006/2013
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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

IN THE MATTER OF

WILFRED ONYANGO NGANYI & 9 OTHERS

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION 006/2013

JUDGMENT

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS * COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES * The Registrar ARUSHA TANZANIA

The Court composed of: Elsie N. THOMPSON, Vice President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Sylvain ORÉ, Ben KIOKO, Rafâa BEN ACHOUR, Solomy B. BOSSA and Angelo V. MATUSSE, Judges; and Nouhou DIALLO, Deputy 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"), Judge Augustino S. L. RAMADHANI, President of the Court and a national of Tanzania, did not hear the Application.

In the matter of:

Wilfred Onyango Nganyi & 9 Others
represented by:

the Pan-African Lawyers' Union (PALU),
represented by:
Mr. Donald Deya - Counsel

v.

United Republic of Tanzania,
represented by:

i. Ambassador Irene Kasyanju
Head of Legal Division
Ministry of Foreign Affairs and International Cooperation

ii. Ms. Sarah D. Mwaipopo
Acting Deputy Attorney General,
Director of Constitutional Affairs and Human Rights
Attorney General's Chambers

iii. Mr. Edwin Kakolaki
State Attorney In charge (PSA)
Office of the Attorney General

iv. Ms. Nkasori Sarakikya
Assistant Director- Human Rights
Attorney General's Chambers

v. Mr. Mark Mulwambo
Principal State Attorney
Attorney General's Chambers

vi. Mr. Ally Ubwa
Second Secretary-Legal Officer
Ministry of Foreign Affairs and International Cooperation

After deliberations,

delivers the following unanimous *judgment:*

I. The Parties

1. The Application was filed on 23 July 2013, by Wilfred Onyango Nganyi, Peter Gikura Mburu, Jimmy Maina Njoroge, Patrick Muthee Muriithii, Simon Githinji Kariuki, Boniface Mwangi Mburu, David Ngugi Mburu, Michael Mbanya Wathigo, Gabriel Kungu Kariuki and Simon Ndugu Kiambuthi (hereinafter referred to as the "Applicants"), all citizens of the Republic of Kenya, against the United Republic of Tanzania (hereinafter referred to as the "Respondent").

II. Subject matter of the Application

2. The Applicants allege that they were in Mozambique exploring business opportunities when, on 16 December 2005, they were, without lawful resort to legal measures of extradition, kidnapped and arrested by the Mozambican police, in collaboration with the Kenyan and Tanzanian Police Forces, after a false report made by a lady by name Maimouna Salimo, for being linked to dangerous elements of the Kenyan military forces and Kenya administration Police. They also allege that thereafter they were put on a military airplane referred to as *Buffalo* bound for Tanzania.

3. According to the Applicants, prior to their being brought to Tanzania, the Mozambican Police arraigned them before an investigating judge who acquitted them of any wrong-doing and ordered their release. They add that in defiance of the court order, Mozambican police kept them in custody until they were forcibly and unlawfully transferred to Tanzania on 16 January 2006.

4. The Applicants explain that in the morning of 14 January 2006, while still under the custody of the Mozambican authorities, they were handcuffed and bundled into police vans, driven to Maputo city airport, where they met a group of Kenyan and Tanzanian Police Officers, including a Tanzanian Officer whom they later came to know as SSP Kigondo, the Regional Criminal Officer, Kilimanjaro Region. This Police Officer they say who was holding their possessions, including boarding passes for a commercial flight scheduled for Dar-es-Salaam and a transparent plastic bag full of handcuffs.

5. According to them, they refused to board the commercial flight, although their luggage had been checked-in, and following their refusal to board the commercial flight, they were bundled into the vans and returned to the police station for lockup, until the morning of 16 January 2006, when they were again forcefully driven to a

Mozambique military airbase and forcefully bundled into a Mozambique military aircraft, the *"Buffalo"*, in the presence of Kenyan and Tanzanian Police Officers.

6. They allege that the aircraft landed at Mwalimu Julius Nyerere International Airport in Dar-es-Saalam, and upon their arrival in Dar-es-Salaam, they were blindfolded, bundled into waiting vehicles and driven to three different locations and locked up, still handcuffed with hands behind their backs. They add that on 19 January 2006, they were again bundled into heavily guarded vehicles, handcuffed with hands behind their backs and driven under tight heavily armed police presence to Moshi, at the Kilimanjaro International Airport Police Station, where they allege having been submitted to severe beatings with heavy sticks and metal rods, torture by use of electric shocks from a special torture police squad, led by one Inspector Duwan Nyanda, and refused access to communication with their lawyers who came several times to meet them.

7. The Applicants further claim that they were eventually charged for a range of serious criminal offences, which trials have been unduly and inordinately delayed and riddled with multiple violations of various rights.

8. According to them, two of the charges were later withdrawn by the Respondent, that is, Criminal Case 647 of 2006 and Criminal Case 881 of 2006, and the Respondent entered a *nolle prosequi* in respect of the dropped murder charge in Criminal Case 10 of 2006 in accordance with the provisions of Section 91 (1) of the Criminal Procedure Act of the Respondent State.

9. They submit that three (3) of them were released after the murder charge was withdrawn for lack of evidence, five (5) were subsequently convicted for conspiracy to commit an offence, contrary to Section 384 of the Penal Code, and armed robbery, contrary to Section 287A of the Penal Code, and sentenced to 30 years in prison,

and are currently serving their sentence at Ukonga Central Prison at Dar-es-Salaam, while two (2) died in detention in the course of the trial.

10. The three (3) who were released are: Boniface Mwangi Mburu, David Ngugi Mburu and Michael Mbaya, while the five (5) who were convicted and sentenced are: Wilfred Onyango Nganyi, Jimmy Maina Njoroge, Patrick Muthee Muriithii, Gabriil Kungu Kariuki, and Simon Ndugu Kiambuthi, and the two (2) who died in custody were: Peter Gikura Mburu and Simon Githinji Kariuki.

III. Proceedings before the national courts of Tanzania

11. The Applicants allege that on 24 January 2006, they were arraigned before the Moshi Resident/District Court and charged with a count of murder and three charges of armed robbery, after being accused of robbing the National Bank of Commerce Limited, Moshi Branch on 21 May 2004 and the murder of one Benedict Laurent Kimaro Mfuria at Moshi, on 26 July 2005.

12. They bring the Application before this Court on the basis of Criminal Case 2 of 2006 (conspiracy to commit an offence, contrary to Section 384 of the Penal Code and armed robbery, contrary to Section 287A of the Penal Code) at the Resident Magistrate Court Moshi and Criminal Case 10 of 2006 (murder) at the High Court of Tanzania.

13. Before these cases could be heard, the Applicants filed Misc. Criminal Application 7 of 2006 at the High Court of Tanzania to request for leave to file orders of *certiorari* and prohibition in order to challenge their alleged forceful kidnapping and abduction from Mozambique. In their Application they sought:

> "a. an order to stay criminal proceedings against them;

b. an order of *certiorari* to quash their committal to trial on the preliminary inquiry on the charge of murder;

c. an order of *certiorari* to quash their arrest and the original four criminal charges as based on illegal and unlawful actions by the police and immigration services.

d. an order prohibiting the Resident Magistrate, Moshi, from hearing or determining the criminal case against them;

e. an order for their immediate release and for restoration of their property which included passports, unused air tickets, Kenyan identity cards, international vaccination certificates, ATM cards, frequent flier cards, US$29,047, KSh28,000, four mobile phones, three gold rings, wrist watches and shoes; and

f. costs".

14. On 1 June 2006, the High Court of Tanzania granted the Applicants leave to apply for orders of *certiorari* and prohibition, but declined to order stay of proceedings.

