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AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

**THE MATTER OF
WILFRED ONYANGO NGANYI AND 9 OTHERS**

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 006/2013

**JUDGMENT
(REPARATIONS)**

4 JULY 2019



Yme *JK* *Am* *Am* *Am*

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The Court composed of: Sylvain ORÉ, President; Ben KIOKO, Vice-President; Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSOUOLA, Blaise TCHIKAYA, Stella I. ANUKAM, Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 8(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Imani D. ABOUD, a national of the United Republic of Tanzania, did not hear the Application.

In the Matter of:

Wilfred Onyango NGANYI, Boniface Mwangi MBURU, David Ngugi MBURU, Michael Mbanya WATHIGO, Peter Gikura MBURU, Simon Githinji KARIUKI, Jimmy Maina NJOROGE, Patrick Muthe MURIITHI, Gabriel Kungu KARIUKI and Simon Ndung'u KIAMBUTHI

represented by:

Advocate Donald O. DEYA, Pan African Lawyers Union (PALU)

versus

UNITED REPUBLIC OF TANZANIA

represented by:

- i. Dr. Clement J. MASHAMBA, Solicitor General;
- ii. Ms. Sarah MWAIPOPO, Director, Constitutional Affairs and Human Rights, Attorney General's Chambers;
- iii. Ms. Nkasori SARAKEYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers;

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- iv. Mr. Baraka LUVANDA, Ambassador, Head Legal Unit, Ministry of Foreign Affairs, East Africa, Regional and International Affairs;
- v. Mr. Abubakar MRISHA, Senior State Attorney, Attorney General's Chambers;
- vi. Ms. Blandina KASAGAMA, Legal Officer Ministry of Foreign Affairs, East Africa, Regional and International Cooperation;

after deliberation,

renders this Judgment:

I. SUBJECT OF THE APPLICATION

1. This Application for reparation was filed pursuant to the Judgment on the merits delivered by the Court on 18 March 2016.¹ In the said Judgment, the Court unanimously found that the Respondent State violated the Applicants' rights to be tried within a reasonable time and to legal aid protected under Article 7(1)(c) and (d) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") respectively.
2. Having found these violations, the Court ordered the Respondent State to:
 - i. Provide legal aid to the Applicants for the proceedings pending against them in the domestic courts.
 - ii. Take all necessary measures within a reasonable time to expedite and finalise all criminal appeals by or against the Applicants in the domestic courts.
 - iii. Inform the Court of the measures taken within six months of the Judgment.
3. In accordance with Rule 63 of the Rules, the Court also directed the Applicants to file submissions on the request for other forms of reparation within thirty (30) days of receipt of the certified true copy of the Judgment on the merits and the

¹ See Application No. 006/2013. Judgment of 18/03/2016 (Merits), *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania* (hereinafter referred to as "*Wilfred Onyango Nganyi and Others v. Tanzania* (Merits)"), § 190.

Respondent State to reply thereto within thirty (30) days of the receipt of the Applicants' submissions.

II. BRIEF BACKGROUND OF THE MATTER

4. As recounted in the above mentioned Judgment of the Court rendered on the merits of the case, the Applicants who are ten (10) nationals of the Republic of Kenya brought an Application to this Court on 23 July 2013 alleging that their rights to a fair trial had been violated in the course of proceedings before the courts of the Respondent State. The case in domestic courts arose from the Applicants' arrest in Mozambique and their transfer to the territory of the Respondent State where they were detained and prosecuted on charges of murder and armed robbery.
5. Of the ten (10) Applicants, five (5) were acquitted and released on 5 March 2014 after the murder charge was withdrawn for lack of evidence. These are Michael Mbanya Wathigo, David Ngugi Mburu, Boniface Mwangi Mburu, Peter Gikura Mburu and Simon Githinji Kariuki. Two (2) of these five (5) Applicants passed away on 17 September 2015. These are Boniface Mwangi Mburu and Simon Githinji Kariuki. The other five (5), Wilfred Onyango Nganyi, Jimmy Maina Njoroge, Patrick Muthe Muriithi, Gabriel Kungu Kariuki and Simon Ndung'u Kiambuthi were convicted of armed robbery and were each sentenced to a thirty (30) year prison term.
6. Having challenged their unlawful arrest and detention in domestic courts, the Applicants reverted to this Court, which found the Respondent State in violation of their rights to a fair trial and directed the Parties to make submissions with regard to reparation as earlier stated.

III. SUMMARY OF PROCEDURE BEFORE THE COURT

7. On 18 March 2016, the Registry transmitted to the Parties a certified true copy of the Judgment on the merits.

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8. The Parties filed their submissions on reparations within the time stipulated by the Court.
9. Pleadings were closed on 28 January 2019 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

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

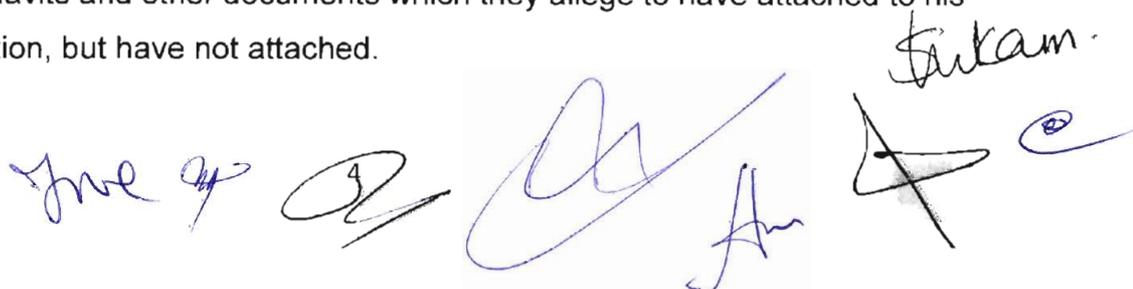
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- i. Monetary compensation as detailed in claims made under paragraphs 163-180 of the Applicant's written submission on reparation;
- ii. Restoration of those incarcerated, that is, their release from prison where they are currently serving an unlawful sentence;
- iii. Application of the principle of proportionality when considering the award for compensation;
- iv. An order that the Respondent State guarantees non-repetition of these violations against the Applicant;
- v. An order that the Respondent State should report to this Court every six months until it satisfies the orders this Court shall make when considering the submissions for reparations;
- vi. An order that, as a measure of satisfaction, the Respondent State should publish in the national Gazette, in both English and Swahili, the judgment dated 3 June 2016, [sic] delivered by this Court on the merits of the matter;
- vii. Any other reparations this Honourable Court shall deem necessary.”

11. The Respondent State prays the Court to make the following orders and declarations:

“

- i. That, the judgment of the Court dated 18th March, 2016 is sufficient reparation to the prayers found in the Applicants submission for reparations.
- ii. That, the Applicants be ordered to submit to the Court and the Respondent the affidavits and other documents which they allege to have attached to his application, but have not attached.



