

Onyachi & Anor v Tanzania (reparations) (2021) 5 AfCLR 527

Application 003/2015, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania*

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

Judges: TCHIKAYA, KIOKO, BENACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSACOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

In a 2017 judgment, the Court held that the Respondent State had violated some of the human rights of the Applicants who had been arrested in Kenya and extradited to the Respondent State where they were convicted of armed robbery. In this judgment on reparations, the Court granted the Applicants damages for the moral prejudice suffered and inter alia, ordered their release from prison.

Reparations (basis for award, 18; measures of reparation, 20; proof of claim, 75; material prejudice, 21, 30-31; material prejudice of indirect victims, 36-37; legal fees, 39; moral prejudice, 47-50; moral prejudice of indirect victims, 58-60; non-pecuniary reparations, release as an exceptional relief, 63-66)

I. Brief background of the matter

1. In their Application filed before the Court on 7 January 2015, Messrs Kennedy Owino Onyachi and Charles John Mwanini Njoka (hereinafter referred to as “the Applicants”) alleged that their rights to equality and equal protection of the law, liberty and security, freedom against torture and ill-treatment and their right to a fair trial had been violated by the Respondent State. The Applicants asserted that the said violations occurred after they were illegally arrested and extradited from the Republic of Kenya to the Respondent State and were convicted of robbery on the basis of improperly obtained evidence.
2. On 28 September 2017, the Court rendered its judgment whose operative part on the merits at paragraphs v-ix reads as follows:
 - v. *Declares* that the Respondent has not violated Articles 3, 5, and 7(2) of the Charter.
 - vi. *Finds* that the Respondent violated Articles 1, 6 and 7(1) (a), (b) and (c) of the Charter.
 - vii. *Orders* the Respondent State to erase the effects of the violations established through the adoption of measures such as presidential pardon or any other measure resulting in the release of the Applicants as well as any measure leading to erasing of the consequences

of the violations established and to inform the Court, within six (6) months, from the date of this judgment of the measures taken.

- viii. *Grants*, in accordance with Rule 63 of the Rules of Court, the Applicants to file submissions on the request for reparations within thirty (30) days hereof, and the Respondent to reply thereto within thirty (30) days of the receipt of the Applicant's submissions.
 - ix. *Reserves* its ruling on the prayers for other forms of reparation and on costs.
3. It is this judgment that serves as the basis of the present Application for reparations.

II. SUBJECT OF THE APPLICATION

4. On 30 July 2018, the Applicants filed their written submissions for reparations. In their submissions, the Applicants prayed the Court to award them reparations on the basis of its findings in the judgment on merits.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

5. On 3 October 2017, the Registry transmitted a certified true copy of the judgment on the merits, to the Parties.
6. The Applicants, filed their submissions on reparations on 30 July 2018 after being granted two extensions of time. The submissions were transmitted to the Respondent State on 1 August 2018 with a request that it should file its Response within thirty (30) days of receipt.
7. On 27 September 2018, the Respondent State requested further extension of time to file its submissions in Response and it was granted thirty (30) days extension from 1 October 2018.
8. Despite additional extensions of time and reminders sent on 7 January 2019, 19 September 2019 and 25 March 2020, the Respondent State failed to file its Response to the submissions on reparations.
9. Pleadings were closed on 16 November 2020 and the Parties were duly notified. By the same notice, the Parties were also notified that, pursuant to Rule 63 of the Rules, in the absence of a Response from the Respondent State to be filed within forty five (45) days from the date of receipt, the Court would enter a judgment in default.
10. On 12 May 2021, the Respondent State filed its Response to the Applicant's submissions on reparations, together with a request

for leave to file its Response out of time.

11. On 20 July 2021, the Court, in the interest of justice, issued an order for reopening of pleadings and accepted the Respondent State's Response as properly filed. On the same date, the Order re-opening pleadings and the Respondent State's Response were transmitted to the Applicants, requesting them, to file their Reply within thirty (30) days of receipt of the notice.
12. On 20 August 2021, the Registry sent a reminder to the Applicants to file their Reply to the Respondent State's submissions on reparations within fifteen (15) days of receipt.
13. On 23 August 2021, the Respondent State requested the Court to proceed with the determination of the matter, should the Applicants fail to comply with the Court's order to file their Reply within the prescribed time.
14. Pleadings were closed on 6 September 2021 and parties were duly notified.

