants sought and were granted leave to appeal to the Court of Appeal. In a ruling dated 25 January 2016, the Court of Appeal dismissed the Applicants' appeal (Civil Appeal No. 73 of 2014) for lack **of** merit.

B. Alleged violations

11. The Applicants contend that the Respondent State has violated the following Charter rights:

i. the right to be entitled to the enjoyment of all Charter rights without discrimination (Article 2);

2 A deed of settlement is a legal document that formalizes an agreement between parties to resolve a dispute. It outlines the responsibilities and tasks that each party must take in order to settle the dispute.

ii. the right to equal protection of the law (Article 3(2));

iii. the right to property (Article 14);

iv. the right to work under equitable and satisfactory conditions (Article 15).

12. The Applicants further contend that the Respondent State has also violated Articles 6 and 7 of the International Covenant for Economic Social and Cultural Rights (hereinafter referred to as "the ICESCR")[3] in relation to their right to work and right to just and favourable conditions of work respectively.

III. Summary of the Procedure before the Court

13. The Application was filed on 26 January 2017. Since several attachments purported to be part of the Application were missing, the Applicants were, on several occasions, reminded to file the missing documents.

14. On 15 June 2017, the Applicants filed the last of the missing annexures whereupon the Application was served on the Respondent State on 28 June 2017.

15. On 30 August 2017, the Respondent State filed its Response and this was transmitted to the Applicants on 17 September 2017. The Applicants filed their Reply to the Response on 9 October 2017.

16. Pleadings were closed on 31 January 2018 but, pursuant to the Court's decision during its 49th Session, to combine the consideration of the merits and reparations, pleadings were reopened on 29 June 2018 to allow both Parties to file their submissions on reparations.

17. The Parties filed the remainder of their pleadings within the time frames stipulated by the Court and pleadings were closed again on 10 August 2021.

IV. Prayers of the Parties

18. On the merits, the Applicants pray the Court to:

i. Declare that the Respondent is in violation of Article 2 of the African Charter on Human and Peoples' Rights.

ii. Declare that the Respondent is in violation of Article 3(2) of the African Charter on Human and Peoples' Rights

iii. Declare that the Respondent is in violation of Article 14 of the African Charter on Human and Peoples' Rights.

3 The Respondent State acceded to the ICESCR on 11 June 1976.

iv. Declare that the Respondent is in violation of Article 15 of the African Charter on Human and Peoples' Rights.

v. Declare that the Respondent is in violation of Article 6 and 7 of the International Covenant on Economic Social and Cultural Rights.

vi. Make an Order the Government of the United Republic of Tanzania to put in place the necessary constitutional, legislative and other measures to guarantee the right to guaranteed under Article 2, 3(2), 14 and 15 of the African Charter.

vii. Order that the Respondent should respect and fulfil the rights claimed by the Applicants herein.

viii. Order that the Respondent should pay the claimed sums by the Applicants herein.

ix. Order for reparations to the Applicants in respect of trauma, anguish, suffering and unprecedented delay by the Respondent.

x. Order that the Respondent must report to the Executive Council the implementation of this judgment.

xi. Any other such relief(s) and or measures as the Court may deem fit and just to grant.

19. On reparations, the Applicants pray the Court to grant the following:

i. Restoration of the Applicants rightful monies a sum of TSH 564 743 132 202.83. Ought to be payable to the Applicant as direct victims of the prejudice suffered.

ii. The amount of USD 20 000 for each of the 1747 victims for moral damages suffered to them severally.

iii. The amount of USD 6 000 on top of every victim's payments as token compensation for moral damages suffered at least four of their indirect victims. Each USD 1500.

iv. Honourable Court grants the Applicants USD 4000 for legal fees during the national proceedings where he was presented by their Advocates in the High Court and Court of Appeal proceedings.

v. The amount of USD 20 000 in legal fees at the Court.

vi. The amount of USD 15 200 for expenses incurred.

vii. Without prejudice to prayers (i) to (vii) – a written apology by the Respondent to each of the Applicants.

viii. Any other such relief that this Court will deem just and fair to grant to the Applicants

20. The Applicants further pray:

b. … that this Honourable Court applies the principle of proportionality when considering the award for compensation to be granted …

c. …that this Honourable Court makes an order that the Respondent guarantees non-repetition of these violations to them and that the Respondent is required to report back to this Honourable Court every six months until they satisfy the orders this Court shall make

when considering the submission for reparations.

d. … the Government publishes in the national Gazette the decision on the merit of the main Application within one month of delivery of judgment as a measure of satisfaction.