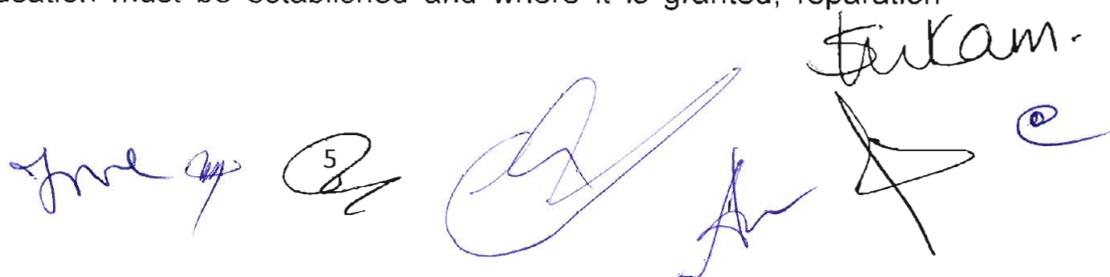
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- iii. That, the applicants be ordered to submit to the Court and the Respondent verification and evidence of the computed amount sought.
- iv. That, the Applicants' claims for lawyers' fees should be set at the scale of the legal aid scheme established by the Court both for the main case and the subsidiary case on reparations.
- v. That, the prayer for restoration of the Applicants' liberty be denied.
- vi. That, the prayer for restoration of the Applicants' liberty is contemptuous of the judgment of the Honourable African Court on Human and Peoples' Rights.
- vii. That, the Honourable Court be pleased to order that there was no gross violation of international human rights law and international humanitarian law.
- viii. That, the Applicants not be granted reparations.
- ix. That, the Applicants' claim for reparations be dismissed in its entirety with costs.
- x. That, since all the alleged violations occurred before the Respondent State deposited its declaration to accept complaints from individuals then the Honourable Court has no mandate to order reparations for acts committed before 29th March 2010."

V. REPARATIONS

12. The Court notes that Article 27(1) of the Protocol provides: "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 fair compensation or reparation" and pursuant to Rule 63 of the Rules, "The Court shall rule on the request for the reparation ... by the same decision establishing the violation of a human or peoples' right or, if the circumstances so require, by a separate decision".

13. In line with its earlier judgments on reparations, the Court considers that for reparation claims to be granted, the Respondent State should be internationally responsible, causation must be established and where it is granted, reparation



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should cover the full damage suffered. Furthermore, the Applicant bears the onus to justify the claims made.²

14. The Court notes that responsibility of the Respondent State and causation have been established in the Judgment on the merits.
15. With respect to the extent of damage to be covered for the violation of the right to be tried within a reasonable time, the Court observes that, as it has found in the Judgment on the merits, prejudice was suffered for the period during which the case was put on hold before the trial commenced. The applicable period is therefore of two (2) years, six (6) months and fourteen (14) days or thirty (30) months and fourteen (14) days.³
16. The Court further notes that the Applicants' prayers for reparation relate to both material and non-material damages. As stated earlier, claims for material damage must be supported by evidence. The Court has also held that the purpose of reparation is mainly to ensure *restitutio in integrum*, which is to place the victim, as much as possible, in the situation prior to the violation.⁴
17. With respect to non-material damage, as this Court has previously held, prejudice is assumed in cases of human rights violations⁵ and assessment of quantum must be done in fairness and taking into account the circumstances of the case.⁶ In line with the consistent practice of the Court, lump sums are awarded in such circumstances.⁷

² See Application No. 013/2011. Judgment of 05/06/2015 (Reparations), *Norbert Zongo and Others v. Burkina Faso* (hereinafter referred to as "*Norbert Zongo and Others v. Burkina Faso (Reparations)*"), §§ 20-31; Application No. 004/2013. Judgment of 03/06/2016 (Reparations), *Lohé Issa Konaté v. Burkina Faso* (hereinafter referred to as "*Lohé Issa Konaté v. Burkina Faso (Reparations)*"), §§ 52-59; and Application No. 011/2011. Judgment of 13/06/2014 (Reparations), *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (hereinafter referred to as "*Reverend Christopher R. Mtikila v. Tanzania (Reparations)*"), §§ 27-29.

³ See *Wilfred Onyango Nganyi and Others v. Tanzania (Merits)*, §§ 124 and 155.

⁴ See *Norbert Zongo and Others v. Burkina Faso (Reparations)*, §§ 57-62.

⁵ *Ibid*, § 55; and *Lohé Issa Konaté v. Burkina Faso (Reparations)*, § 58.

⁶ See *Norbert Zongo and Others v. Burkina Faso (Reparations)*, § 61. See Application No. 001/2015. Judgment of 07/12/2018 (Merits and Reparations), *Armand Guehi v. United Republic of Tanzania (Republic of Côte d'Ivoire Intervening)* (hereinafter referred to as "*Armand Guehi v. Tanzania (Merits and Reparations)*"), § 177.

⁷ See *Norbert Zongo and Others v. Burkina Faso (Reparations)*, § 62.

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18. The Court notes that the claims with respect to the two deceased Applicants Boniface Mwangi Mburu and Simon Githinji Kariuki are made by Winnie Njoki Mwangi and Margaret Nyambura Githinji who were not part of the proceedings on the merits of the case. The claimants provide valid documents proving that they are the wives of the respective Applicants. The Court considers that, in the circumstances and as is accepted practice in international human rights proceedings,⁸ the claimants have substituted these deceased Applicants as the legal representatives of their beneficiaries in the present proceedings on reparation.
19. The Court further notes that, in the present case, the Applicants make their claims in different currencies. In this respect, the Court is of the considered opinion that, taking into account fairness and considering that the Applicant should not be made to bear the fluctuations that are inherent in financial activities, determination of the quantum of damages should be made on a case-by-case basis. As a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.⁹
20. In the instant matter, the Applicants being nationals of the Republic of Kenya where they conducted their activities, the alleged loss of income should have been assessed in Kenya Shillings. However, given that the Respondent State does not challenge the fact that the Applicants framed their claims in United States (US) Dollar, damages, if any, will be awarded in the latter currency.

A. Pecuniary reparations

i. Material loss

21. The Applicants claim compensation for both loss of income and costs incurred in the proceedings before domestic courts.

⁸ See for instance, as in the practice of the European Court of Human Rights, *Raymond v. Italy*, 22 February 1994, § 2 série A no 281 A; *Stojkovic v. The Former Yugoslav Republic Of Macedonia*, no 14818/02, 8 November 2007, § 25; *X v. France*, 31 March 1992, § 26, série A no 234 C; and *M.P. and Others v. Bulgaria*, no 22457/08, 15 November 2011, §§ 96-100.

⁹ See Application No. 003/2014. Judgment of 07/12/2018 (Reparations), *Ingabire Victoire Umuhoza v. Republic of Rwanda*, § 45.