IV. Prayers of the Parties

15. The Applicants pray the Court to grant the following reparations:
 - i. Restoration of the Applicants' liberty;
 - ii. The amount of twenty thousand dollars (USD 20,000) each to the Applicants as a direct victim for the moral prejudice suffered;
 - iii. The amount of five thousand dollars (USD 5,000) each to Charles John Mwaniki Njoka's indirect victims;
 - iv. The amount of five thousand dollars (USD 5,000) each to Kennedy Owino's indirect victims;
 - v. The amount of ten thousand dollars (USD 10,000) to each group of the Applicants' indirect victims for the material prejudice suffered;
 - vi. The amount of twenty thousand dollars (USD 20,000) in legal fees;
 - vii. The amount of one thousand six hundred dollars (USD 1,600) for expenses incurred.
16. On its part the Respondent State prays that:
 - i. The judgment of the Court dated 28th September, 2018 is sufficient reparation to the prayers found in the Applicants' submission for reparations;
 - ii. The Applicants' claim for reparations be dismissed in its entirety with costs;
 - iii. Any other relief(s) this Court may deem fit to grant

V. Reparations

17. Article 27(1) of the Protocol provides that: "If the Court finds that

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

18. The Court recalls its earlier judgments and restates its position that, “to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim”.¹
19. The Court also reaffirms that reparation “... must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed.”²
20. Measures that a State must take to remedy a violation of human rights includes notably, restitution, compensation and rehabilitation of the victim, satisfaction and measures to ensure non-repetition of the violations taking into account the circumstances of each case.³
21. The Court reiterates that with regard to material prejudice, the general rule is that there must be a causal link between the established violation and the prejudice suffered and the burden of proof is on the Applicant who has to provide evidence to justify their prayers.⁴ Exceptions to this rule include moral prejudice, which need not be proven, since presumptions are made in favour of the Applicant and the burden of proof shifts to the Respondent State.
22. In the instant case, in its Judgment on the merits, the Court established that the Respondent State violated the Applicants' right to liberty and security and their right to a fair trial contrary to Articles 6 and 7(1)(a), (b) and (c) of the Charter. As a consequence

1 *Mohamed Abubakari v United Republic of Tanzania*, ACtHPR, Application No. 007/2013, Judgment of 4 July 2019 (reparations), § 19; *Alex Thomas v United Republic of Tanzania*, AfCHPR, Application No. 005/2013, Judgment of 4 July 2019 (reparations), § 11; *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and reparations), §§ 119; *Ingabire Victoire Umuhuza v Rwanda*(reparations) (2018) 2 AfCLR 202, § 19.

2 *Mohamed Abubakari v Tanzania* (reparations), § 20; *Alex Thomas v Tanzania* (reparations), § 12; *Umuhuza v Rwanda* (reparations), § 20; *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 118.

3 *Mohamed Abubakari v Tanzania* (reparations), § 21; *Alex Thomas v Tanzania* (reparations), § 13; *Ingabire Victoire Umuhuza v Rwanda* (reparations), § 20.

4 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v Burkina Faso*, (reparations) (2016) 1 AfCLR 346, § 15, *Mohamed Abubakari v Tanzania* (reparations), § 22, *Alex Thomas v Tanzania* (reparations), § 14.

of these violations, the Court also found violation of Article 1 of the same.

23. Relying on the above finding of the Court, the Applicants pray the Court to award them damages in the form of pecuniary and non-pecuniary reparations.