15. After the grant by the High Court, the Applicants filed Criminal Application 16 of 2006, to request for prerogative orders of *certiorari* and prohibition as follows:

"a. An order to stay proceedings in Moshi District Court, Criminal Cases 647 of 2005, and 2 of 2006 and committal proceedings in Preliminary Inquiry No. 26 of 2006 which are pending before the Resident Magistrate, Moshi, who was cited as the fourth Respondent;

b. An order of *certiorari* to quash an order of the third respondent, that is, the Resident Magistrate Moshi, committing the Applicants for trial before the High Court;

c. An order of certiorari to quash the illegal and unlawful actions of the first and second respondents, that is, the Inspector General of Police and the Director of Immigration services, and all the criminal charges and prosecutions in the aforementioned four criminal cases, which are grounded on the patently illegal and unlawful actions of the said first and second respondents;

d. An order of prohibition, to prohibit the third and fourth respondents from hearing, or in any other way, determining all or any of the aforesaid criminal cases and or charges;

e. An order for the immediate release of the Applicants from custody and for the restoration of their passports, unused air tickets (Maputo-Nairobi), Kenya identity cards, international certificates of vaccination, ATM cards, frequent flyer cards, US $29,047, KSh 28,000, four mobile phones, three golden rings, wrist watches and shoes; and

f. Any other order the Court may deem fit and just to grant".

16. At the same time, the Respondent State filed Criminal Appeal No. 276 of 2006, against the High Court decision in Misc. Criminal Application No. 007 of 2006, which granted leave to the Applicants to file for orders of *certiorari* and prohibition. Proceedings in Criminal Application No. 16 of 2006 were therefore stayed pending the results of the Respondent State's appeal.

17. On 20 November 2007, the Court of Appeal struck out the Respondent's Criminal Appeal No. 276 of 2006. This decision enabled Criminal Application No. 16 of 2006 to proceed.

18. On 26 September 2008, the High Court dismissed in its totality Criminal Application No. 16 of 2006. On 26 November 2008, the Applicants appealed this decision of the High Court to the Court of Appeal in Criminal Appeal No. 353 of 2008, and on 14 February 2011, the appeal was struck out for being incompetent as the Appellants had not obtained leave to appeal. They then filed a fresh appeal to the Court of Appeal in Criminal Appeal No. 27 of 2011; the Court of Appeal allowed the Appeal on 19 March 2013, on the basis that the trial High Court judge erred in deciding the case on the merits without ruling on the preliminary points of law raised by the Respondent. The case was therefore remitted back to the High Court for a decision on the preliminary points of law.

19. The Applicants aver that thereafter, they filed an Application before this Court, arguing that they have exhausted local remedies as: "(a) On the criminal charges, there has been an inordinate delay of seven years before their case has been brought to trial; and (b) On the violation of their rights, their application has gone up to the Court of Appeal".

20. The Applicants also point out that their Applications have proceeded all the way to the Court of Appeal twice, both times without success. To that extent, they argue that within the judicial system of the Respondent, they have exhausted all local remedies. Furthermore, they allege that the Court of Appeal of the Respondent "ought to have treated the repeated applications with the objective of obtaining substantive justice in the matter without undue regard to technicalities of the law, especially of the procedural law".

21. In conclusion, the Applicants maintain that they only brought the Application to this Court after they realised that the Respondent was taking too long to initiate the proceedings directed by the Court of Appeal in Case 79 of 2011.

22. The case file before this Court reveals that, at the time the Applicants seized this Court on 23 July 2013, Criminal Case 2 of 2006, Criminal Case 10 of 2006 and Criminal Application 16 of 2006 were still pending before the Respondent's Courts.

23. This Court's attention was also drawn to the fact that in December 2006, the Respondent conducted a similar trial on the same facts, same offences, by the same Court (the Resident Magistrate Court at Moshi), by the same prosecution, on a completely different set of suspects, Some of the suspects in this case were sentenced to 30 years imprisonment with 12 strokes of the cane, while others were sentenced to 3 years imprisonment. When this matter was raised by the Applicants, the Respondent did not respond to it. The Applicants also did not show this Court the relationship between the two cases, save for drawing those similarities.

IV. Alleged violations

24. In their Application, the Applicants allege the following:
    a. "That, our rights of properties were violated by the Respondent State;
    b. That our rights of freedom were violated by the Respondent State;
    c. That our rights of work were violated by the Respondent State; and
    d. That our rights to be tried within a reasonable time by the Courts were violated by the Respondent State".

V. Procedure before the Court

25. The Application was filed at the Court on 23 July 2013.

26. On 30 July 2013, the Registry sought clarification from the Applicants on whether they had been in touch with their counsel and had remitted their Application back to the High Court for a ruling on the preliminary points of law as directed by the Court of Appeal in its judgment of 19 March 2013.

27. In a letter dated 12 August 2013, the Applicants informed the Court that, for four months since the Court of Appeal's directive of 19 March 2013, they had not heard from their counsel, Mr. Loomu Ojare, from Arusha.

28. On 27 August 2013, the Registry sought clarification from the Applicants on whether their counsel was appointed by the Respondent, and whether they had instructed counsel to set their matter down for hearing by the High Court as directed by the Court of Appeal or whether they themselves had requested the High Court to re-hear their case in accordance with the order of the Court of Appeal.

29. On 26 September 2013, the Applicants informed the Court that their counsel was hired by their relatives. They further stated that in an effort to push the matter before the High Court, they wrote and attempted to communicate with their counsel in vain, so they wrote a letter to the High Court on 16 August 2013, requesting it to set a date for the hearing of their matter as ordered by the Court of Appeal but that letter has not been responded to.

30. On 12 December 2013, in conformity with Rule 35 (2) (a) of the Rules, the Registrar served the Application on the Respondent and invited it to indicate the names and addresses of its representatives within 30 days and respond to the Application within 60 days, from the date of receipt of the notification. On the same date, the Chairperson of the African Union Commission and through the latter, the Executive Council of the African Union and all States Parties to the Protocol, were notified of the Application, in conformity with Rule 35 (3) of the Rules.

31. The Respondent filed its Response to the Application on 26 February 2014.

32. On 31 March 2014, the Applicants replied to the Respondent's Response.

33. On 8 April 2014, the Registry, in conformity with Rule 35 (2) (b) of the Rules, transmitted the Application to the Republic of Kenya, being the State Party whose

citizens are the Applicants, drawing its attention to the fact that it was entitled to intervene in the proceedings, if it so wished.

34. On 9 April 2014, the Registry, pursuant to Rule 31 of the Rules, requested the Applicants to inform the Court whether they were still facing challenges with respect to legal representation, and if so, advised them to contact the Pan African Lawyers' Union (PALU) on the possibility of the latter providing them legal assistance.

35. On 2 June 2014, the Registry enquired from PALU whether it could consider providing legal aid to the Applicants, and by letter dated 11 August 2014, PALU expressed its willingness to represent the Applicants in the matter. On the same date, the Registry informed the Respondent that the Applicants would be represented before the Court by PALU.

36. By letter of 4 November 2014, the Parties were informed that the Application was set down for public hearings on 12 and 13 March 2015.

37. On 19 December 2014, the Respondent requested the Court to adjourn the hearings of the Application to June 2015, citing reasons of "limited manpower and other matters of equal national importance".

38. On 19 January 2015, the Registry forwarded the Respondent's request for adjournment to the Applicants, and the latter responded on 22 January 2015, indicating that they had no objection to the adjournment.

39. On 9 February 2015, the Court notified both Parties that it had adjourned the hearing to its 37th ordinary session and that the hearing would be on preliminary objections, admissibility and merits of the case.

40. On 13 May 2015, the Applicants requested the Court to facilitate their attendance at the hearing, and sought an Order from the Court to direct the Respondent to transfer them from Ukonga Prison (Dar-es-Salaam) to Karanga Prison (Moshi).

41. On 18 May 2015, the Court, after having examined the Applicants' request, decided that given the circumstances of the case, their presence was not necessary.

42. On 20 May 2015, both Parties submitted bundles of documents which included trial proceedings from the trial courts and lists of authorities for consideration, whilst seeking the Court's leave to submit additional evidence after the closure of proceedings, under Rule 50.

43. On 21 May 2015, public hearing took place at the seat of the Court in Arusha, during which the Parties made oral submissions and responded to questions put by the Court.