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a. Loss of income

22. The Applicants in the present case, relying on the amount awarded to the Applicant for loss of income in the *Konaté* case referred to earlier, pray the Court to award them US Dollars Fifty Thousand (US\$ 50,000) annually to each of those who were acquitted, that is Michael Mbanya Wathigo, David Ngugi Mburu, Boniface Mwangi Mburu, Peter Gikura Mburu and Simon Githinji Kariuki, and for the entire period of almost six (6) years during which they were in custody, making it a total amount of US Dollars Two Hundred Eighty Eight Thousand Eight Hundred and Eighty Nine (US\$288,889) each.

23. With regard to those who were convicted, that is Onyango Nganyi, Jimmy Maina Njoroge, Patrick Muthe Muriithi, Gabriel Kungu Kariuki and Simon Ndung'u Kiambuthi, the Applicants pray this Court to grant an amount of US Dollars Three Hundred Sixty Three Thousand Eight Hundred and Eighty Nine (US\$ 363,889) to each of them for loss of income.

24. The Respondent State challenges these claims as baseless, misconceived and untenable. It submits that unlike in the *Konaté* case where the loss of income resulting from the suspension of the newspaper's publication was not in contention, the Applicants have not provided tangible proof of the business activities they were conducting and the income derived from such activities.

25. The Respondent State further submits that even if their source of income was proven, the Applicants are still not entitled to any compensation for loss of income since they were prosecuted for armed robbery and murder, and imprisoned by the competent courts of law.

* * *

26. The Court notes that, as it had held in the Judgment on the merits, the violations found did not affect the outcome of domestic proceedings as far as the Applicants who were convicted are concerned. In fact, these Applicants' case before this Court was not that of their illegal arrest and detention. Furthermore, the prejudice caused

John *Ngugi* *Michael Mbanya Wathigo* *David Ngugi Mburu* *Boniface Mwangi Mburu* *Peter Gikura Mburu* *Simon Githinji Kariuki* *John* *Ngugi*

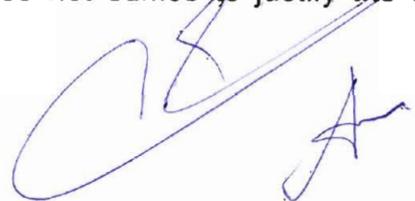
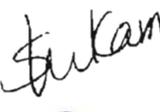
Hundred (US\$ 900) to provide him with medical attention. He provides receipts in support of this claim.

32. The Court notes, regarding the alleged loss of income suffered due to the termination of his business contract, that the contract for supply and termination letter adduced by the Applicant are *prima facie* evidence of the existence of a contract but not of the actual income flowing from such a contract. Furthermore, there is no correlation between the termination of the contract and the loss of annual income as quantified by the Applicant to the tune of US Dollars Forty-One Thousand Two Hundred and Fifty (US\$ 41,250). The Court is of the considered opinion that further evidence in the form of bank statements or tax certificates attesting to taxes paid with respect to the alleged annual income and the gross income received from the performance of this specific contract or other such contracts should have been tendered. In the absence of these documents, there is insufficient proof of the alleged loss and related compensation claim. The prayer is consequently dismissed.

33. With regard to the claim for money spent for the Applicant's medication amounting to US Dollars Nine Hundred (US\$ 900), the Court finds that the amount exceeds that appearing on the receipts attached. Consequently, based on the proven figure the Court awards the amount of US Dollars Two Hundred and Fifty (US\$ 250).

34. With respect to Simon Kariuki Githinji (deceased), through the affidavit sworn by Margaret Nyambura Githinji, the deceased's wife, the latter avers that her husband ran a scrap metal business which earned him approximately US Dollars Seven Thousand (US\$7,000) annually. A certified true copy of business licence to that effect is attached.

35. The Court notes that with regard to the claim of loss of income to the tune of US Dollars Seven Thousand (US\$7,000), there is no evidence to support the same. The Court is of the considered opinion that, although the deceased's wife submitted a business licence, that document alone does not suffice to justify the amount.

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claimed as it only shows the existence of the said business. The prayer is therefore dismissed.

36. With respect to David Ngugi Mburu, he alleges in his affidavit that he ran a scrap metal and salvage business, and was also farming and keeping livestock. The Applicant avers that his net annual income was approximately US Dollars Thirty Two Thousand and Five Hundred (US\$ 32,500). He annexes a business license and delivery notes for the scrap metal business. The Applicant avers that due to his prolonged absence as a result of the trial his business collapsed. He claims a total US Dollars Two Hundred and Eighty-Eight Thousand Eight Hundred and Eighty-Nine (US\$ 288,889).

37. The Court considers that the provision of a business license and delivery notes serves as evidence of the existence of the business and the fact that it was operational. The same documents do not however provide comprehensive and detailed indications on the income it generated in order to justify the amount being claimed.

38. Taking into account the period of incarceration and based on its discretion, the Court decides to award the amount of US Dollars Two Thousand (US\$ 2, 000) to the Applicant.

39. With respect to Boniface Mwangi Mburu (deceased), through the affidavit sworn by Winnie Njoki Mwangi, the deceased's wife, the latter avers that her husband ran a clothes import business which earned him approximately US Dollars Six Thousand (US\$6,000) annually. She provides a certified copy of his travel record to Dubai.

40. The Court notes that the travel record does not give any indication as to the nature of the business the deceased engaged in. The air ticket submitted neither proves the existence of the business nor does it prove the purpose of the trip involved. The claim is therefore dismissed.

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41. With respect to Michael Mbanya Wathigo, the Applicant avers that he ran a school transport and waste paper recycling business. He further states that he travelled to different countries and used to go to Dubai twice a year for various orders from clients. The Applicant claims that his net annual income derived from the said business was approximately US Dollars Fifty-Eight Thousand, Four Hundred and four (US\$ 58,404). He tenders evidence showing the business he had. He prays to be awarded the sum of US Dollars Three Hundred and Sixty Three Thousand, Eight Hundred and Eighty-Nine (US\$ 363,889). He also provides evidence that he was once denied visa to Turkey.

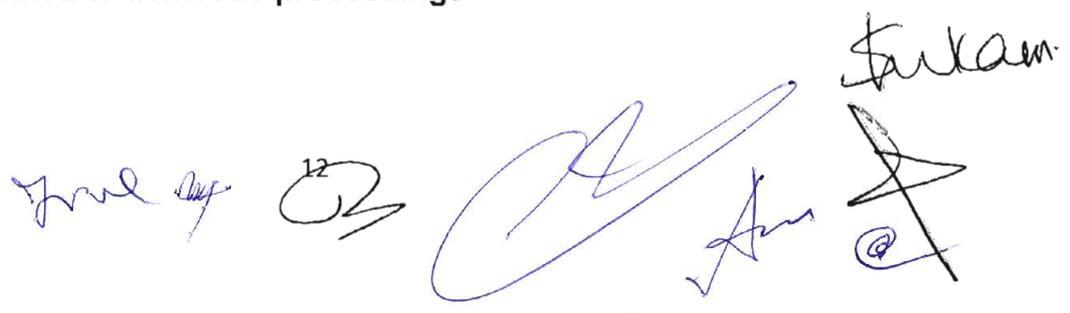
42. The Court notes that there is no evidence to the effect that the Applicant used to travel to Dubai for business. Furthermore, it is not clear whose property the transport business was and documents submitted to that effect show that the Applicant was only a coordinator of the business.