A. Pecuniary Reparations

i. Material Prejudice

a. Material prejudice suffered by the Applicants

24. The Applicants allege that the grant of monetary compensation, based on the principle of equity for the injury suffered would give them the feeling of fair reparation. Citing the jurisprudence of the Inter-American Court of Human Rights in *Sawhoyamaxa Indigenous Community v Paraguay* and that of the European Court of Human Rights in the case of *Young, James & Webster v United Kingdom*, the Applicants assert that pecuniary prejudice includes loss of income suffered by the victims and the expenses incurred such as the loss of earnings and potential for loss of earnings, for example, pension rights, and replacement of objects lost or damaged.⁵ The Applicants also aver that a disruption of one's life plan has been ruled to entitle one to reparations.
25. In this regard, the Applicants submit that, they lost their business because of their imprisonment. They claim that before their arrest, they had companies. They contend that the first Applicant's company was named Mwangaza Electrical Work Co. Ltd and the second Applicant owned Tech Dome Ltd with a Certificate of Incorporation No. 102037. According to the Applicants, their life plans were severely disrupted such that they were not able to realise their plan of growing their companies and had no opportunity to make arrangements to organise business while they were away. Moreover, the Second Applicant, Mr. Njoka contends that he had a plan of providing high-quality education to his children but he could not do so as some of his properties were sold to pay off his debts as a result of his imprisonment.

5 *Sawhoyamaxa Indigenous Community v Paraguay*. Merits, reparations and costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006), § 216, *Young, James & Webster v United Kingdom*, 44 Eur.Ct.H.R. (ser. A) (1981), § §10-11.

26. On its part, the Respondent State concedes that the Court may award reparations to individuals when a State is found to be in violation of human rights and the said violations have caused harm. The Respondent State further asserts that the award of reparations is governed by certain rules of international law, including the principles of burden of proof, standard of proof and the requirement of a causal link between violations of human rights and a State's wrongful conduct.
27. The Respondent State further submits that the burden of proof generally lies with the person seeking remedies. With respect to standard of proof, the Respondent State argues that a victim must show that it is "more probable than not" that he/she is entitled to the reparations requested and in principle and practice, all aspects of the claim, that is , the victim's identity, the harm suffered and causation are subject to this standard of proof. Furthermore, the Respondent State avers that reparations shall accrue only where there is a causal link between the established wrongful act and the alleged prejudice.
28. Relying on the foregoing principles, the Respondent State contends that in the instant Application, the Applicants have failed to prove that they are entitled to reparations in accordance with the standard of proof required of them. It also argues that the Applicants failed to show a causal link between the established violations of the right to legal representation or their right to liberty and the extent of the harm suffered whether directly or indirectly as a result of such violations.
29. The Respondent State adds that in order to assist the Court to assess material loss, an applicant is required to support such claims with evidence relevant to the actual loss suffered as a result of the violation complained of. In the instant Application, the Respondent State asserts that the Applicants failed to provide any evidence supporting their monetary claims; as such, the application for reparation lacks merit. Furthermore, the Respondent State submits that the life plan of the Applicants was disrupted by their own action; that is, if they had not committed any crime, they would not have been detained and sentenced to serve a thirty (30) year sentence in prison.

30. The Court recalls that in order for a claim for material prejudice to be granted, an applicant must show a causal link between the established violation and the loss suffered, and further prove the loss suffered.⁶ In the instant case, the Court notes that the Applicants have not established the link between the violations established and the material loss which they claim to have suffered. Furthermore, though they filed affidavits, they did not provide documentary evidence such as business licences, registration with Revenue Authorities, etc. proving the existence of businesses that they alleged to have had before their arrest and conviction.⁷
31. The Court, therefore, dismisses the Applicants' prayers for pecuniary damages for the material prejudice that they allege to have suffered as a result of their conviction and imprisonment.

b. Material prejudice suffered by indirect victims

32. The Applicants allege that their family and close relatives, the indirect victims, suffered financial loss due to their incarceration. The Applicants elaborate that their family and close relatives' day-to day lives were disrupted when they had to make various trips from Kenya to Dar es Salaam to visit them in prison, attend court hearings, cater for the Applicants' meals, medication, legal assistance and other subsidiary expenses.
33. On this basis, the Applicants pray the Court to grant an amount of United States Dollars Five Thousand (USD 5000) to each group of the Applicants' indirect victims for such material loss.
34. The Applicants list names of family members and close family members who are the alleged indirect victims, as follows:
 - i. For Mr Kennedy Owino Onyachi - Mary Onyachi, Iscar Onyachi, Hassan Onyachi, George Onyachi, Susan Onyachi Lilian Onyachi, Winnie Onyachi, Jury Onyachi, Oscar Onyachi, Gerald Onyachi, Judy Onyachi and Mercy Onyachi.