21. On jurisdiction and admissibility, the Respondent State prays the Court to order:

i. That the Application has not invoked the jurisdiction of the Honourable Court under Article 3(1) and Rule 26 of the Rules of the Court.

ii. That the Application has not met the admissibility requirements stipulated under Rules 26, 40(5) and 40(6) of the Rules of Court, Article 56(5) and 56(6) of the African Charter on Human and Peoples' Rights and Article 6(2) of the Protocol.

iii. That the Application be dismissed in accordance to Rule 38 of the Rules of Court.

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

22. With respect to the merits of the Application, the Respondent State prays that:

i. The Court order and declares that the Respondent State has not violated Article 2 of the African Charter on Human and Peoples' Rights.

ii. The Court declares that the Respondent State has not violated Article 3(2) of the African Charter on Human and Peoples' Rights.

iii. The Court declares that the Respondent State has not violated Article 14 of the African Charter on Human and Peoples' Rights.

iv. The Court declares that the Respondent State has not violated Article 15 of the African Charter on Human and Peoples' Rights.

v. The Court declares that the Respondent State has not violated Article 6 of the International Covenant on Economic, Social and Cultural Rights.

vi. The Court declares that the Respondent State has not violated Article 7 of the International Covenant on Economic, Social and Cultural Rights.

vii. The Court order and declare the Respondent State has constitutional provisions, laws and other measures that guarantee the rights under Articles 2, 3(2), 14 and 15 of the African Charter.

viii. The Court declares that the Applicants' claims are baseless and untenable.

ix. The Court order that the Applicants are not entitled to any claims of money as they were paid all their benefits. It is not even clear how much money they are claiming from the Court.

x. The Court order that the Applicants are not entitled to any reparations in respect of the alleged trauma, anguish, suffering and unprecedented delay. They are the cause of the alleged delay by filing endless.

xi. The Court orders that there is no need for the Respondent State to report to the Executive Council the implementation of this judgment.

xii. Any such relief(s) and or such measures as the Court may deem fit and just to grant.

23. In its submissions on reparations, the Respondent State prays for the following:

i. A Declaration that the Respondent State has not violated the cited provisions of the African Charter and ICESCR.

ii. The Applicant's claims for reparations be dismissed in its entirety.

iii. That, the Respondent pray for any other relief(s) this Court may deem fit to grant.

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 instrument 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 pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules." [4]

26. On the basis of the above-cited provisions, the Court must preliminarily ascertain its jurisdiction and dispose of objections to its jurisdiction, if there are any.

A. Objections to the jurisdiction of the Court

27. The Respondent State raises two objections in respect of the Court's jurisdiction. Firstly, it argues that the Court does not have material jurisdiction and, second, that the Court lacks temporal jurisdiction.

4 Formerly, Rule 39(1), Rules of Court, 2 June 2010.

i. Objection alleging that the Court lacks material jurisdiction

28. First, relying on the Court's own jurisprudence,[5] the Respondent State contends that the Applicants have not properly invoked the Court's jurisdiction but "they basically want to revise the order of the Court of Appeal of Tanzania in Civil Appeal No. 73 of 2014." Second, the Respondent State asserts that the Court does not have "jurisdiction to interpret the East African Mediation Agreement Act of 1984 and the Deed of Settlement." In relation to the latter argument, the Respondent State argues that "the East African Mediation Agreement Act of 1984 is not among the instruments envisaged under Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules of the Court."

29. In their Reply, the Applicants argue that the Court's material jurisdiction is established since the Respondent State is a party to the Charter, the Protocol and also that it made the Declaration under Article 34(6) of the Protocol.

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30. 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.[6]

31. With regard to the Respondent's State's objection that the Applicants have invited it to sit as an appellate court, the Court recalls, in accordance with its established jurisprudence, that it is not an appellate body with respect to decisions of national courts.[7] However, and as the Court has emphasised "… this does not

5 *Urban Mkandawire v Malawi* (admissibility) (21 June 2013) 1 AfCLR 283 and *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190.