43. The Court conversely notes that the business licence tendered is evidence that the Applicant had a business of waste paper recycling. However, there is no other supporting document such as business transactions which prove that he was actually doing the said business so as to justify how much he could have earned in a month or year. The business licence alone does not justify his income of approximately US Dollars Fifty Thousand, Four Hundred and Two (US\$ 50,402) per year.

44. Finally, the Court notes that there is no connection between the present case and the fact that the Applicant was denied a visa to go to Turkey as the two scenarios are different and therefore the claim is unfounded.

45. In light of these considerations, the Court dismisses the claim.

b. Legal fees related to domestic proceedings



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46. The Applicants pray the Court to grant them reparation for the legal fees that they incurred in the proceedings before domestic courts. They aver that, after over ten (10) years, some of the receipts that were issued have been misplaced and at times counsel did not issue receipts when they received payments. The Applicants further submit that their counsel contacted Advocate Ojare and Advocate Mwale who represented them in the domestic proceedings, and these lawyers informed their counsel that they no longer have any of the receipt books for the said period.
47. The Applicants also submit that they have however provided correspondence from Advocate Ojare's Chambers stating that each Applicant was to pay Tanzanian Shillings Fifty Thousand (TZS 50,000) for each appearance. They claim that, therefore in Criminal Case No. 2 of 2006, there were 137 appearances making it a total amount of 137×8 (Applicants) \times 50,000 Tanzanian Shillings Fifty Four Million and Eight Hundred Thousand (TZS 54,800,000). They submit that in this case only eight (8) of them were affected namely: Wilfred Onyango Nganyi; Jimmy Maina Njoroge; Patrick Muthee Muriithi; Gabriel Kungu; Simon Ndung'u Kiambuthi; Michael Mbanya Wathigo; David Ngugi Mburu; and Boniface Mwangi Mburu.
48. In Criminal case No. 7 of 2006, Miscellaneous Criminal Application No. 16 of 2006, Criminal Appeal No. 353 Criminal Appeal No. 79 of 2011, there were 35 appearances, making it a total amount of $35 \times 50,000 \times 10$ (Applicants) = Tanzanian Shillings Seventeen Million and Five Hundred Thousand (TZS 17,500,000). This case involved all the Applicants.
49. The Applicants further aver that in Criminal Session No. 10 of 2006, they have not received the full proceedings from the Registry of the relevant court and are not able to provide information on the number of appearances involved. Thus, they pray this Court to order the Respondent State to provide the proceedings of that case. This case affected seven (7) of the Applicants: Wilfred Onyango Nganyi; Jimmy Maina Njoroge; Patrick Muthee Muriithi; Simon Kariuki Githinji; David Ngugi Mburu; Boniface Mwangi Mburu; and Peter Gikura Mburu.
50. The Respondent State submits that the Applicants are not entitled to any reparations for legal fees paid in the proceedings before domestic courts as there

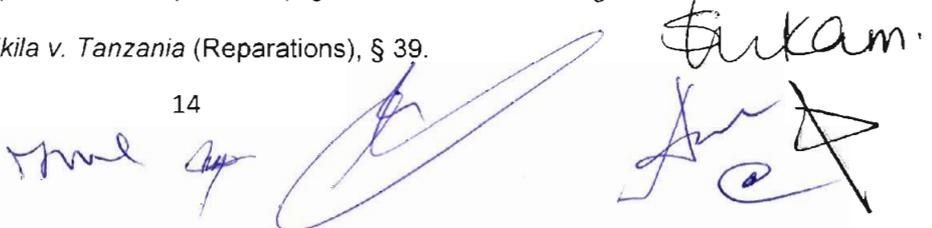
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is no proof of payment in many instances. The Respondent State further submits that, where evidence is provided for such payments, the amounts claimed are manifestly excessive and inflated.

51. The Court reiterates the position taken in its previous judgments that reparation may include payment of legal fees and other expenses incurred in the course of domestic proceedings.¹⁰ In such cases, the Applicant is required to provide documents in support of the claims made.¹¹
52. The Court notes that, in the instant case, based on the findings made earlier in the present Judgment with respect to the Applicants who were convicted, claims for payment of legal fees incurred in domestic proceedings can be justified only as far as the Applicants who were acquitted are concerned. The latter presented the applicable scale of fees for lawyers who represented them in domestic proceedings. The Court however notes that the Applicants did not submit any supporting document to prove the costs allegedly incurred in many of the instances. They maintain that the receipts were misplaced due to long passage of time. The Court finds that the explanation provided is not sufficient proof and the claim for these expenses is therefore dismissed.
53. With respect to expenses that were proved by proper document such as receipts or equivalent documents, compensation is warranted. The Court therefore awards compensation as follows: David Ngugi Mburu who paid Tanzanian Shillings One Million and Eight Hundred Thousand (TZS 1,800,000) to Loom – Ojare & Co. Advocates; Michael Mbanya Wathigo who paid Tanzanian Shillings Fifty Thousand (TZS 50,000) to Loom – Ojare & Co. Advocates; and Peter Gikura Mburu who paid Tanzanian Shillings Two Million (TZS 2,000,000) to J.J. Mwale & Co. Advocates.

¹⁰ See *Armand Guehi v. Tanzania* (Merits and Reparations), § 188; and *Norbert Zongo and Others v. Burkina Faso* (Reparations), § 79.

¹¹ See *Reverend Christopher R. Mtikila v. Tanzania* (Reparations), § 39.

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ii. Non-material loss

a. Loss incurred by the Applicants

54. The Applicants make a claim for reparation essentially on account of the pain, physical and emotional suffering and trauma, which the Applicants suffered throughout the duration of the lengthy criminal proceedings as a consequence of which some of them are still imprisoned.

55. They pray this Court to grant an amount of US Dollars One Hundred Fifteen Thousand Five Hundred and Fifty-Six (US\$ 115,556) to each Applicant who was acquitted and the amount of US Dollars One Hundred and Forty-Five Thousand Five Hundred and Fifty-Six (US\$145,556) to those who were convicted.

56. The Applicants who were acquitted refer to the judgment of the Court in the *Konaté* case¹² where the Applicant was awarded US Dollars Twenty Thousand (US\$ 20,000) for moral damages for the entire period of eighteen (18) months that he spent in prison. Based on the same standard, the Applicants in this case aver that they spent a period of eight (8) years and eight (8) months (104 months) in custody and, should the Court decide to evaluate damages on a *prorata* basis, this gives the total of US Dollars One Hundred Fifteen Thousand Five Hundred and Fifty-Six (US\$ 115,556) stated earlier.