VI. Prayers of the Parties

(i) Applicants' prayers

44. In their Application of 23 July 2013, the Applicants "pray(ed) to the African Court on Human and Peoples' Rights to regain these rights which were violated by the Respondent State". They also prayed for:
    (a) Restoration of their rights which were violated with regard to the allegations made in this Application; and
    (b) An Order for reparation to remedy the violations with regard to the allegations made in the Application.

45. In their reply of 31 March 2014, to the Respondent's Response to the Application, the Applicants emphasized that their main complaint is the delay by the Respondent in dealing with the matters they are facing within the national justice system, being Criminal case No. 2 of 2006 and Criminal Application No. 16 of 2006. They state that even though they have made a number of Applications to stay proceedings against them, none of these Applications was granted, it is therefore not an excuse for the

Respondent to delay their trial on the basis of Applications they made, because no stay was ever granted in their Applications.

46. At the public hearing of 21 May 2015, the Applicants prayed the Court for:

> "1. a declaration that the Respondent State has violated their rights to be tried within a reasonable time as is required by Article 7 of the Charter and indeed by Section 192 of the Respondent State's Criminal Procedure Act.
>
> 2. a declaration that the Respondent State has violated their rights to be afforded legal aid and representation for the entire duration of the trial.
>
> 3. an order of this Court that the pending Case be concluded within a reasonable time as the Court may determine.
>
> 4. a further order that the Court Orders that the Respondent State provides legal aid and representation to the Applicants for the remainder of the Appeal within the National Courts.
>
> 5. reparation, should follow a decision of this Court pursuant to the present proceedings if it goes in their favour.
>
> 6. any other declaration and/or orders that this honourable Court may deem fit in the circumstances".

(ii) Respondent's prayers

47. In its Response to the Application, the Respondent raised preliminary objections with regard to the jurisdiction of the Court and on the admissibility of the Application. It also submitted on the merits of the Application.

48. In its Response, the Respondent prayed the Court to grant the following orders with respect to the admissibility of the Application:

> "i. That the Application has not evoked the jurisdiction of the honourable Court.
>
> ii. That the Applicants have no locus standi to file the Application before the Court and hence should be denied access to the Court as per Articles 34(6) and 5(3) of the Protocol.
>
> iii. That the Application has not met the admissibility requirements stipulated under Rule 50(2) (5) and (6) of the Rules nor Article 56 and Article 6(2) of the Protocol.
>
> iv. That the Application has not met the mandatory procedural requirement stipulated in Rule 34(1) of the Rules of Court.
>
> v. That the Application be dismissed in accordance to Rule 38 of the Rules of Court.
>
> vi. That the cost of this Application be borne by the Applicants".

49. With respect to the merits of the Application, the Respondent prayed the Court to grant the following orders:

> "i. That the Tanzanian Police did not forcefully kidnap and abduct the Applicants in collusion with Mozambican and Kenyan Police Officers.

ii. That the Respondent complied with the mandatory requirements of section 13(1)(a)(b)(c) of the CPA [Cap 20 RE 2002].

iii. That the Government of the United Republic of Tanzania has not violated the Applicants' right to own property.

iv. That the Government of the United Republic of Tanzania has not violated the Applicants' right to freedom.

v. That the Government of the United Republic of Tanzania has not violated the Applicants' right to work.

vi. That the Government of the United Republic of Tanzania has not violated the Applicants' right to be tried within a reasonable time.

vii. That the Applicants not be awarded any reparations with regard to claims and allegations made in this Application against the United Republic of Tanzania.

viii. That the cost of this Application be borne by the Applicants"].

50. At the public hearing, the Respondent made the following prayers:

"1. a declaration that the Respondent State has not caused an inordinate delay in the matters facing the Applicants in Criminal Case No 2/2006 and 16/2;

2. an order of not awarding reparations;

3. the application be dismissed".

51. Pursuant to Rule 39 (1) of the Rules, the Court will deal with the questions of its jurisdiction and admissibility of the Application; if the case arises, the Court will then examine the merits of the matter.

VII. Jurisdiction of the Court

i. Jurisdiction ratione materiae

52. According to the Respondent, the jurisdiction of the Court, as elaborated in Article 3 (1) of the Protocol and Rules 26 and 40 (2) of the Rules, has not been invoked by the Applicants. The Respondent avers that the Applicants have merely cited ongoing cases against them within the national judicial system and have made no attempt to even mention the Protocol, the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter"), or any other relevant human rights instruments ratified by the Respondent, neither have they complied with the Constitutive Act of the African Union.

53. The Respondent further states that the allegations in the Application include allegations against Kenya and Mozambique, States Parties to the Protocol which have not made the declaration accepting the jurisdiction of the Court to receive Applications, pursuant to Articles 5 (3) and 34 (6) of the Protocol. The Respondent adds that the Applicants have alleged that there was a conspiracy between the Police Forces in Kenya, Mozambique and Tanzania in kidnapping and abducting them, and although two of these States have not been joined in the Application, they are inadvertently involved due to the nature of the allegations of conspiracy which have been raised.

54. The Respondent concludes by praying that *"the Applicants should be denied access to the Court and the Application should be duly dismissed for having failed to invoke the jurisdiction of the Court"*.

55. In their Reply to the Respondent's preliminary objection on the jurisdiction of the Court, the Applicants maintained that the jurisdiction of this Court has been invoked, adding that they have "complied with the Rules and Protocol of the Court in Article 3 (1), Rule 26 and Rule 40 (2)".

56. The Applicants submit further that their allegations against States Parties which have not made the declaration accepting the jurisdiction of the Court to receive Applications as per Articles 5(3) and 34(6) of the Protocol were wrongly cited, noting that in their application to the Court, they "just gave a brief history of how we came to be in the Respondent State", and "never intended to involve any member states in this application, as our application is of inordinate delay in the matters that are facing us in Criminal Case No. 2 of 2006 and Criminal Application No. 16 of 2006. This delay having been caused by the Respondent state (Tanzania) which is one of the states which have made a Declaration accepting the competence of the Court to receive cases as per Article 5(3) and 34(6) of the Protocol".

57. The Court overrules the Respondent's objection that its jurisdiction has not been invoked simply because the Applicants have only cited ongoing cases against them within the national judicial system and have not mentioned the Protocol, the Charter, or any other relevant human rights instruments ratified by the Respondent. The Court has held in previous cases involving the same Respondent, that is, Application 003/2012, Peter Chacha v United Republic of Tanzania delivered on 28 March 2014 and Application 001/2013, David Frank Omary v. United Republic of Tanzania delivered on 28 March 2014, that as long as the rights alleged to have been violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter.

58. In the instant case, the Applicants allege violations of a number of rights (see paragraph 24 above). It is not necessary that specific provisions of the Charter be mentioned in the Application; it suffices that the rights allegedly violated are guaranteed by the Charter or any other instrument to which the Respondent is party.

59. This position is similar to the one held by the African Commission on Human and Peoples' Rights (hereinafter referred as the "Commission") in a Communication filed against the same Respondent. In *Communication 333/06 - Southern Africa Human Rights NGO Network and Others v Tanzania,*[1] the Commission held that:

> *"one of its primary considerations under Article 56 (2) is whether there has been prima facie violation of human rights guaranteed by the African Charter. ... The Commission is only concerned with whether there is preliminary proof that a violation occurred. Therefore, in principle, it is not mandatory for the Complainant to mention specific provisions of the African Charter that have been violated."*[2]

60. The Court therefore, holds that it has jurisdiction *ratione materiae* to deal with the Application.

ii. Jurisdiction ratione personae

61. The Court will now examine the Respondent's objection that it lacks jurisdiction because the Application contains "allegations against Kenya and Mozambique, States Parties which have not made the declaration accepting the competence of the Court to receive cases as per Articles 5(3) and 34(6) of the Protocol".