6 See, for example, *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18, *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

7 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) § 14.

preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[8]

32. In the present case, the Court notes that the Applicants have alleged violations of Articles 2, 3(2), 14 and 15 of the Charter as well as Articles 6 and 7 of the ICESCR, whose interpretation and application falls within the Court's jurisdiction.

33. Given the above, and in light of Articles 3 and 7 of the Protocol, by examining whether or not the Respondent State's conduct is in consonance with the provisions of the earlier mentioned instruments, the Court will be acting within its powers and neither will it be sitting as an appellate court nor will it be exercising power to revise the decision of the Court of Appeal. Consequently, the Court dismisses the objection alleging that it would be sitting to revise the decision of the Respondent State's Court of Appeal in hearing this Application.

34. With respect to the Respondent State's objection that the Court does not have jurisdiction to interpret the East African Community Mediation Agreement Act of 1984 and the Deed of Settlement, the Court recalls that, in the present case, the Applicants have alleged a violation of, among others, Articles 14 and 15 of the Charter as well as Articles 6 and 7 of the ICESCR. It is thus within the Court's remit, in the circumstances, to determine whether or not the allegations raised by the Applicants amount to a violation of the Charter or the ICESCR. In ascertaining whether or not there has been a violation of the Applicants' rights, therefore, the instruments of reference will be the Charter and the ICESCR and not the East African Community Mediation Agreement of 1984.

35. Given the preceding, the Court dismisses the Respondent State's objection alleging that it does not have jurisdiction to interpret the East African Community Mediation Agreement Act of 1984 and the Deed of Settlement. The Court thus holds that it has material jurisdiction in this case.

8 *, Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations) *§ 26; Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 247 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287 § 35.

ii. Objection alleging that the Court lacks temporal jurisdiction

36. The Respondent State contends that the "Court has no jurisdiction to hear and determine this matter since the cause of action arose even before the establishment of this Court and that the alleged violations occurred before the Respondent State accepted the jurisdiction of the African Court on Human and Peoples Rights." The Respondent State submits, therefore, that "if the Court is seized with an individual application against the Respondent State which alleges the violation of a right founded on facts which occurred before 9th March 2010, the Court does not in principle have jurisdiction to deal with such an allegation."

37. In their Reply the Applicants contend that Court's jurisdiction is confirmed due to the fact that the Respondent State has violated Articles 14 and 15 of the Charter and that these violations "continue to date."

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38. The Court recalls that it has previously held that its temporal jurisdiction is established if, at the time the alleged violation occurred, the Respondent State was a party to the Charter. [9] Further, the Court has confirmed that its temporal jurisdiction is confirmed, for all State's parties to the Protocol, if at the time the Protocol entered into force, the alleged violations were continuing. [10]

39. In the present case, the litigation between the Parties as a result of the unpaid terminal benefits was, initially, concluded by a consent judgment entered on 21 September 2005. It was only when the Applicants thought they were being underpaid that further proceedings were commenced before the High Court on 15 October 2010. The immediate precursor to this Application, therefore, are the proceedings brought by the Applicants seeking to have fresh computations included in a new deed. These proceedings were concluded when the Court of Appeal dismissed

9 *TLS and others v Tanzania* (merits) (14 June 2013) 1 AfCLR 34

10 .*Ibid §* 84.

the Applicants' appeal on 25 January 2016. The Applicants' case before this Court is that their rights were violated through the judgments of both the High Court and the Court of Appeal.

40. As against the preceding background, the Court notes that as of 15 October 2010, when the litigation which is alleged to have violated the Applicants' rights commenced, the Respondent State was a party to both the Charter and the Protocol and it had also already deposited the Declaration and was thus in a position to be sued before the Court. Additionally, given the continuing nature of the alleged violations,[11] the Court finds that its jurisdiction is established and it thus dismisses the Respondent State's objection to its temporal jurisdiction.

B. Other aspects of jurisdiction

41. The Court observes that none of the Parties has raised any objection in respect of its personal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled.

42. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that the Respondent State, on 21 November 2019, deposited with 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 it has held that the withdrawal of a Declaration 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, or new cases filed before the withdrawal takes effect.[12] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[13] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by the said withdrawal.

11 *Jebra Kambole v Tanzania*, ACtHPR, Application No. 018/2018, Judgment of 15 July 2020 (merits and reparations) *§* 24.

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

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

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

44. 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 territorial jurisdiction is established.

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

VI. Admissibility

46. 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".