57. The Applicants who were convicted submit that a period of one hundred and thirty (131) months has since passed and their criminal appeals are yet to be concluded. Similarly, relying on the *Konaté* judgment, they pray the Court to grant US Dollars One Hundred Forty-Five Thousand Five Hundred and Fifty-Six (US\$ 145,556) to each of them based on evaluation of the damages on a *prorata* basis.

58. The Respondent State avers that the Applicants did not suffer any moral prejudice since they have received adequate care from the government from the date of their

¹² See *Lohé Issa Konaté v. Burkina Faso* (Reparations), § 59.

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arrest and incarceration to date. The Respondent State submits that the Applicants are therefore not entitled to any reparation.

59. The Respondent State further submits that the prayer for US Dollars One Hundred Fifteen Thousand Five Hundred and Fifty-Six (US\$ 115,556) to be awarded to each of the Applicants who were acquitted is baseless and a mere afterthought as the Applicants never suffered any loss of income.

60. The Respondent State contends that unlike in the case of *Konaté* case where there was evidence of loss of income as the Applicant in that case was a publisher, the Applicants in the present case do not provide evidence of a lawful source of income.

* * *

61. The Court notes that, as it has held in its judgment on reparation in the case of *Reverend Christopher R. Mtikila v. Tanzania*, moral damage is one that causes suffering and afflictions to the victim, emotional distress to the family members as well as non-material changes in the living conditions of the victim and his family.¹³

62. In its Judgment on the merits, the Court found a violation of the Applicants' right to be tried within a reasonable time owing to the undue delay in the proceedings.¹⁴ As restated earlier in the present Judgment, the delay is of thirty (30) months and fourteen (14) days and not eight (8) years as claimed by the Applicants. Assessment of quantum will therefore be based on the delay of thirty (30) months and fourteen (14) days.

63. In the same vein, the *Konaté* standard referred to by the Applicants is distinguishable from their case due to the difference in the nature of the offences being prosecuted. Furthermore, in the Judgment on merits, the Court made a determination to the effect that the violations found did not fundamentally impact on the outcome of the proceedings. Due to these considerations, and recalling that the Applicants obtained certain forms of reparations awarded in the Judgment on the

¹³ See *Reverend Christopher R. Mtikila v. Tanzania* (Reparations), § 34.

¹⁴ See *Wilfred Onyango Nganyi and Others v. Tanzania* (Merits), § 155.

merits, proportionality requires that similarity should not apply with the *Konaté* case in assessing the quantum of reparation for moral prejudice.

64. With respect in particular to the Applicants who were convicted, the Court notes that, as at 20 August 2018 when the Applicants replied to the Respondent State's submissions on reparation, there was no indication that measures had been taken "within a reasonable time to expedite and finalise" cases pending against them in the domestic courts as ordered by the Court in its Judgment on the merits.¹⁵ Given that the time spent without completing the proceedings was already found to be unreasonable at the time this Court ruled on the merits, the Court is of the considered opinion that unreasonableness has been aggravated by non-completion of the proceedings more than two years later. It proceeds from the ongoing that while all the Applicants suffered the initial delay in the commencement of the trial, those against whom proceedings are still pending have suffered additional prejudice.
65. Having said that, the Court is of the view that the amounts claimed by the Applicants are excessive. In equity and based on the circumstances stated above, the Court grants US Dollars Three Thousand (US\$3,000) to the Applicants who were acquitted, including the representatives of the deceased; and US Dollars Four Thousand (US\$ 4,000) to the Applicants who were convicted and are still awaiting completion of their appeals, given the additional prejudice suffered.
66. With regard to the claims made by the Applicants who were convicted alleging that as a result of their trial and long imprisonment they suffered emotional anguish, disruption of life plan as well as loss of social status, the Court notes that the prejudice averred is the lawful consequence of their conviction and sentencing. As earlier recalled, the violations found in the Judgment on the merits did not fundamentally affect their conviction and sentencing. Furthermore, the Court has remedied the violations by ordering that they should be afforded legal counsel during their appeals and that these proceedings be expedited. Finally, prayers for

¹⁵ *Ibid*, § 193(x).

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other reparations are addressed in the present Judgment. The related claims are therefore dismissed.

67. The Court notes that, in the Judgment on the merits of the present case, it had ordered that the Applicants who were convicted should be granted legal aid during their appeals. However, that order does not address the violation that ensued from the lack of legal aid during their trial as established by the Court. The latter violation caused non-pecuniary prejudice to the concerned Applicants who make claims for reparation. The Court therefore awards the Applicants who were convicted an amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) each.

b. Loss incurred by the indirect victims

68. The Applicants pray the Court to grant compensation to the indirect victims as they suffered emotional harm as a result of the violation and prejudice suffered by the Applicants.¹⁶ Relying on the judgment in the *Zongo* case,¹⁷ the Applicants pray the Court to grant indirect victims the following amounts calculated on a *prorata* basis:

- i. US Dollars Two Hundred and Eight Thousand Eight Hundred and Eighty-Nine (US\$ 288,889) each to the spouses of the Applicants who were acquitted.
- ii. US Dollars Three Hundred and Sixty-Three Thousand Eight Hundred and Eighty-Nine (US\$363,889) each to the spouses of the Applicants who were convicted.
- iii. US Dollars One Hundred and Forty-Five Thousand Five Hundred and Fifty-Six (US\$145, 556) each to the children of the Applicants who were convicted ; and US Dollars One Hundred and Fifteen Thousand Five Hundred and Fifty-Six (US\$ 115,556) each to the children of those who were acquitted.
- iv. US Dollars One Hundred and Forty-Five Thousand, Five Hundred and Fifty-Six (US\$ 145,556) each to the siblings of the Applicants who were convicted;

¹⁶ The list of indirect victims as reflected in paragraph 71 of this judgment is that resulting from the assessment of this Court after considering the list of indirect victims as submitted by the Applicants.

¹⁷ *Norbert Zongo and Others v. Burkina Faso* (Reparations), § 111 (ii).

and US Dollars One Hundred and Fifteen Thousand Five Hundred and Fifty-Six (US\$115,556) each to the siblings of those who were acquitted.

- v. US Dollar One Hundred and Forty-Five Thousand Five Hundred and Fifty-Six (US\$ 145,556) each to the parents of the Applicants who were convicted; and US Dollars One Hundred and Fifteen Thousand Five Hundred and Fifty-Six (US\$ 115,556) each to the parents of those who were acquitted.

69. The Respondent State challenges all the Applicants' claims on reparations as baseless. According to the Respondent State, victimhood is not established and there is no reason why the stated persons should be granted reparation.