62. The Court notes that in their Reply to the Respondent's objection, the Applicants made it clear that they never intended to involve any other Member State in the Application, as their Application and contention is about inordinate delay in the matters that are facing them in Criminal Case 2 of 2006 and Criminal Application 16 of 2006, before the Courts of the Respondent, this delay having been orchestrated by the Respondent, which has made a declaration accepting the jurisdiction of this

[1] 28th Activity Report, November 2009 – May 2010.
[2] As above, paragraph 51.

Court. This position was reiterated by the Applicants during their oral submissions at the public hearings.

63. The Court further notes that the Applicants are Kenyan nationals; they bring the Application against a State Party to the Protocol which on 29 March 2010, made the declaration in terms of Article 34 (6) of the Protocol, accepting the jurisdiction of this Court to receive cases from individuals. The Court therefore finds that it has jurisdiction *ratione personae* to receive the Application.

iii. Jurisdiction ratione temporis

64. The Court's jurisdiction *ratione temporis* has not been challenged. The Court has held in its judgment of 28 March 2014 in Application 013/2011 – the Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso, that the relevant dates regarding its *ratione temporis* jurisdiction are those of the entry into force of the Charter, the Protocol as well as that of the deposit of the declaration accepting the jurisdiction of the Court to receive Applications from individuals.

65. In the instant case, the Respondent ratified the Charter on 18 February 1984, the Protocol on 7 February 2006 and deposited the declaration required under Article 34(6) of the Protocol on 29 March 2010.

66. As far as the Court is concerned, the violations alleged by the Applicants in the instant case do not constitute instantaneous but continuous violations of the international obligations of the Respondent, and as such gives the Court jurisdiction to hear the matter: While the alleged violations occurred before the filing of the special declaration by the Respondent, i.e. 29 March 2010, they were continuing after this date. Indeed, the Applicants are still in detention, and some of the cases

brought against them are still pending before the Respondent's Courts and they have not been provided with legal aid to pursue the pending cases.

iv. Jurisdiction ratione loci

67. With respect to jurisdiction *ratione loci*, which has also not been challenged, the Court is of the view that since the alleged violation occurred within the territory of the Respondent, the Court has jurisdiction.

68. Having established that it has jurisdiction to examine the Application, the Court will now proceed to consider the Respondent's preliminary objections on the admissibility of this Application.

VIII. Admissibility of the Application

69. In its Response to the Application, the Respondent avers that, "in the alternative but without prejudice to …" its preliminary objections on the jurisdiction of the Court, it was objecting to the admissibility of the Application on four (4) grounds, namely:

i. That the Application is incompatible with the Charter of the Organization of African Unity (OAU) or with the present Charter as per Rule 40(2) of the Rules of the Court,

ii. That the Applicants failed to exhaust local remedies as per Rule 40 (5) of the Rules;

iii. That the Application was not submitted within a reasonable time from the time local remedies were exhausted as per Rule 40 (6) of the Rules; and

iv. That the Application does not comply with Rule 34(1) of the Rules as it is not signed by the Applicant or his/her representatives.

70. The Respondent argues in this regard that "... the general maxim is that for an Application to be considered admissible, all the conditions for admissibility should be met. The Respondent submits that as the conditions of admissibility prescribed in Rule 40 (2), (5) and (6) have not been met, compounded with non-compliance with Rule 34 (1) of the Rules of Court, this Application before the honourable Court should be deemed inadmissible and dismissed with costs."

i. Objection on compliance with Rule 34 (1) of the Rules of Court

71. Although this is not an admissibility requirement in terms of Article 56 of the Charter and Rule 40 of the Court Rules, the Respondent cited this as one of the grounds to declare the Application inadmissible. Indeed, according to the Respondent, the Application does not comply with Rule 34 (1) of the Rules because the Application was not signed by the Applicants or their representatives as required by the Rule. The Respondent submits that not signing an Application renders it invalid for want of ownership and verification, stressing that the fact that this basic requirement was not met, renders the Application null and void and incurably defective, thus the Application is not admissible before the Court.

72. In their Reply, the Applicants submit that "... the Respondent did not study our Application well because we believe that the Court would not have received our Application if it was not signed ...". They add that "...the Application before the Court was made in prison and was and is a necessary step of signing any document being sent from prison so as to show that the maker was not forced to do so as he is restrained".

73. The Court finds the Respondent's objection immaterial and irrelevant, in light of the fact that the main Application is supported by the attachments which are signed and referred to in the Application. The cover letter from the Central Prison forwarding the Application is duly signed by the Officer-in Charge of the Prison. The attachments to the Application depicting the *Evidence of inordinate delay of local remedies* and the

Request for Reparation in the Application are all marked with the ten (10) Applicants' thumbprints. Both documents are referred to in the main Application. The Court therefore finds the Respondent's objection on this point to be baseless and lacking in merit, and hereby dismisses the same.

74. The Court will now turn to the other objections on the admissibility of the Application raised by the Respondent.

75. The Court recalls that Rule 40 of its Rules provides that "Pursuant to the provisions of article 56 of the Charter to which article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any mater or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

ii. Compatibility of the Application with the Constitutive Act of the African Union

76. According to the Respondent, the Application is not compatible with the Constitutive Act of the African Union, noting that the Application has been brought merely by making reference to cases the Applicants are facing before domestic courts. The Respondent states further that throughout the Application, the Applicants have failed to cite any provision of the African Charter that has been violated, noting that the Application seeks

for the Court to deliberate and subsequently adjudicate on matters/actions carried out by the Police Forces of Kenya and Mozambique, being States Parties which have not recognized the jurisdiction of the Court by depositing the declaration. The Respondent cites the Court's decisions in *Application No. 005/2011, Daniel Amare and Mulugeta Amare vs. Republic of Mozambique and Mozambique Airlines and Application 002/011, Sofiane Abadou vs. People's Democratic Republic of Algeria*, in support of its argument.

77. The Respondent concludes that, based on the foregoing, the Application has not satisfied the admissibility requirement under Rule 40 (2) of the Rules and should therefore be dismissed.

78. In their Reply to the above objection, the Applicants state as follows:

> "(we) refute the claims of the Respondent State which states that we want the Court to deliberate and subsequently adjudicate on matters/actions carried out by the police of Kenya and Mozambique. It is our submission that the matter concerning the forceful kidnapping and abduction by the Tanzanian police in collusion with the Kenyan and Mozambican police, is a matter which has not been fully determined as it is still pending in the High Court of Tanzania in Moshi. The matter in Application 16 of 2006 which is in the High Court concerning the wrongful kidnapping and abduction has been dragging in court for the last 8 years and going. This matter has been unduly prolonged".

79. The Court notes that the Constitutive Act of the African Union which replaced the Charter of the OAU provides that one of the objectives of the African Union shall be to promote and protect human and peoples' rights in accordance with the Charter and other relevant human rights instruments. Therefore, the present Application is in line with the objectives of the African Union as it requires the Court, as an organ of the African Union, to consider whether or not human and peoples' rights are being

protected by the Respondent, in line with the African Charter and other instruments ratified by the Respondent. The Court has already ruled on this matter in its Judgment in Application *003/2012, Peter Joseph Chacha v. United Republic of Tanzania,* delivered on 28 March 2014, where it held that, so long as an Application states facts which revealed a *prima facie* violation of rights, the Application will be admissible (*paragraphs 114 to 124 of the Judgment*).

80. Having examined the arguments of both Parties and considering its finding on jurisdiction above, the Court hereby rejects the Respondent's objection on this ground.

iii. Exhaustion of local remedies

81. The Respondent avers that it is premature for the Applicants to have instituted this matter before this Court, as they have ongoing cases before the national courts which are yet to be finalised. The Respondent adds that the Applicants have the right to appeal any of the cases against them if they feel aggrieved by the decisions of the Courts, but the cases have to come to finality in order for the Applicants to exercise their right to appeal. According to the Respondent, the Applicants have the additional remedy of instituting a Constitutional Petition regarding the alleged violations of rights, vide the *Basic Rights and Duties Enforcement Act, and*, if the Applicants are aggrieved with the Court of Appeal's decision, they have at their disposal, the remedy of instituting a Review of such decision, as provided in Part 111 B-Section 66 of the Tanzania Court of Appeal Rules, 2009.