47. In line with Rule 50(1) of the Rules,[14] "the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

48. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all of the following conditions:
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> a. Indicate their authors even if the latter request anonymity;
>
> b. Are compatible with the Constitutive Act of the African Union and with the Charter;
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> c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
>
> d. Are not based exclusively on news disseminated through the mass media;
>
> e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
>
> f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and
>
> g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the Charter.

14 Formerly Rule 40 Rules of Court, 2 June 2010.

A. Objections to the admissibility of the Application

49. While some of the above-mentioned 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 relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of domestic remedies

50. The Respondent State avers that the Applicants have not exhausted domestic remedies in respect of all the claims that they are raising before the Court. According to the Respondent State, "the said allegations [as raised by the Applicants before the Court] have never been raised before the Courts in the United Republic of Tanzania, which is contrary to Rule 40(5) of the Rules of Court …"[15] In support of its averments, the Respondent State cites the decision of the African Commission on Human and Peoples' Rights (hereinafter "the Commission") in *Majuru v Zimbabwe*.

51. The Respondent State also contends that, in respect of the claims by the Applicants, "…the remedies within the United Republic of Tanzania are available, adequate, satisfactory and effective, hence the Applicants should have exhausted first." It is also the Respondent State's further contention that the Applicants could have challenged the alleged violation of their rights under section 4 of the Basic Rights and Duties Enforcement Act by instituting an action for redress before the High Court. The Respondent State thus submits that the Application should be declared inadmissible for failure to exhaust domestic remedies.

52. The Applicants, for their part, submit that they "have exhausted all domestic remedies in regard to the violations complained of in particular and that the violation is continuing." According to the Applicants, when the Court of Appeal delivered its judgment on 29 January 2016 it dealt them " …the final blow, in a judgment which further denies the victims appeal relative to their right to work and right to own property." They further submit that their rights under Articles 14 and 15 of the Charter "…having been violated, having been taken away by the Court of Appeal of Tanzania, the highest

15 Currently Rule 50(2)(e) Rules of Court, 2020.

court in Tanzania [they] has no remedy to fall back to …".

53. In relation to the availability and sufficiency of domestic remedies, the Applicants submit that the remedies alluded to by the Respondent State under its Constitution as well as the Basic Rights and Duties Enforcement Act "…cannot be availed without delay, difficulties and have proved to be ineffective where the Applicants since 1977 have not been paid their terminal benefits and a good number of them even died before getting their entitlement." The Applicants thus submit that the Application is admissible.

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54. The Court recalls that pursuant to Article 56(5) of the Charter, whose requirements are mirrored in Rule 50(2) (e) 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.[16]

55. The Court observes that one of the main contentions by the Respondent State is that the Applicants have raised allegations before it which were never raised in the domestic proceedings. Specifically, these are allegations relating to the violation of the Applicants' rights to non-discrimination, equal protection of the law, to property and to work under equitable and satisfactory conditions including equal pay for equal work. In respect of the Applicants' claims before this Court, it is to be noted that the bone of contention between the Parties is a labour dispute which coalesces around the alleged failure by the Respondent State to pay the Applicants their terminal dues.

56. While the Applicants did not plead their case before the domestic courts in the same manner that they have done before the Court, it is clear that the alleged violation of their rights was occasioned during the domestic proceedings. A claim for underpayment of terminal benefits directly implicates various rights and guarantees under the bundle of labour rights. By way of illustration, the right

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

to dignified working conditions, to choose work, to adequate remuneration, to equal pay for work of equal value and to equal treatment, all fall within the bundle of labour rights.

57. The Court reiterates, therefore, that where an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby afforded an opportunity to pronounce themselves on possible human rights breaches. This is because the alleged human rights violations form part of the bundle of rights and guarantees that were related to or were the basis of the proceedings before domestic courts. In such a situation it would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for such claims.[17] The Court thus accepts that the Applicants should be deemed to have exhausted local remedies with respect to the allegations covered by the bundle of rights and guarantees.