* * *

70. The Court recalls that compensation for moral prejudice applies to relatives of the victims of a human rights violation as a result of the indirect suffering and distress. As the Court held in the *Zongo* case, "It is apparent that the issue as to whether a given person may be considered as one of the closest relatives entitled to reparation has to be determined on a case-by-case basis, depending on the specific circumstances of each case".¹⁸

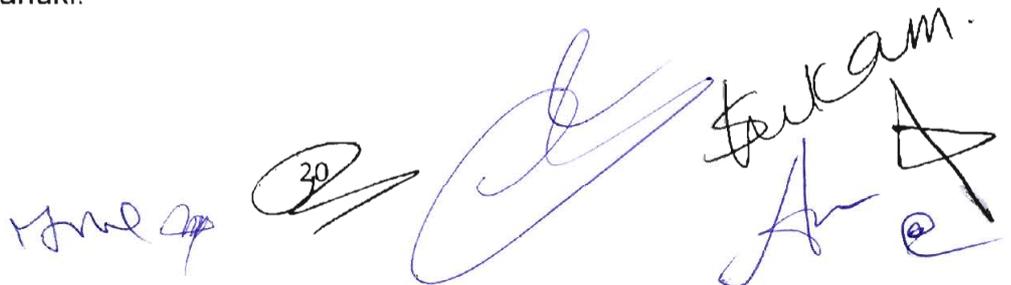
71. In the context of this case, there is hardly any doubt that the close relatives of the Applicants suffered moral damage arising from the breaches attributable to the Respondent State as determined in the Judgment on the merits. In the absence of contrary submissions and in light of the circumstances, the Court considers that compensation is warranted only for the closest relatives being the spouses, children, fathers and mothers of the Applicants. These are therefore persons who, in the instant case, can claim the status of victim. For the spouses, they should produce a marriage certificate or any other equivalent proof, and children have to produce a birth certificate or any other equivalent evidence to show proof of their filiation. As regards fathers and mothers, they must produce an attestation of paternity as well as a birth certificate or any other equivalent proof.¹⁹

¹⁸ *Ibid*, § 49.

¹⁹ See *Norbert Zongo and Others v. Burkina Faso* (Reparations), § 54.

72. The Court notes that in the present case, the Applicants produce the required evidence. On that basis, the persons entitled to moral damages are listed herein below:

- i. As regards the dependants of Michael Mbanya Wathigo, the victims are his children Brian Ng'ang'a Mbanya and Sally Mwikali Mbanya; and his mother Prisca Wangeci.
- ii. As regards the dependants of David Ngugi Mburu, the victims are his wife Jane Wangare Mukami; his children Eric Mburu Ngugi; Linet Wanjiku Ngugi, and Lensey Mukami Ngugi; and his mother Wanjiku Mburu Mwenda.
- iii. As regards the dependants of Peter Gikura Mburu, the victims are his wife Mary Wanjiru Njoroge; his children Loise wambui Gikura and Lucy Waceke Gikura; and his mother Loise Wambui Mburu.
- iv. As regards the dependants of Boniface Mwangi Mburu, the victims are his wife Winnie Njoki Mwangi and his child Ryan Mburu.
- v. As regards the beneficiaries of Simon Kariuki Githinji, the victims are his wife Margret Kariuki Githinji; his children Teresia Wambui Githinji and John Bosco Kariuki; his father John Bosco Kariuki; and his mother Teresia Wambui Kariuki.
- vi. As regards the dependants of Wilfred Onyango Nganyi, the victims are his wife, Irene Muthoni Wanjiku; his daughter Ashley Atieno Onyango; and his mother Margaret Atieno Nganyi.
- vii. As regards the dependants of Jimmy Maina Njoroge, the victims are his wife Marion Njoki; his children Brian Waiguru Maina, Leila Wamaitha Maina and Taliah Waithera Maina.
- viii. As regards the dependants of Patrick Muthee Muriithi, the victims are his wife Catherine Wangui Wanjohi; his children Joe Moses Wanyeki, Bryan Muriithi, and Marc Ribai; and his mother, Zipora Nyaguthi.
- ix. As regards the dependants of Gabriele Kungu Kariuki, the victims are his wife Carol Wanjiku Mwangi his children Teresia Wambui Kungu and Carlyn Bosco Kariuki Kungu; and his parents John Bosco Kariuki and Teresa Wambui Kariuki.



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- x. As regards the dependants of Simon Ndung'u Kiambuthi, the victims are his wife Susan Njeri Mbugua; and his children Rose Wanjiru Ndung'u and Michelle Ngawaro Ndung'u.

73. With respect to quantum, the Court considers that compensation to be awarded to the indirect victims should be commensurate to the loss suffered by the direct victims. The amount requested by the Applicants with regard to the indirect victims is therefore excessive.

74. Against these considerations, the Court notes that the Applicants and beneficiaries do not allege a differentiated level of prejudice. On the basis of equity, the Court awards compensation as follows:

- i. An amount of US Dollars One Thousand (US\$ 1,000) to each spouse;
- ii. An amount of US Dollars Eight Hundred (US\$ 800) to each child; and
- iii. An amount of US Dollars Five Hundred (US\$500) to each father and mother.

B. Non-pecuniary reparations

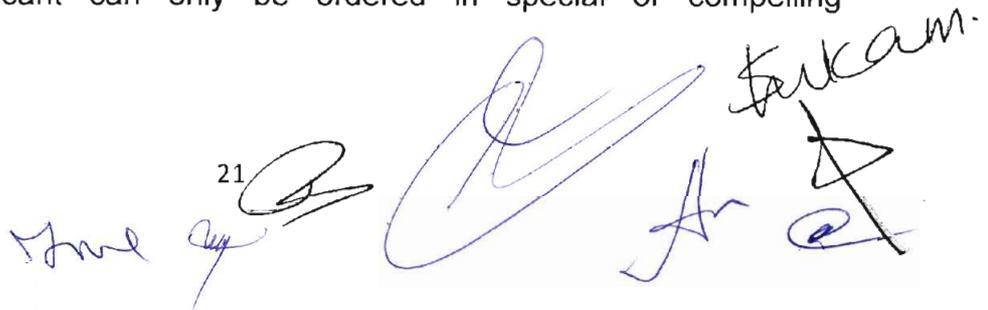
i. Release of the Applicants

75. The Applicants pray this Court to "order the restoration of those incarcerated, that is liberty by their release from prison where they are currently serving an unlawful sentence".

76. The Respondent State submits that the prayer that the Applicants should be released is vexatious and frivolous since the cases against them are still ongoing and they have appealed to the Court of Appeal, which is expected to rule on their release or otherwise.