82. With regard to the pending cases before the High Court, the Respondent submits that cases are heard on a first-come-first-heard basis, and unfortunately, there is a backlog of cases pending at the national Courts. The Respondent adds that it has every intention of ensuring that matters before the Courts are dispensed with in a timely manner as it is cognizant of the fact that justice delayed is justice denied and wishes no unwarranted delays to anyone.

83. The Respondent submits in conclusion that from the foregoing, the Applicants are yet to exhaust the available local remedies, adding that as the exhaustion of local remedies is a fundamental principle prior to filing a matter before the Court, "the Application has not passed the test of admissibility, as it has not met the requirements of Rule 40 (5) of the Rules of Court". The Respondent cites the African Commission's *Communication 333/2006 Sharingo and Others vs. Tanzania* and *Communication No 275/2003, Article 19 vs Eritrea,* to support its argument.

84. In their Reply to the Respondent's argument of failure to exhaust local remedies, the Applicants state that "we, the applicants in the application have not exhausted the local remedies as alleged by the Respondent. Our complaint in the matter is about the unduly prolonged period that has taken us to be in prison from 2006 up to date". They add that they "let go of the chance for review as this was the second time the Court of Appeal was remitting back the application to the High Court, so our defence counsels advised us against going for a review so that we can on the onset shed more light into the application".

85. The Court first notes that the Applicants themselves have conceded that they have not exhausted local remedies. This position is stated in their reply to this preliminary objection, and reiterated during their oral submissions at the public hearings, in which they stressed that their contention "is not about having to exhaust local legal remedies at their disposal but rather that the matter has been unduly prolonged since 2006 when they were incarcerated to date".

86. The question for the Court is to determine whether the reasons given by the Applicants for not exhausting local remedies fall within the permissible scope of the exception as envisaged under Article 56 (5) of the Charter and reflected under Rule 40 (5) of the Rules of Court.

87. Rule 40 (5) which is drawn from Article 56 (5) of the Charter, provides that applications to the Court shall, *inter alia* "be filed after exhausting local remedies, if

any, unless it is obvious that this procedure (local remedies) is unduly prolonged". (emphasis added).

88. There is no dispute as to the availability of local remedies, as even the Applicants themselves acknowledge that remedies are available, but only that they have been unduly prolonged in their case. Rule 40 (5) of the Rules, as interpreted by the Court, provides a test for the credibility of any local remedy. It does not only require the remedy to be available, but requires it to also be effective and sufficient.

89. In *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabè Movement for Human and Peoples' Rights vs. Burkina Faso, (supra)* this Court indeed ruled that an effective remedy refers to "that which produces the expected result and therefore the effectiveness of a remedy as such is measured in terms of its ability to solve the problem raised by the complainant".[3] This position is shared by the African Commission, which held in *Communication 147/95-149/96, Dawda Jawara vs. The Gambia,* that "a remedy is available if it can be pursued by the Applicant without any impediment, it is deemed effective if it offers prospects of success, is found satisfactory by the complainant or is capable of redressing the complaint".[4]

90. The exception under Rule 40 (5) requires that the procedure must not only be prolonged but must have been done so "unduly". This presupposes that resort to the exception will not stand if it is demonstrated by the Respondent that the procedure was 'duly' prolonged'.

91. According to the Black's Law Dictionary, unduly means, "excessively" or "unjustifiably". Thus, if there is a justifiable reason for prolonging a case, it cannot

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[3] African Court on Human and Peoples' Rights, Application 013/2011, Judgment of 28 March 2014, page 24, paragraph 68.

[4] African Commission on Human and Peoples' Rights, *Sir Dawda K. Jawara v. The Gambia,* Communication 147/95-149/96, paragraph 31; African Commission on Human and Peoples' Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe,* Communication 284/03, paragraph 116.

be termed "undue", for example, where a country is caught in a civil strife or war, which may impact on the functioning of the judiciary, or where the delay is partly caused by the victim, his family or his representatives.

92. In *Communication 293/04, Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa vs, Zimbabwe*, the African Commission noted that while it has not developed a standard for determining what is "unduly prolonged", it can be guided by the circumstances of each case and by the common law doctrine of a "reasonable man's test". Under this test, the Commission sought to find out, given the nature and circumstances of a particular case, how any reasonable man would decide.

93. Considering the circumstances of this Application, the question is whether the procedure has been unduly prolonged.

94. Taking all the factors into account, the Court answers the question posed in paragraph 93 in the affirmative. Since the Applicants were arrested and charged before the Respondent's Courts in 2006 until they seized this Court in 2013, and to date, almost ten years since proceedings started, the Respondent's courts have failed to bring finality to the matter. The Respondent's arguments that the delay has been occasioned by applications made by the Applicants for stay of proceedings cannot stand, as it behoves the Courts of the Respondent to bring finality to the matter. Besides, there is no indication that the Respondent's courts granted any of the Applications to stay proceedings in the matters.

95. Furthermore, the Respondent's arguments that the Applicants should have instituted a Constitutional Petition or a Review is unacceptable, because this Court has established that these are extra-ordinary remedies that the Applicants need not resort to, as it was held by this Court in its Judgment delivered on 20 November 2015, in Application 005 of 2013, Alex Thomas v. United Republic of Tanzania (see Alex Thomas, *supra,* paragraph 64).

96. Given the Applicants' situation, compounded by the delay in providing them with Court records and the absence of legal counsel at the later stage of the proceedings, this Court holds that the Respondent's objection relating to non-exhaustion of local remedies is unfounded, and hereby dismisses the same.

iv. Filing of the Application within a reasonable time

97. In its Response to the Application, the Respondent submits that the requirement of reasonableness of time has not been met, as the Applicants have not exhausted all available local remedies as per Rule 40 (5) of the Rules. Therefore, according to the Respondent, it cannot be said that the Application has been filed within a reasonable time from when local remedies were exhausted, as local remedies are yet to be exhausted.

98. The Respondent avers that in the alternative and without prejudice to what has been stated above, should the Court find that local remedies have been exhausted, it is its contention that the Application has not been filed within a reasonable time from when the local remedies were exhausted. It avers further that although Rule 40 (6) of the Rules does not prescribe, define or quantify a period of reasonable time, there are developments in international human rights jurisprudence, which have established a period of six (6) months as reasonable time. The Respondent adds that being in remand prison is not a bar for the Applicants to access the Court, as they in fact have been able to do so, and indeed the Applicants have let a reasonable time elapse from the time they felt aggrieved in 2006 and from the time the decision was delivered in the Court of Appeal, in Criminal Appeal 353 of 2008, to the time they brought the Application before this Court.

99. The Respondent concludes on this point that the Application should be declared inadmissible because of the unreasonable time that has lapsed, in accordance with the provision of Rule 40 (6) of the Rules. The Respondent refers to the *African*

Commission's Communication 308/2005 Majuru vs. Zimbabwe to support its argument.

100. The Applicants for their part submit that "we continue to contend strongly and refute the claims of the Respondent State that we had not exhausted the local and legal remedies because in our application we insist on the time taken by the court to adjudicate our matter". They add that "the application No 006 of 2013 was formally written on 20 June 2013 and sent to the Court on Human and Peoples' Rights registrar. The time period from when the ruling was made by the Court of Appeal sitting at Arusha on 19 March 2013 looking at the time frame, it is within the required six-month period. Although we, the applicants still insist that our main complaint in application No. 006 of 2013 is of the unduly prolonged period in dispensing of justice".

101. The Court has already held in paragraph 96 above, that the objection on exhaustion of local remedies is unfounded, as the bone of contention in this Application is the alleged undue delay in hearing the Applicants' cases. Besides, the Court has deduced from the pleadings that the last Ruling of the Court of Appeal on this matter was on 20 March 2013, and the Application was filed before the African Court on 23 July 2013. In all estimation, a period of four months is a reasonable period of time.

102. The Court therefore holds that the Application was filed within reasonable time, and thus overrules the Respondent's objection on this ground.