58. In respect of the contention that the Applicants should have commenced action under the Basic Rights and Duties Enforcement Act to vindicate their rights before domestic courts, the Court recalls that for purposes of exhausting local remedies, an Applicant is only required to exhaust judicial remedies that are available, effective and sufficient. Notably, however, the Court has always considered that there is an exception to this rule if local remedies are unavailable, ineffective or insufficient, or if the procedure for obtaining such remedies is abnormally prolonged.[18] The Court also notes that an applicant is only required to exhaust ordinary judicial remedies.[19]

59. In the present case, the Court, in line with its jurisprudence, holds that given the special nature of the constitutional petition procedure, under the Basic Rights and Duties Enforcement Act, in the Respondent State, the Applicants were not bound to exhaust

17 *Jibu Amir alias Mussa and another v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 § 37; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465 §§ 60-65, *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 54.

18 *The Beneficiaries of Late Norbert Zongo and others v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197 § 84; *Alex Thomas v United Republic of Tanzania* (merits) § 64 and *Wilfred Onyango Nganyi and Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507 § 95.

19 *Oscar Josiah v United Republic of Tanzania*, ACtHPR, Application No. 053/2016, Judgment of 28 March 2019 (merits) § 38 and *Diocles William v United Republic of Tanzania*, AfCHPR, Application No. 016/2016. Judgment of 21 September 2018 (merits and reparations) § 42.

this procedure as it is an "extra-ordinary remedy".[20]

60. 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

61. According to the Respondent State "… the decision of the Court of Appeal in Civil Appeal No. 73 of 2014 was delivered on the 25th January 2016 but the Applicants lodged this Application …on 26th of January 2017 which is twelve months after the decision of the Court of Appeal." Relying on the decision of the Commission in *Majuru v Zimbabwe*, the Respondent State submits that the Application should have been filed within six (6) months and since no reasons have been given for a failure to file within the earlier mentioned time period, the Application should be dismissed.

62. The Applicants submit that the Application was filed within a reasonable period of time and that it is admissible. They point out that the Respondent State has not been "… willing to pay the Applicants their monies, since 1977 [and] has been very reluctant and unwilling to respect the rights of the Applicants. Even in obtaining copies of judgments the Respondents Courts delayed substantially …".

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63. The Court confirms that Article 56(6) of the Charter does not stipulate a precise time limit within which an Application shall be filed before the Court. Rule 50 (2) (f) of the Rules simply refers to 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 of the matter."

64. Further, and as the Court has established, the reasonableness of the period for seizure of the Court depends on the particular circumstances of each case and must be determined on a

20 See Application No. 025/2016. Judgment of 26 May 2019 (merits and reparations*) Kenedy Ivan v United Republic of Tanzania;* and *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599 §§ 66-70;

case-by-case basis. [21]

65. In the present case, the Court of Appeal dismissed the Applicants' appeal on 29 January 2016 and the present Application was filed on 26 January 2017. A total of eleven (11) months and twenty-eight (28) days, therefore, lapsed before the Application was instituted before the Court. The Court notes that the litigation between the Parties, in the domestic courts, was lengthy and involved several determinations both by the High Court and the Court of Appeal. The Court also takes notice of the Applicants' submission that "obtaining copies of judgments [from] the Respondent's courts delayed substantially …" and this was not contested by the Respondent State. Given all the preceding facts, the Court finds that, in the present case, the period of eleven (11) months and twenty-eight (28) days, before the Application was filed, is reasonable within the meaning of Article 56(6) of the Charter.

66. In light of the above, the Court, therefore, dismisses the Respondent State's objection to the admissibility of the Application based on failure to file within a reasonable time.

B. Other conditions of admissibility

67. 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 50 (2)(a),(b), (c), (d), and (g) of the Rules, is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

68. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) of the Rules is fulfilled since the Applicants have clearly indicated their identities.

69. The Court notes that the claims made by the Applicants seek to protect their rights as guaranteed under the Charter. It further notes that one of the objectives of the African Union, as stated in Article 3(h) of its Constitutive Act, is the promotion and protection of human and peoples' rights. The Court, therefore, considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

70. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent

21 *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) (22 March 2018) 2 AfCLR 248 § 57.

State, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.

71. Regarding the condition contained in Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

72. Finally, with respect to the requirement laid down in Rule 50(2)(g) 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.

73. 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 50 of the Rules, and accordingly finds it admissible.

VII. Merits

74. The Applicants allege a violation of their rights under Articles 2, 3(2), 14 and 15 of the Charter. They have also pleaded a violation of their rights under Articles 6 and 7 of the ICESCR. The Court will now examine each of the alleged violations in turn.