6 See *Armand Guehi v Tanzania* (merits and reparations), § 181; *Norbert Zongo and Others v Burkina Faso* (reparations), § 62.

7 *Christopher Jonas v United Republic of Tanzania*, Application No. 011/2015. Judgment of 25 September 2020 (reparations), § 20, *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 18.

- ii. For Charles John Mwanini Njoka: Teresiah Wangari Ndengwa (wife), Stephanie Njoki Mwaniki (child), Brian Kiarie Mwaniki (child), Mary Njoki Mukirae (mother), Mosses Mukirae Njoki, Elizabeth Nyakibia, and George Thairu Njoki (siblings), Francis Ndegwa Gituturi (father), Lussiah Warigia Ndegwa (mother in law), David Muroki Ndegwa (deceased), Hannah Heta Ndegwa, Benedict Wanijiku Ndegwa (brother in law), Jane Nyambura Njuguna (cousin).
- 35.** The Respondent State argues that, for indirect victims, the Applicants have failed to submit marriage certificates, birth certificates or any other document showing the level of dependency or previous record of dependency of the alleged indirect victims on the Applicants.

- 36.** The Court notes that in order to claim reparations for material prejudice, indirect victims have to submit evidence of filiation with an applicant and proof of the alleged prejudice. In the instant Application, the Applicants neither filed evidence of filiation with the aforementioned indirect victims nor adduced any other proof such as medical bills or receipts of payments for transportation, food and legal assistance, to substantiate the claims that the indirect victims indeed sustained material prejudice.⁸ The Applicants also did not demonstrate the existence of a causal link between the established human rights violations and the material prejudice allegedly suffered by the indirect victims.
- 37.** The Court therefore dismisses the Applicants' prayers for pecuniary reparations for the material loss allegedly suffered by their indirect victims.

c. Legal fees for proceedings before national courts

- 38.** The Applicants, relying on the Court's decision in the *Zongo* case,⁹ pray the Court to grant them United States Dollars Five thousand (USD 5000) each for legal fees incurred to hire a lawyer to defend themselves in national proceedings where they were

⁸ *Christopher Jonas v United Republic of Tanzania* (reparations), § 27, *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135.

⁹ *Norbert Zongo and Others v Burkina Faso* (reparations), § 79.

represented by Moses Maira & Co. Advocates of P. O. Box 2826, Dar es Salaam.

39. The Court recalls that reparations may include the reimbursement of legal fees and other costs incurred during domestic proceedings.¹⁰ It is however, incumbent upon an applicant to provide proof for the amounts claimed.¹¹
40. In the instant Application, the Court recalls its finding in the Judgment on merits that the Applicants were represented by lawyers both at the Resident Magistrate's Court and the High Court.¹² The violation of the right to legal assistance was established only in relation to the Applicants' lack of representation at the Court of Appeal.¹³ However, the Applicants have not adduced any evidence, such as retainer agreements with their counsel or receipts of payment of legal fees or bank transfers to substantiate their claims.
41. In these circumstances, the Court dismisses the Applicants' claims for reparations for legal fees incurred in the course of domestic proceedings.

ii. Moral prejudice

a. Moral prejudice suffered by the Applicant

42. In the judgment on merits, the Court established that the Applicants' rights were violated as a result of the re-arrest of the Applicants after they were initially acquitted by the Resident Magistrate's Court, contrary to their right to liberty and presumption of innocence. The Court also established that the Respondent

10 *Ibid*; *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 39; *Révérénd Christopher R. Mtikila v Tanzania* (reparations), § 39, Application No 012/2017, ACtHPR, Judgment of 12/11/2020, *Léon Mugesera v Rwanda* (merits and reparations), § 136.

11 *Ibid*.

12 *Kennedy Owino and Another v Tanzania* (merits) (2018), § 107.

13 *Ibid*.

State violated their right to defence by dismissing their defence of *alibi* and convicting them solely on the basis of testimony obtained from a single witness. Furthermore, the Court found that the Respondent State violated the Applicants' right to free legal assistance by failing to avail them counsel at the Court of Appeal where the Applicants defended themselves on a serious charge of armed robbery which carries a severe punishment.