103. From the foregoing, the Court is satisfied that the Application before it satisfies all the conditions of admissibility under Article 56 of the Charter and Rule 40 of the Rules, and therefore declares the Application admissible.

IX. MERITS

i. Applicants' submissions on the Merits

104. In their Application dated 23 July 2013, the Applicants allege that the Respondent has violated their *right to own property*, *right to freedom, right to work*[5] and right to be tried within a reasonable time by the national courts.

105. In their Reply of 31 March 2014 to the Respondent's Response of 26 February 2014, the Applicants further allege as follows:

> *"i. That, the Respondent did not study the application properly in application No. 006 of 2013. Since in the application all Applicants are Kenyans;*
>
> *ii. That, we the Applicants are facing charges in the Resident Magistrates Court in Criminal Case No.2 of 2006, and among the Applicants, only eight (8) are facing this charge;*
>
> *iii. In the High Court in murder session No. 10 of 2006 only seven (7) of the Applicants are facing that charge;*
>
> *iv. That, the Application on No. 006 of 2013 before the Court does not have a Tanzanian Applicant as claimed by the Respondent;*
>
> *v. That, the Applicants were flown from Mozambique aboard an army plane and claims made by the Respondent that they were flown to Tanzania and arrested at Mwalimu Julius Nyerere International Airport are strongly refuted although there is a case pending in the High Court No 16 of 2006 on the same matter;*
>
> *vi. That, we the Applicants, on 24th of April 2006 and 3rd March 2006, had charges of Criminal Cases No. 811 of 2005 and No. 647 of 2005 dropped. This is refuted because the said charges were*

[5] *See paragraph 24 supra. The Applicant did not pursue these three allegations in its subsequent pleadings, be it in its Reply to the Respondent's Response or during the public hearing; the Court will therefore not examine these allegations in this judgment.*

dropped on 3rd September 2007, this being No. 811 of 2005 and 16th of January 2009 Criminal Case No. 647 of 2005; and

vii. That, the Respondent did not comply with Section 13 (1) (a), (b) and (c)…of the Criminal Procedure Act".

106. During the public hearing, the Applicants reiterated these allegations.

ii. Respondent's submission on the Merits

107. For its part, in its Response of 26 February 2014, the Respondent contests the allegations made by the Applicants, stating in particular that:

"i. With respect to the alleged forceful kidnap and abduction of the Applicant, the Respondent states that the arrest of the Applicants was lawful and in compliance to the law, and that the allegations were baseless and without merit and should be duly dismissed.

ii. On the allegation that the respondent did not comply with the mandatory requirements of section 13(1)(a)(b)(c) of the Criminal Procedure Act [Cap 20 RE 2002], the Respondent states that the Criminal Procedure Act caters for occasions where a warrant of arrest is not necessary such as circumstances of an emergency situation and situations duly elaborated in Section 14 of the Criminal Procedure Act [Cap 20 RE 2002]. Accordingly, the Respondent avers that 'this allegation is misconceived, lacks merit and should be dismissed'.

iii. On the allegation that the Applicant's application has been pending in the High Court of Moshi unattended since January 2006, the Respondent avers that 'it was the Applicants themselves who, soon after [being] charged, filed Applications for prerogative Orders against their trials which were only just concluded by the Court of Appeal of Tanzania in a

decision delivered on 19th March 2013, remitting the Applications back to the High Court for consideration of preliminary objections'. The Respondent submits therefore that 'this allegation is frivolous and vexatious and should be dismissed'.

iv. On the allegation that the Applicants' right to own property has been violated, the Respondent states that Article 24(1) of the 1977 Constitution of the United Republic of Tanzania guarantees the right to own property. The Court added that 'any properties found to be lawfully owned by the Applicants shall be duly returned to them upon finalization of their cases.

v. On the alleged violation of the Applicants' right to freedom, the Respondent states that the right to personal freedom is guaranteed in Article 15(1) of the Constitution, adding that the detention is lawful and the Applicants are facing unbailable offences and have ongoing cases within the local jurisdiction.

vi. On the alleged violation on the right to work, the Respondent states that the right to work is guaranteed in Article 22(1) of the Constitution, and added that this being the case, 'the allegations are misconceived, without merit and should be duly dismissed'.

vii. On the alleged violation of the Applicants' right to be tried within a reasonable time, the Respondent submits that 'there is no specific time frame for the completion of trials in the United Republic of Tanzania, [and] that any delay in the cases against the Applicants has been of their own doing as they opened various applications, including Criminal Application 16 of 2006 ...and Criminal Appeal No. 79 of 2011...'.

viii. On the Applicants' request to be awarded reparations with regard to claims and allegations made in the Application, the Respondent prays the Court to dismiss this in its entirety".

In conclusion, the Respondent prayed the Court as per paragraphs 48 and 49 *supra.*

108. During the public hearing of 21 May 2015, the Respondent restated its position and refuted the Applicants' allegations, by stating that the Applicants "...upon receiving leave to file for prerogative orders, proceeded to do so and filed Miscellaneous Case No. 16/2006 at the High Court of Tanzania at Moshi on 19 June 2006. This was an Application for Orders of *certiorari* and prohibition in the matter of forceful kidnapping and abduction of the Applicants from the Republic of Mozambique by the Tanzanian Police in collusion with Kenyan and Mozambique Police". The Respondent adds that: "this was not an Application for a fair trial. What the Applicants were seeking was ...

    i. "An Order to stay the Criminal Proceedings in Moshi District Court;

    ii. An Order of certiorari to quash any other Orders in respect of the murder Case;

    iii. An Order of certiorari to quash action to the 1st and 2nd Respondent's with regards to their Criminal Cases;

    iv. An Order of prohibition to prohibit the 3rd and 4th Respondent's from hearing or in any other way determining any of the Cases against them;

    v. An Order for the immediate release of the Applicants".

109. According to the Respondent, "it was not an Application for fair trial but rather it was seeking to be released so that the cases/charges against them would not proceed within the local jurisdiction. There were no human rights issues raised in this Application."

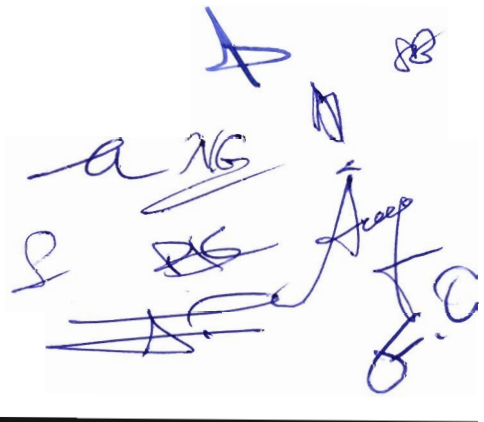
110. The Respondent avers further that the Applicants never raised issues of delay when they were seeking these remedies, thus refuting *"the allegations that the Respondent caused any delay in Criminal Application 16 of 2006, which actually ceased to exist on 19 March 2013, after being quashed by the Court of Appeal"*

111. The Respondent argues that the Applicants never complained about the progress of Application 16/2006 as they themselves were vigorously pursuing their rights and seeking local remedies within the national jurisdiction through this Application, and that throughout the trials, the Applicants were able to afford defence counsel and were represented.

iii. The Court's Findings on the Merits of the Application

112. The Court takes cognizance of the fact that in their Application, the Applicants allege that the Tanzanian Police *"forcefully kidnapped and abducted [them] in collusion with Mozambican and Kenyan Police Officers"*, and illegally handed them over to Tanzanian authorities, and that they have challenged their alleged forceful kidnap and abduction in the High Court of Tanzania at Moshi, *and this case* "*has been delayed since January 2006".*

113. However, it is the Court's understanding that what the Applicants have actually brought before this Court is the alleged prolonged and undue delay in finalising this case of alleged forcefully kidnapped and abduction, which is Criminal Application 16 of 2006, still pending before the High Court of Tanzania at Moshi, together with Criminal Case 2 of 2006 and Criminal Case 10 of 2006. The Court is therefore not called upon to investigate the circumstances under which the Applicants were brought into Tanzania, a matter that was raised only before the domestic courts and not before this court.