A. Alleged violation of the right to non-discrimination

75. Specifically in relation to the right to non-discrimination, the Applicants argue that the Respondent State has violated their rights under Article 2 of the Charter by "discriminating them from getting their terminal benefits…".

76. The Respondent State submits that the "…Applicants were not and are not being discriminated in any way …and the Applicants have failed to show on what grounds they were discriminated hence their allegations are afterthought and misconceived and baseless." According to the Respondent State, the Applicants have "…not shown how they have been exactly discriminated."

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77. The Court recalls that Article 2 of the Charter provides as follows:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without

distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

78. The Court reiterates its position that Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.[22]

79. At a general level, the Court notes that while the Charter is unequivocal in its proscription of discrimination, not all forms of distinction or differentiation can be considered as discriminatory. A distinction or differential treatment becomes discrimination, contrary to Article 2, when it does not have any objective and reasonable justification and in circumstances where it is not necessary and proportional.[23] The Court recalls that it has accepted that discrimination is "a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria." [24]

80. Further, as the Court has noted, the right not to be discriminated against is related to the right to equality before the law and equal protection of the law as guaranteed under Article 3 of the Charter. [25] However, the scope of the right to non-discrimination extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status. The expression "any other status" in Article 2 encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter. In determining whether a ground falls under this category, the Court takes into account the general spirit of the Charter.

81. In respect of the present case, the Court notes that the Applicants have neither specified the ground(s), among those outlined in Article 2 of the Charter or any other, on the basis of which they

22 *African Commission on Human and Peoples' Rights (ACHPR) v Republic of Kenya* (merits) § 137.

23 *Ibid* § 139. See also, *Tanganyika Law Society and others v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34 § 106.

24 *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668 §§146-147.

25 *African Commission on Human and Peoples' Rights v Kenya* (merits) § 138.

allege to have been discriminated nor have they identified a comparator group, in a similar situation to them, which has been treated more favourably. The Court reiterates that with regard to discrimination, the burden lays with the person who alleges discrimination to establish the basis on which the discrimination can be inferred before the defendant is required to demonstrate whether or not the discriminatory conduct can be justified.[26]

82. In the present case, the Court finds that the Applicants have simply made a general allegation of discrimination which they have failed to substantiate.[27] In the circumstances, the Court dismisses their allegation of a violation of Article 2 of the Charter.

B. Alleged violation of the right to equal protection of the law

83. The Applicant avers that the Respondent State has violated Article 3(2) of the Charter due to a "…failure to give them protection of their entitlements under the law …"

84. The Respondent State argues that the Applicants negotiated and executed the Deed of their own free will. According to the Respondent State "the negotiation which resulted into the deed of settlement was arrived at by both parties. During the negotiations the Applicants were treated on the equal basis as they were fully represented and the dispute was settled amicably and was registered in Court by the Applicants…". It is thus the Respondent State's submission that "the Applicants were and are still being accorded equal protection before the law."

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85. Article 3(2) of the Charter provides that "[e]very individual shall be entitled to equal protection of the law."

86. The Court notes that the principle of equality before the law, which is implicit in the principle of equal protection of the law and equality before the law, does not necessarily require equal treatment in all

26 Cf. *Mohamed Abubakari v Tanzania* (merits) § 153-154.

27 See, *Alex Thomas v Tanzania* (merits) § 140; *George Kemboge v Tanzania* (merits) (11 May 2018) 1 AfCLR 369 § 51 and *Kennedy Owino Onyachi and Charles John Njoka v Tanzania* (merits) § 152.

instances and may allow differentiated treatment of individuals placed in different situations.[28]

87. The Court observes that the only substantiation made by the Applicants of their allegation has been by way of their assertion that the Respondent State has violated their rights under Article 3(2) of the Charter by failing to give protection to their entitlements. Besides this, the Applicants have provided no particulars of precisely how their rights under Article 3(2) have been violated.

88. In the circumstances, the Court finds that the Applicants' have failed to substantiate the alleged violation of Article 3(2) of the Charter.[29] The Court thus dismisses the Applicants' allegations.

C. Alleged violation of the right to property

89. The Applicants' assert that the Respondent State has violated the Charter "… by holding their property …" It is the Applicants' submission that "…the term property includes monetary property which the Applicants are entitled to."

90. The Respondent State contends that the Applicants have never been denied their right to own property since "… in determining the Applicants case the Court of Appeal complied with the laws and Constitution of the United Republic of Tanzania."