43. On the basis of the above findings of the Court, the Applicants assert that in the matter of *Konaté v Burkina Faso*, the Court awarded United States Dollars Twenty Thousand (USD 20,000) for moral loss suffered by the Applicant and his family. The Applicants pray that the Court should, on the same basis, award each of them, United States Dollars Twenty Thousand (USD 20,000) and award Five Thousand United States Dollars (USD 5,000) to each indirect victim.
44. In this regard, the Applicants state that they have suffered a long imprisonment following an unfair trial, emotional anguish prior to the trial, during the trial process, and imprisonment; loss of social status; chronic illness including diagnosis for high blood pressure and heart condition and general poor health due to poor prison conditions and emotional and physical stress.
45. The Respondent State, on the other hand, reiterates its contention that there is no direct link between the violations suffered and the alleged harm suffered by the Applicants. The Respondent State also avers that the alleged harm lacks proof. In this regard, the Respondent State asserts that there is no proof that Charles John Mwaniki Njoka was diagnosed with diabetes and Kennedy Owino with asthma, high blood pressure and heart condition. It contends that the Applicants did not adduce medical certificates to substantiate their allegations.
46. As regards the Applicants' prayer for an award of United States Dollars Twenty Thousand (USD 20,000) in moral damages, the Respondent State submits that the computation of the indicated amount has been done through guesswork, as it is not substantiated. According to the Respondent State, the Court cannot grant reparations based on mere speculation and gestures as it will amount to unjustly enriching the Applicants.

47. The Court recalls its established case-law where it has held that

moral prejudice is presumed in cases of human rights violations, and quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.¹⁴ The Court has thus adopted the practice of granting a lump sum in such instances.¹⁵

48. The Court notes, as indicated above, that the Respondent State violated the Applicants' right to security and liberty and their rights to a fair trial contrary to Articles 6 and 7(1)(a), (b) and (c) of the Charter on account of which the Applicants have suffered some moral prejudice. The Applicants are therefore, entitled to moral damages.
49. In assessing the quantum of damages, the Court considers the nature and extent of the violations found. In this regard, the Court recalls its findings in the judgment on merits that the Respondent State violated the Applicants' right to liberty and their right to a fair trial by re-arresting and detaining them after they were acquitted by the Resident Magistrate's Court. In addition, the Respondent State violated the Applicants' right to a fair trial by failing to provide them with free legal assistance at the Court of Appeal and by dismissing their defence of *alibi* without proper consideration.
50. In view of this, and in exercising its discretion, the Court therefore awards the Applicants the amount of Tanzanian Shillings Five Million each (TZS 5,000, 000) as fair compensation.

b. Moral Prejudice suffered by Indirect Victims

51. The Applicants submit that their family members have suffered emotional anguish as a result of their trial, conviction and imprisonment. They assert that they were both the sole providers for their family members.
52. The Applicants mention that both of their mothers suffered a great deal of stress and as a result, Kennedy Owino's mother passed away and Charles Njoka's mother is still depressed and in a bad health condition.
53. The Applicants further state that their family members suffered emotional distress after the Applicants were labelled "criminals".

14 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 59; *Christopher Jonas v United Republic of Tanzania* (reparations), § 23.

15 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 119; *Minani Evarist v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 18; and *Armand Guehi v Tanzania* (merits and reparations), § 177; *Christopher Jonas v United Republic of Tanzania* (reparations), § 24.

Further, they assert that the children of Charles Njoka were affected emotionally since they had to grow up without a father and with the thought that their father was a criminal.

54. Accordingly, they pray the Court to award United States Dollars Five Thousand (USD 5,000) to each indirect victim (indicated in paragraph 34 above) in moral damages.

55. On its part, the Respondent State submits that the beneficiary of the right to legal representation or right to liberty are the Applicants who not only failed to establish prejudice as a result of the established violations but also the causal link between the harm alleged to have been suffered and the said violations.
56. The Respondent State further reiterates that the Applicants have failed to submit marriage certificates, birth certificates or any other document showing the level of dependency or previous record of dependency of the alleged indirect victims on the Applicants.
57. In this regard, the Respondent State contends that pursuant to the Court's own jurisprudence, the purpose of reparation is "*restitutio in integrum*" which is to place the victim as much as possible in the situation prior to the violation. Accordingly, the Applicants ought to have provided material evidence to enable the Court to determine the positions they were in before the violations. Furthermore, it avers that not every violation results in loss.