114. Although not mentioned in their Application or in their reply, at the public hearing, the Applicants also state that they were not provided with legal aid.

115. It is to these two allegations that the Court will now turn.

116. These two allegations fall within the scope of the rights guaranteed under Article 7 of the African Charter, which provides, inter alia, that:

> "Every individual shall have the right to have his cause heard. This comprises: ...(c) the right to defence, including the right to be defended by counsel of his choice; and (d) the right to be tried within a reasonable time by an impartial court or tribunal". (emphasis added).

a. Alleged violation of Article 7 of the African Charter on account of alleged prolonged and undue delay in finalising cases at the national courts

117. The Applicants have stressed in both their written and oral submissions that their Application to the present Court is based on the prolonged and undue delay in hearing the pending criminal cases by the national courts, specifically Criminal Case 2 of 2006 (conspiracy and armed robbery) and Criminal Application 16 of 2006, (where they are challenging their alleged forceful abduction and kidnap from Mozambique).

118. They allege in this regard that their right to be tried within a reasonable time has been infringed, as these matters have been pending since 2006.

119. This is clearly expressed in their Application dated 23 July 2013, where they stated that "our rights to be tried within a reasonable time by the Courts were violated by the Respondent State". In their Reply dated 25 March 2014, they reiterated that "the contention in the Application is only on allegations of delay by the Respondent State in the matters they are facing within the national justice system, being Criminal Case

2 of 2006 and Criminal Application 16 of 2006". During the public hearing of 21 May 2015, they elucidated that "in Misc Criminal Application No. 16 of 2006 at the High Court concerning the kidnapping and abduction of the Applicants, the proceedings were unduly prolonged...".

120. To elaborate, they submit that when they filed the Application in the High Court of Tanzania on 19 June 2006, it was dismissed on 16 September 2008. The Application took about two years and three months to be finalized. They then appealed before the Court of Appeal in a Notice dated 30 September 2008 and the Court of Appeal delivered its ruling on 14 February 2011. This took another period of two years and five months from the time the Application was dismissed by the High Court to the time the Court of Appeal delivered its Ruling.

121. The Applicants then proceeded to seek leave for extension of time to file their Appeal before the Court of Appeal, at which point the Respondent filed *a* preliminary objection to the effect that the Court ruled strictly on the merits and did not take into consideration the Respondent's preliminary objections. When the Respondent filed an appeal, the Applicants raised a preliminary objection that the appeal was based on an interlocutory order that cannot be appealed.

122. The Applicants' appeal was dismissed, and the matter was remitted back to the High Court and then progressed again to the Court of Appeal, which also held that indeed the trial court decided on the merits of the case without taking into consideration the preliminary objections raised by the Respondent, and again referred the case back to the High Court, at which point the Applicants decided to file this Application before the present Court.

123. In its Response dated 26 February 2014, the Respondent "strongly refutes the allegations that it caused delay in Criminal case 16 of 2006, which [according to the Respondent], actually ceased to exist on 19 March 2013, after being quashed by the Court of Appeal". Respondent contends that "the Applicants never complained about the progression of the Application as they themselves were vigorously pursuing their rights and seeking local remedies within their national jurisdiction through this

Application". The Respondent concluded by stating that the Applicants "...are the authors of their own destiny".

124. During the public hearing, the Respondent submitted that there are "... many reasons for *(sic)* why a case would take a long period of time. First of all, there is the issue of complexity and seriousness of the case. There were ten accused people, therefore a substantial case beyond reasonable doubt had to be built and proven against each Applicant. Indeed, it took a period of nearly two years from when the Applicants were arraigned in Court on 25 January 2006, to when the prosecution presented their first witness on 5 August 2008. However, the position was that there were other suspects and accused persons who were facing extradition trials in Kenya and we felt it prudent that all accused persons should be present at once and then commence with Criminal Proceedings".

125. The Respondent argues further that "what happened in effect was that as charges were being substituted and accused persons were being charged in their individual capacity, it was delaying cases, they had to remit *ab initio* and start again. ... Unfortunately, the cases in Kenya went up to the Court of Appeal and they were never released, so we decided to just proceed with the cases against the accused persons".

126. In its closing submission, the Respondent noted that "we would also like to point out that delays in the case were not strictly by prosecution, they were instances when Defence Counsel did not make appearance, there were instances when Defence Counsel was sick, there were instances when Defence Counsel was appearing before the Court of Appeal, Superior Courts, and what happens when you attend a Superior Court, naturally you do not attend the lower Court. So these allegations of delay were not by the Respondent ...".

127. Concerning the alleged violation of Article 7 on account of prolonged and undue delay, the Court would like to emphasize the importance of a speedy judicial process, especially in criminal matters. *Justice delayed is justice denied,* is a maxim that is often used in this regard. If society sees that judicial settlement of disputes is

too slow, it may lose confidence in the judicial institutions and in the peaceful settlement of disputes. In criminal matters, the deterrence of criminal law will only be effective if society sees that perpetrators are tried, and if found guilty, sentenced within a reasonable time, while innocent suspects, undeniably have a huge interest in a speedy determination of their innocence.

128. Article 7 (1) (d) of the African Charter provides that "Every individual shall have the right to have his cause heard. This comprises: [...] the right to be tried within a reasonable time by an impartial court or tribunal" (emphasis added).

129. In the instant case, the Applicants submit that they filed the case in the High Court of Tanzania on 19 June 2006, and as at the time they filed the Application before this Court, that is, 23 July 2013, the matter was still pending before the domestic Courts of the Respondent.

130. Although the Respondent claims that Misc. Criminal Application 16 of 2006 "actually ceased to exist on 19 March 2013, after being quashed by the Court of Appeal", the Applicants reiterated during the public hearing that *"in Misc. Criminal Application 16 of 2006 at the High Court concerning the kidnapping and abduction of the Applicants, the case has been unduly prolonged and dragging in court for the last nine (9) years to date. There has been no stay, and therefore no reason for trial to take nine (9) years",* emphasizing that the matter was still pending before the Courts of the Respondent. The Court notes in this regard that the Respondent did not tender evidence to support its assertion that the matter has been disposed of.

131. Be that as it may, if the Court were to limit the computation of time from when the matter was instituted, that is, 19 June 2006, to when the Respondent claims the matter was quashed by the Court of Appeal, that is, 19 March 2013, it will be a period of six (6) years and two-hundred and seventy-three (273) days.

132. In the alternative, if one calculates from the time the case was instituted on 19 June 2006 and when the Applicants seized this Court, that is, 23 July 2013, it will be over seven (7) years, and if the Court considers the Applicants' contention that, to date,

the matter is still pending in the High Court of Tanzania at Moshi, (which the Court is minded to do), the period will be more than nine (9) years.

133. Whatever time computation the Court adopts, it is clear that the matter brought before this Court has been pending in the courts of the Respondent for at least six (6) years.

134. Having determined the length of time the matter has been pending at domestic level, the Court will now proceed to determine whether this time is reasonable within the meaning of Article 7 (1) (d) of the Charter.

135. The Court notes from the onset that there is no standard period that is considered "as reasonable" for a court to dispose of a matter. In determining whether time is reasonable or not, each case must be treated on its own merits.

136. As the jurisprudence of the European Court of Human Rights reveals, several criteria may be used to determine whether time is reasonable or not, including inter alia: (i) the complexity of the case; (ii) the behaviour of the applicant; (iii) the behaviour of the national judicial authorities].[6]

137. This Court will therefore use these criteria for its assessment of whether or not the duration of the proceedings in the instant case was reasonable.

i. Complexity of the case

138. To determine the complexity of a case, all aspects of the case must be considered, as the complexity may concern questions of fact as well as of law.