77. The Court reiterates its well-established case law that a measure such as the release of the Applicant can only be ordered in special or compelling

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circumstances.²⁰ The said circumstances must be determined on a case-by-case basis, taking into consideration mainly proportionality between the measure of restoration sought and the extent of the violation established.²¹ This position is well exemplified in the matter of *Mgosi Mwita Makungu v. United Republic of Tanzania* where this Court held that an order for release would be warranted for instance where the conviction is based entirely on arbitrary considerations and continued detention would occasion a miscarriage of justice.²²

78. As the Court concluded earlier, the violations found in the Judgment on the merits did not fundamentally affect the outcome of the proceedings before domestic courts. Furthermore, the Court did not find that the conviction and sentencing of the Applicants who are serving their prison term were unlawful and they have been granted a remedy in the present Judgment regarding the delayed proceedings. In light of these considerations, the prayer is not justified and is therefore dismissed.

ii. Non-repetition of the violations and report on implementation

79. The Applicants pray the Court to order that the Respondent State guarantees non-repetition of the violations against them and reports back every six (6) months until the orders made by this Court on reparations is implemented.

80. The Respondent State contends that this prayer and that related to reporting back to the Court should be denied as they were already canvassed in the Judgment on the merits.

²⁰ See for instance, *Armand Guehi v. Tanzania* (Merits and Reparations), § 164; and Application No. 005/2013. Judgment of 20/11/2015 (Merits), *Alex Thomas v. United Republic of Tanzania* (hereinafter referred to as "*Alex Thomas v. Tanzania* (Merits)"), § 157.

²¹ See *Armand Guehi v. Tanzania* (Merits and Reparations), *idem*; Application No. 016/216. Judgment of 21/09/2018 (Merits and Reparations), *Diocles William v. United Republic of Tanzania* (hereinafter referred to as "*Diocles William v. Tanzania* (Merits and Reparations)"), § 101; Application No. 027/2015. Judgment of 21/09/2018 (Merits and Reparations), *Minani Evarist v. United Republic of Tanzania* (hereinafter referred to as "*Minani Evarist v. Tanzania* (Merits and Reparations)"), § 82.

²² See Application No. 006/2016. Judgment of 07/12/2018 (Merits and Reparations), *Mgosi Mwita Makungu v. United Republic of Tanzania*, §§ 84-86. See also, *Diocles William v. Tanzania* (Merits and Reparations), § 101; and *Minani Evarist v. Tanzania* (Merits and Reparations), § 82.

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81. The Court considers that, as it has held in the matter of *Armand Guehi v. Tanzania*, while guarantees of non-repetition generally apply in cases of systemic violations,²³ these remedies would be relevant in individual cases where the violation will not cease or is likely to re-occur.²⁴

82. The Court notes that, as earlier recalled, the violations found in the Judgment on the merits did not fundamentally affect the outcome of the proceedings before domestic courts as far as the Applicants who were convicted are concerned. Regarding the Applicants who were released, the Court observes the likelihood of repetition of the violations is non-existent. Taking into account that the violations have ceased and remedy has been duly afforded to the Applicants as appropriate, this Court does not deem it necessary to issue an order regarding non-repetition.²⁵ The prayer is therefore dismissed.

83. With respect to the order for report on implementation of this Judgment, the Court is of the considered opinion that such an order is inherent in its judgments when it directs the Respondent State or any other party to carry out a specific action.

iii. Publication of the decision

84. The Applicants pray the Court to order the Respondent State to publish in the national Gazette, in both English and Swahili, the Judgment on the merits as a measure of satisfaction.

85. The Respondent State submits that the Court should deny this prayer given that the Judgment on the merits of this Application is already widely available through this Court's website.

²³ *Armand Guehi v. Tanzania* (Merits and Reparations), § 191. See also *Norbert Zongo and Others v. Burkina Faso* (Reparations), §§ 103-106; African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), § 10 (2017). See also Case of the "Street Children" *Villagran-Morales et al. v. Guatemala*, Inter-American Court of Human Rights, Judgment on Reparations and Costs (26 May 2001).

²⁴ *Armand Guehi v. Tanzania* (Merits and Reparations), § 191; and *Reverend Christopher R. Mtikila v. Tanzania* (Reparations), § 43.

²⁵ See *Armand Guehi v. Tanzania* (Merits and Reparations), §§ 191 and 192.

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86. The Court considers that although a judgment, *per se*, can constitute a sufficient form of reparation for moral damage, other measures, including publication of the decision, can be ordered as the circumstances warrant.²⁶ The Court restates that, as its case-law exemplifies, a measure such as publication would apply for instance in cases of grave or systemic violations that affect the domestic system of the Respondent State; where the Respondent State has not implemented a previous order of this Court in relation to the same case; or where there is need to enhance public awareness of the findings in the case.²⁷

87. In the instant case, the Court notes that, more than two (2) years after it delivered its Judgment on the merits where it ordered the Respondent State to expedite the appeals of the Applicants who were convicted, it is yet to do so. The Court considers that, in the circumstances, publication of the Judgment is warranted. The Court consequently orders that the present Judgment and the Judgment on the merits are published on the websites of the Judiciary and the Ministry of Constitutional and Legal Affairs, and that the Judgments remain accessible for at least one (1) year after the date of publication.

VI. COSTS

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

89. The Court recalls that, in line with its earlier judgments, reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.²⁸ The Applicant must provide justification for the amounts claimed.²⁹

²⁶ *Ibid*, § 194; and *Reverend Christopher R. Mtikila v. Tanzania* (Reparations), § 45.

²⁷ *Armand Guehi v. Tanzania* (Merits and Reparations), § 191. See also and *Reverend Christopher R. Mtikila v. Tanzania* (Reparations), § 45; and *Norbert Zongo and Others v. Burkina Faso* (Reparations), §§ 103-106.

²⁸ See *Norbert Zongo and Others v. Burkina Faso* (Reparations), §§ 79-93; and *Reverend Christopher R. Mtikila v. Tanzania* (Reparations), § 39.

²⁹ *Norbert Zongo and Others v. Burkina Faso* (Reparations), § 81; and *Reverend R. Mtikila v. Tanzania* (Reparations), § 40.

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A. Legal fees related to proceedings before this Court

90. The Applicants pray the Court to order the payment of the following being the legal fees incurred in the proceedings before the African Court:

- i. PALU Secretariat Legal fees: 800 hours of legal work; 600 hours for four Assistants at US Dollars One Hundred and Fifty (US\$ 150) an hour amounting to US Dollars Ninety Thousand (US\$ 90,000); 200 hours for the lead counsel at US Dollars Two Hundred (US\$ 200) per hour amounts to US Dollars Forty Thousand (US\$ 40,000), which makes it a total of US Dollars One Hundred and Thirty Thousand (US\$ 130,000);
- ii. Payment to Arnold Laisser: US Dollars Three Hundred (US\$ 300);
- iii. Facilitation fees to William Kivuyo: US Dollars Four Hundred and One (US\$ 401);
- iv. Facilitation fees to Cynthia Kimaro: US Dollars Eight Hundred and Twenty-Five (US\$ 825); and
- v. Facilitation fee to Grace Mbogo: US Dollars Five Hundred and Fifty Two (US\$ 552).