91. According to the Respondent State, "… the Applicants allegations are misconceived and out of context as there is no violation of their rights to property whatsoever." The Respondent State also argues that the right to property and the right to just remuneration are two distinct rights. According to the Respondent State, the Applicants' right to property has not been violated since "what the Applicants are claiming is the right to just remuneration and not the right to property. The Applicants were paid all their entitlements." The Respondent State thus puts the Applicants to strict proof with regard to their allegations.

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28 *Norbert Zongo and Others v Burkina Faso* (merits) § 167.

29 Cf. *Minani Evarist v Tanzania* (merits) (21 September 2018) 2 AfCLR 402 § 75.

92. The Court recalls that Article 14 of the Charter provides as follows:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

93. In respect of the right to property, the Court has held that:

> …in its classical conception, the right to property usually refers to three elements namely: the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof (*fructus*), and the right to dispose of the thing, that is, the right to transfer it (*abusus*).[30]

94. The above understanding of the right to property finds concurrence in the decision of the Commission in *Dino Noca v Democratic Republic of Congo* where it was held that:

> The right to property includes not only the right of access to one's property and freedom from violation of the enjoyment of such property or injury to it, but also the free possession and utilization and control of such property, in a manner the owner deems adequate.[31]

95. Although the Applicants have not been detailed in their specification of how their right to property has been violated, the Court notes that the Applicants have argued that their right was violated "when the Court of Appeal of Tanzania, finally issued a judgment which further denied the Applicants their right … to own property." It is the Court's observation, in the circumstances, that the Applicants' grievance is about the litigation before the Respondent State's courts and particularly the final pronouncement by the Court of Appeal in so far as it impacts their right to property, the property being the money they believe is due to them as terminal benefits.

96. In recalling the domestic litigation between the Parties, the Court observes that this litigation involved several determinations by both the High Court and the Court of Appeal. Amidst all the determinations, however, the key event was the Parties' agreement to settle the matter and enter a consent judgment. An inescapable fact of the litigation before the domestic courts, therefore, is that it is the Parties' themselves that drew up the terms on which the litigation was concluded.

97. The Court, having carefully considered all the records of the proceedings before both the High Court and the Court of Appeal, in their entirety, finds no reason(s) for interfering with their findings especially in relation to the alleged violation of the Applicants' right to property. The Applicants' claims for terminal benefits were fairly considered, on their merits, by both the High Court and the Court

30 *African Commission on Human and Peoples' Rights v Kenya* (merits) § 124.

31 Communication 286/2004, ACHPR, *Dino Noca v Democratic Republic of Congo* § 161.

of Appeal and no grounds have been pleaded or proved before this Court necessitating this Court's intervention. The Court thus dismisses the Applicants' claim of a violation of Article 14 of the Charter.

D. Alleged violation of the right to work

98. The Applicants argue that the Respondent State has violated Article 15 of the Charter "... by failure to respect their right to just remuneration objected before the High Court and the Court of Appeal as to the ….existing status of the Applicants benefits/ claims payment exercise." According to the Applicants, they were "lawful employees and are still entitled to all such terminal benefits as claimed which the Respondent has refused to pay hence [constituting] violations under the African Charter." The Applicants also invoke a violation of Articles 6 and 7 of the ICESCR in relation to their right to work as well as their right to just and favourable conditions of work.

99. The Respondent State contends that the Applicants have never been denied their right to just remuneration since "… in determining the Applicants case the Court of Appeal complied with the laws and Constitution of the United Republic of Tanzania." It also submits that the "…right to work which is enshrined under Article 2 of the Constitution of the United Republic of Tanzania is not absolute. The Applicants were employed by the East African Community and not Tanzania." According to the Respondent State, the Applicants have no cause of action in so far as the right to work under equitable and satisfactory conditions is concerned since they were employed by the defunct EAC. The Respondent State also submits that the Applicants have no action against it since they "…withdrew all their claims after entering the Deed of Settlement with the Respondent in September 2005. The Applicants were also paid all their entitlements."

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100. The Court notes that Article 15 of the Charter provides that "every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." The Court further notes that Article 15 of the Charter corresponds to the provisions of Articles 6 and 7 of the ICESCR.