58. The Court notes that with regard to indirect victims, as a general rule, moral prejudice is presumed with respect to parents, children and spouses while for other categories of indirect victims, proof of existence of moral prejudice is required. In general, reparation is granted only when there is evidence of spousal relation, of marital status or for other close relatives, through documents showing filiation with an applicant, which include, birth certificates for

children and parents.¹⁶

59. In the instant case, the Applicants have not supplied the Court with any evidence demonstrating their marital or consanguineal relationship with those individuals that they identified by name. The Court emphasises in this regard that it is not sufficient to list the alleged indirect victims for it to award reparations. Apart from this, the Applicants should have provided proof of filiation including birth certificates, marriage certificate or any other document attesting to their relationship with the indirect victims.¹⁷
60. In view of the foregoing, the Court dismisses the Applicants' prayer for reparations for moral prejudice allegedly suffered by indirect victims.

c. Non-Pecuniary Reparations

i. Restoration of the Applicants' Liberty

61. The Applicants recall the Judgment on the merits, where it requested the Respondent State to "take all necessary measures that would help erase the consequences of the violations established", including "the release of Applicants". Based on this, the Applicants submit that the restoration of their liberty is the only way in which adequate reparations could be said to have been granted given the circumstances of the Applicants. Accordingly, they pray the Court to order their release.
62. The Respondent State contends that the Court has no criminal jurisdiction to quash the Applicants' sentence. It submits that the Court's jurisdiction as per Article 3 of the Protocol, is only limited to the interpretation and application of the Charter, the Protocol and any other human rights instruments ratified by it.

16 *Zongo and others v Burkina Faso* (reparations), § 54; and *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135; *Léon Mugesera v Rwanda* (merits and reparations), § 148.

17 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), §§ 135-136.

- 63.** As regards the prayer for release, the Court has stated that it can only be ordered in specific and compelling circumstances. This would be the case “if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings that the Applicant’s arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice.”¹⁸
- 64.** In the instant case, the Court recalls that in the Judgment on merits, it had ordered the Respondent State, among others,
 ...to take all necessary measures that would help erase the consequences of the violations established, restore the pre-existing situation and re-establish the rights of the Applicants. Such measures could include the release of the Applicants. The Respondent should inform the Court within six (6) months, from the date of this judgment of the measures taken.
- 65.** The Court notes that, to date, the Respondent State has not reported of the measures it has taken to remedy the consequences of the established violations. The records before the Court also indicate that the Applicants are still in jail and that, having been in prison for the last eighteen (18) years, they have served almost two-thirds of their thirty (30) year sentence.¹⁹ Taking these factors into account and the specific circumstances of the case, including the nature of the established violations and the fact that the Applicants are imprisoned in a foreign country far from their homes and families, the Court finds that there are compelling reasons to order the Respondent State to ensure their release.²⁰
- 66.** Accordingly, the Court grants the Applicants’ prayer to be released from prison as, in the particular circumstances of the case, release is the most proportionate measure to remedy the established violations of the Applicants’ human rights.²¹

ii. Restitution

- 67.** The Applicants submit that the African Commission²² recognised the importance of restitution and has held that a State in violation

18 *Minani Evarist v Tanzania* (merits and reparations), § 82.

19 *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (2018) 2 AfCLR 550, § 85.

20 *Ibid*, § 86.

21 *Ibid*.

22 ACHPR, *The Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) vs. Sudan* § 22.

of rights enshrined in the Charter should take measures to ensure restitution. On this basis, the Applicants pray that in the instant case, as they cannot be returned to the state they were before their imprisonment, the Court should take into account the principle of restitution when considering the amount to award them.

68. The Respondent State submits that where a person has caused suffering by way of armed robbery to his victims and has been duly tried on good evidence by a competent court and his appeal heard and conclusively determined, he is not entitled to restitution since any alleged loss was caused by his own act of committing a crime.
69. The Respondent State submits that in the instant case as well, the Applicants' citation of the decision of the African Commission in *Sudan Human Rights Organisation and Centre on Housing Rights v Sudan* is irrelevant and inapplicable, as the Applicants were duly tried on the basis of adequate evidence by a competent court and their appeal heard and finally determined. Furthermore, the Respondent State contends that restitution is only applicable where other measures such as compensation are not relevant or sufficient.