91. The Respondent State avers that the Applicants' prayer to be paid legal fees for proceedings before this Court should not be granted as there is no evidence in support thereof. The Respondent State submits that the working period alleged are not explained, the figures are excessive and the involvement of Arnold Laisser, William Kivuyi, Cynthia Kimaro, and Grace Mbogo in the proceedings is not explained. The Respondent State also submits that the prayer should be denied since the Applicants were provided legal aid by this Court and there is a discrepancy between costs prayed for in the Application and subsequent submissions of the Applicants.

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92. The Court notes that the Applicant was duly represented by PALU throughout the proceedings under the Court's legal aid scheme.³⁰ Noting further that its legal aid scheme is *pro bono* in nature, the Court rejects the claim.

B. Other expenses related to proceedings before this Court

93. In their joint written submissions, the Applicants pray the Court to order the reimbursement of transport costs and accommodation expenses incurred in the proceedings before this Court.

94. The Respondent State submits that the prayer should be denied since the Applicants were provided legal aid by this Court. The Respondent State also avers that the prayers related to other costs are an afterthought and misconceived since they were not made in the Application.

95. The Court notes that, in the proceedings before it, the Applicants were represented by PALU under the legal aid scheme. Consequently, the considerations relied on in examining the claim for payment of legal fees before this Court apply to the present claim. The claim is therefore dismissed.

96. As a consequence of the above, the Court decides that each Party shall bear its own costs.

VII. OPERATIVE PART

97. For these reasons:

THE COURT,

³⁰ See African Court on Human and Peoples' Rights Legal Aid Policy 2013-2014, Legal Aid Policy 2015-2016, and Legal Aid Policy from 2017.

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Unanimously:

Pecuniary reparations

On material loss

- i. *Does not grant* the prayer for material damages sought by:
 - a. Peter Gikura Mburu;
 - b. Michael Mbanya Wathigo;
 - c. Margaret Nyambura Githinji who is the wife of Applicant Simon Kariuki Githinji (deceased); and
 - d. Winnie Njoki Mwangi who is the wife of Applicant Boniface Mwangi Mburu (deceased).
- ii. *Awards* damages and compensation as follows:
 - a. US Dollars Two Thousand (US\$ 2,000) to David Ngugi Mburu for loss of income;
 - b. US Dollars Two Hundred and Fifty (US\$ 250) to Peter Gikura Mburu for medical expenses;
 - c. Tanzanian Shillings One Million and Eight Hundred (TZS 1,800,000) to David Ngugi Mburu for the fees incurred in the proceedings before domestic courts;
 - d. Tanzanian Shillings Fifty Thousand (TZS 50,000) to Michael Mbanya Wathigo for the fees incurred in the proceedings before domestic courts; and
 - e. Tanzanian Shillings Two Million (TZS 2,000,000) to Peter Gikura Mburu for the fees incurred in the proceedings before domestic courts.

On non-material loss

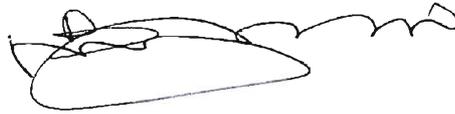
- iii. *Does not grant* the prayer for damages to the Applicants who were convicted with respect to long imprisonment, emotional anguish during trial and imprisonment, disruption of life plan, and loss of social status;
- iv. *Awards* moral damages as follows:

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- a. US Dollars Three Thousand (US\$3,000) to each of the Applicants who were acquitted, that is Michael Mbanya Wathigo, David Ngugi Mburu, and Peter Gikura Mburu; and to each of the representatives of beneficiaries of the deceased Applicants Boniface Mwangi Mburu and Simon Githinji Kariuki, who are Winnie Njoki Mwangi and Margaret Nyambura Githinji;
- b. US Dollars Four Thousands (US\$ 4,000) to each of the Applicants who were convicted, that is Wilfred Onyango Nganyi, Jimmy Maina Njoroge, Patrick Muthe Muriithi, Gabriel Kungu Kariuki and Simon Ndung'u Kiambuthi;
- c. US Dollars One Thousand (US\$1,000) to each of the wives, that is Jane Wangare Mukami, Mary Wanjiru Njoroge, Winnie Njoki Mwangi, Margret Kariuki Githinji, Irene Muthoni Wanjiku, Marion Njoki, Catherine Wangui Wanjohi, Carol Wanjiku Mwangi, and Susan Njeri Mbugua;
- d. US Dollars Eight Hundred (US\$800) to each of the children, that is Brian Ng'ang'a Mbanya, Sally Mwikali Mbanya, Eric Mburu Ngugi; Linet Wanjiku Ngugi, Lensey Mukami Ngugi, Loise wambui Gikura, Lucy Waceke Gikura, Ryan Mburu, Teresia Wambui Githinji, John Bosco Kariuki, Ashley Atieno Onyango, Brian Waiguru Maina, Leila Wamaitha Maina, Taliah Waithera Maina, Joe Moses Wanyeki, Bryan Muriithi, Marc Ribai, Teresia Wambui Kungu, Carlyn Bosco Kariuki Kungu, Rose Wanjiru Ndung'u and Michelle Ngawaro Ndung'u;
- e. United States Dollars Five Hundred (US\$500) to each of the fathers and mothers, that is Prisca Wangeci, Wanjiku Mburu Mwenda, Loise Wambui Mburu, John Bosco Kariuki, Teresia Wambui Kariuki, Margaret Atieno Nganyi, Zipora Nyaguthi, John Bosco Kariuki and Teresa Wambui Kariuki; and
- f. Tanzanian Shillings Three Hundred Thousand (TZS 300,000) to each of the Applicants in relation to non-provision of legal aid during the proceedings before domestic courts.

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Wanjiku Mburu Mwenda
John Bosco Kariuki
Teresia Wambui Kariuki
Margaret Atieno Nganyi
Zipora Nyaguthi
John Bosco Kariuki
Teresa Wambui Kariuki

Ben KIOKO, Vice-President;



Rafaâ BEN ACHOUR, Judge;



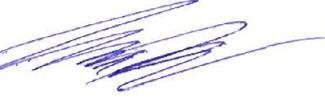
Ângelo V. MATUSSE, Judge;



Suzanne MENGUE, Judge;



M.-Thérèse MUKAMULISA, Judge;



Tujilane R. CHIZUMILA, Judge;



Chafika BENSAOULA, Judge;



Blaise TCHIKAYA, Judge;



Stella I. ANUKAM, Judge;



and Robert ENO, Registrar.



Done at Arusha, this Fourth Day of the month of July, in the year Two Thousand and Nineteen, in English and French, the English text being authoritative.



2019-07-04

Judgement on Reparations in NGANYI and Others Vs URT Delivered on 04 July 2019

African Court on Human and Peoples' Rights

African Court on Human and Peoples' Rights

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