Given the substantive congruence between the provisions of the two instruments earlier referred to, the Court will consider the Applicants' claims under Article 15 of the Charter without conducting a separate analysis of the ICESCR.

101. As the Commission has established in its Principles and Guidelines on the Implementation of Economic, Social and Cultural rights in the African Charter on Human and Peoples' Rights:[32]

> The right to work is essential for the realisation of other economic, social and cultural rights. It forms an inseparable and inherent part of human dignity and is integral to an individual's role within society. Access to equitable and decent work, which respects the fundamental rights of the human person and the rights of workers in terms of conditions, safety and remuneration can also be critical for both survival and human development.

102. In the present case, the Court observes that what is at issue, specifically, is the right to remuneration and that the Applicants' case is that this right has been violated due to the decisions of the Respondent State's courts. In this connection, the Court concedes that the right to remuneration is a critical component of the right to work[33] and that withholding remuneration could amount to a violation of the right.

103. The Court finds that the Respondent State's obligation to pay the Applicants their terminal benefits arose from the arrangements following from the dissolution of the EAC in 1977. While a regional effort involving the then members of the EAC – Kenya, Tanzania and Uganda – was undertaken to facilitate the dissolution of the EAC, culminating in the adoption of the East African Community Mediation Agreement of 1984, the responsibility for the payment of the pension and other benefits was, ultimately, devolved to each of the partner States in respect of its nationals.[34]

104. The Court recalls that the payment of the Applicants' terminal benefits was the focal point of the dispute between the Parties in the domestic courts. As pointed out earlier in this judgment, both the High Court and the Court of Appeal considered the Applicants' claims and dismissed them. As noted by the Court of Appeal,[35]

32 See, https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed 10 August 2021) § 57-58.

33 See, Committee on Economic, Social and Cultural Rights General Comment No. 18- The right to work https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en (accessed 10 August 2021).

34 See, Clause 10.05 of the East African Community Mediation Agreement of 1984.

35 See, pages 15-16 of the judgment of 25 January 2016.

the Applicants commenced proceedings, five (5) years after executing the Deed, seeking a certificate under the Government Proceedings Act claiming a sum other than that which was originally endorsed with their consent. In its reasoning, the Court of Appeal refused to entertain the Applicants' claim because:

> …it makes no sense to issue a certificate to a party who had agreed to be paid a certain amount in settlement of his/her claim and then comes later on to claim for additional payment which did not even form part of the original agreement … coming to court after the payments were made and after a period of five years had elapsed, questioning the deed of settlement, and claiming that the payment was not made in accordance with the Deed of Settlement amounts to asking the Court to reopen negotiations.

105. The Court, recalling the progression of the dispute between the Parties before the domestic courts, and especially paying attention to the findings of both the High Court and the Court of Appeal, finds that the Applicants have failed to substantiate how the Respondent State violated their right to work, generally, and the right to remuneration specifically. In the circumstances, the Court finds no basis for interfering with the findings of the domestic courts and thus dismisses the Applicants' allegations on this point.

VIII. Reparations

106. The Applicants prayed the Court to award them reparations. The specifics of their claims are captured in paragraphs 20 to 21 of this Judgment.

107. The Respondent State prayed the Court to dismiss all the Applicants' claims for reparations.

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108. Article 27(1) of the Protocol provides that:

> If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of the fair compensation or reparation.

109. The Court having found that the Respondent State has not violated any of the Applicants' rights dismisses all the claims for reparations.

IX. Costs

110. None of the Parties made any prayer in respect of costs.

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111. The Court notes that Rule 32 of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs, if any".[36]

112. In the present Application, the Court orders that each Party shall bear its own costs.

X. Operative part

113. For these reasons:

The Court

Unanimously:

On jurisdiction

i. *Dismisses* the objections to its jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections to the admissibility of the Application;
iv. *Declares* that the Application is admissible.

On merits

v. *Finds* that the Respondent State has not violated the Applicants' right to non-discrimination under Article 2 of the Charter;
vi. *Finds* that the Respondent State has not violated the Applicants' right to equal protection of the law under Article 3(2) of the Charter;
vii. *Finds* that the Respondent State has not violated the Applicants' right to property under Article 14 of the Charter;
viii. *Finds* that the Respondent State has not violated the Applicants' right to work under Article 15 of the Charter.

On reparations

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

36 Formerly Rule 30, Rules of Court, 2 June 2010.

On costs

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