70. The Court notes that it has already dealt with this issue when considering the prayers on restoration of the Applicant's liberty in paragraphs 64 and 65 above. Consequently, the Court finds this prayer to be moot.

VI. Costs

71. The Applicants claim legal aid fees for three hundred (300) hours of legal work, two hundred (200) hours for two assistant counsel and one hundred (100) hours for the lead counsel, charged at United States Dollars One Hundred (USD 100) per hour for the lead counsel and United States Dollars fifty (USD 50) per hour for the Assistants. These amounts to United States Dollars Ten Thousand (USD 10,000) for the lead counsel and United States Dollars Ten Thousand (USD 10,000) for the two assistants.
72. Furthermore, the Applicants pray the Court to grant reparations for postage amounting to United States Dollars two hundred (USD 200), printing and photocopying amounting to United

States Dollars two hundred (USD 200), transportation to and from the seat of the Court and PALU Secretariat and from PALU Secretariat to Ukonga Prison amounting to United States Dollars one thousand (USD 1000) and communication costs amounting to United States Dollars two hundred (USD 200).

73. The Respondent State submits that the prayers of the Applicants on costs are unfounded and baseless. It argues that there is no proof that substantiates the postage fees, stationary fees, transportation cost and communication cost and in any event, the Applicants were represented by PALU, whose costs for legal representation are covered by the Court.
74. Furthermore, the Respondent State contends that the Applicants are convicts and are not allowed to use any other transport, communication, material used or photocopies other than the ones provided by its government through the prison authorities. Accordingly, the Respondent State asserts that claims for transport and stationary costs are unjustified.

75. In terms of Rule 32(2) of the Rules “unless otherwise decided by the Court, each party shall bear its own costs.”²³
76. The Court recalls, in line with its earlier judgments, that reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.²⁴ Even so, the applicant

23 Rules of Court, 26 June 2020.

24 *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 79-93; *Christopher Mtikila v Tanzania* (reparations), § 39; *Mohamed Abubakari v Tanzania* (reparations), § 81; *Alex Thomas v Tanzania* (reparations), § 77.

must provide justification for the amounts claimed.²⁵

77. In the instant Application, the Court notes that PALU represented the Applicants on a *pro bono* basis under the Court's legal aid scheme and in any event, PALU did not produce evidence to prove that it incurred the alleged costs. This claim is therefore unjustified and is hereby dismissed.
78. The Court, therefore, holds that each party shall bear its own costs.

VII. Operative part

79. For these reasons,
The Court,

By a majority of Nine (9) for, and One (1) against, Justice Rafaâ Ben Achour Dissenting

On pecuniary reparations

- i. *Dismisses* the Applicants' prayer for damages for material prejudice they allegedly suffered;
- ii. *Dismisses* the Applicants' prayer for damages for material prejudice allegedly suffered by the indirect victims;
- iii. *Dismisses* the Applicants' prayer for damages for moral prejudice allegedly suffered by indirect victims;
- iv. *Dismisses* the Applicants' claims for reimbursement for legal fees allegedly incurred during proceedings before national courts.

Unanimously

- v. *Grants* the Applicants' prayer for damages for moral prejudice suffered due to the violations found and awards, Mr Kennedy Owino Onyachi and Charles John Mwaniki Njoka, the sum of Tanzanian Shillings Five Million (TZS 5,000, 000) each in reparations.
- vi. *Orders* the Respondent State to pay the amounts indicated under (v) above free from taxes effective within six (6) months from the date of notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

25 *Norbert Zongo and Others v Burkina Faso* (reparations), § 81; *Mtikila v Tanzania* (reparations), § 40.

On non-pecuniary reparations

- vii. *Grants* the Applicants' prayer and orders their release from custody.

On implementation and reporting

- viii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

- ix. *Dismisses* the Applicants' prayer related to legal fees, costs and other expenses incurred in the proceedings before this Court
- x. *Orders* each party to bear its own costs.