139. In the case-law of the European Court of Human Rights, complexity can be, among other factors, due to: (i) the nature of the facts that are to be established, (ii) the number of accused persons and witnesses, (iii) international elements, (iv) the

[6] *Application 12919/1987 (Boddaert v. Belgium, Application No 11681 of 1985 (Union Alimentaria Sanders Sa v. Spain and Application 32771/1996 (Cuscani v. United Kingdom).*

joinder of the case to other cases, (v) the intervention of other persons in the procedure. Therefore, a more complex case may justify longer proceedings.[7] The European Court however indicated that even in very complex cases unreasonable delays may still occur.[8]

140. In *Ivan Iovchev Petrov v. Bulgaria*,[9] the Applicant and a certain Mr S.V. were arrested in Sofia on suspicion of having stolen a car in 1990. They were charged and placed in pre-trial detention. In the beginning of 1991, Mr S.V. managed to escape during a transfer from one detention facility to another. In May 1991, the Applicant was released on bail. On 24 July 1991, the Applicant was arrested in Gabrovo on charges of theft. The case was joined to other cases pending against Mr S.V., some of which also concerned the applicant. On 5 February 1993, the proceedings were stayed as Mr S.V.'s whereabouts were unknown. According to the Applicant, Mr S.V. had settled in Greece, but during the following years had come back to Bulgaria every summer without ever having been stopped or bothered by the authorities, and had even renewed his identity documents. The Court concluded that it took altogether about 9 years for the matter to be disposed of.

141. In determining whether or not the time was reasonable, the European Court held that "... the case was factually complex, as it concerned numerous offences committed in different places. However, it does not appear that this was the principal reason for the delays in the investigation. Nor does it seem that the Applicant contributed in any way to the protraction of the proceedings, which was apparently mainly the result of the authorities' inability to track down and summon his co-accused, Mr. S.V. The absence of a co-accused cannot justify a period of inactivity as long as the one obtaining in the present case, where almost no investigative actions were carried out for a period of about nine years, especially since, in view of

[7] See *Boddaert v. Belgium* (Application 12919/87) in which a period of six years and three months was not considered unreasonable by the Court since it concerned a difficult murder enquiry and the parallel progression of two cases.
[8] See *Ferantelli and Santangelo v. Italy* (Application 19874/92) concerning a murder trial that took sixteen years.

[9] Application 15197/02.

the delay, the authorities could have envisaged separating the cases against the applicant and Mr S.V".

142. In the instant case, Respondent avers that the delay in finalising the matter could be attributed to the complexity of the case. The Respondent argues further that "what happened in effect was that as charges were being substituted and accused people were being charged in their individual capacity, it was delaying cases, they had to remit *ab initio* and start again. Unfortunately, the cases in Kenya went up to the Court of Appeal and they were never released, so we decided to just proceed with the Cases against the accused people".

143. The Respondent thus advances two main elements to justify the complexity of the case: one, the fact that there were ten accused persons and because of that it took a period of nearly two years from when the Applicants were arraigned to when the prosecution presented their first witness; and second, that there were other suspects and accused persons who were facing extradition trials in Kenya and the Respondent felt it prudent that all accused persons should be present before commencing proceedings.

144. First, this Court does not believe that simply because the accused persons are many a matter before a court is automatically complex. Besides, by linking the prosecutions of the Applicants to other cases pending before another Court whose proceedings were outside the control of the Respondent means putting the rights and personal liberty of the Applicants at the mercy of a foreign jurisdiction. This was a gamble and one which ended up badly, because in the end, the so-called 'other suspects", facing extradition from Kenya never appeared. The fact that the Respondent finally decided to proceed with the trial of the Applicants after failing to secure the extradition of the 'other suspects' from Kenya, demonstrates that it was possible to separate the cases and prosecute them *ab initio*. The delay had therefore nothing to do with the complexity of the case and was as such unjustified.

ii. Conduct of the Applicants

145. During the public hearing, Respondent claimed that "... delays in the cases were not strictly by prosecution, they were instances when the Defence Counsel did not make appearance, there were instances when Defence Counsel was sick, there were instances when Defence Counsel was appearing before the Court of Appeal, Superior Courts, and what happens when you attend a Superior Court, naturally you do not attend the lower Court. So these allegations of delay were not by the Respondent ...".

146. The Court will therefore examine the extent to which the Applicants contributed to the delay.

147. The Applicants admit that they filed Applications for stay of criminal proceedings against them. However, the Applications for stay were dismissed, and the appeal against that dismissal has been pending. The Applicants cannot be blamed for using procedural avenues that are available to them to secure their freedom.

148. In *Unión Alimentaria Sanders SA v. Spain,* the European Court of Human Rights held that the applicant's duty is only to "show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings". [10]

149. The Court takes note of the Respondent's arguments that defence counsel may have played a part in the delays, in that they were sick, did not appear or preferred to appear before superior courts in other cases, but does not demonstrate the extent to which this action of defence counsel delayed the proceedings or whether they deliberately wanted to delay proceedings. There is no evidence before this Court to indicate that any of the action of the defence as narrated by the Respondent, was aimed at stalling the process.

[10] Judgment of 7 July 1989, Application 11681/85, § 35

150. The Court therefore dismisses Respondent's argument according to which the Applicants were partly responsible for the delay.

iii. Conduct of the domestic judicial authorities

151. During the public hearing, the Applicants allege that at the Resident Magistrate's Court in Moshi, "there were over 55 adjournments in the life of the Case, adding that in the first four years of the case, only one witness testified, and throughout the cases, "the Applicants constantly questioned the very length of the trials … , up to a year after they had been charged, the most frequent reason for seeking adjournment was that they were still constituting the Police file, that investigations were still ongoing". The Respondent did not challenge this assertion of the Applicants.

152. The Applicants further state that in an effort to push the matter before the High Court, they wrote and attempted to communicate with their counsel in vain, so they wrote a letter to the High Court on 16 August 2013, requesting it to set a date for the hearing of their matter as ordered by the Court of Appeal but that letter has not been responded to.

153. Even assuming that the defence counsel were trying to delay the process, there rests a special duty upon the authorities of domestic courts to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay. Judges also have the right, as well as the duty, to actively monitor and ensure that judicial proceedings before them comply with the reasonable time requirement. The European Court of Human Rights has held, in *Cuscani v. the United Kingdom,* for

example that "the trial judge is the ultimate guardian of fairness"[11], and expects a more pro-active attitude of the trial judge.[12]

154. Therefore, looking at the European Court's case-law, delays that have been attributed to the State in criminal cases include the transfer of cases between courts, the hearing of cases against two or more accused together, the communication of judgment to the accused and the making and hearing of appeals.[13]

155. On the basis of the above, this Court concludes that the time was unreasonable not because of the complexity of the case, nor the action of the Applicants, but more so because of the lack of due diligence on the part of the national judicial authorities. The Court cannot condone the Respondent's action of putting the case on ice for a period of almost two years on the ground that the authorities were still investigating the matter or because they were waiting for the extradition of co-accused from another foreign jurisdiction. The Court thus finds the Respondent in breach of Article 7 (1)(d) of the African Charter, which guarantees the right to be tried within a reasonable time.

b. Alleged violation of Article 7 on account of alleged failure to provide Applicants with legal aid

156. In their Application dated 23 July 2013 and their Reply of 31 March 2014, the Applicants were silent on the question of legal aid. However, during the Public Hearings, they raised the issue and stated that they need not have applied for legal aid for it to be granted, but rather, the trial magistrate and Appellate Judges had an obligation to enquire into whether or not they qualified for legal aid, according to the criteria set out in Section 3 of the Legal Aid (Criminal Proceedings) Act.

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[11] *(Appl. No. 32771/96) ECtHR 24 September 2002*

[12]: *Ibid*

[13] N. Mole and C. Harby, *The Right to a Fair Trial*, Human Rights Handbooks No. 3, pp. 27 - 28.

157. During the public hearing, the Respondent refuted the Applicants' allegations and argued that "throughout the trials, the Applicants had Defence Counsel, they were able to afford Defence Counsel. This is documented in the proceedings, there was a Mr. Ojare and a Mr. Mwale and Judgments that we have produced will also show that they were suitably and adequately represented by seasoned Defence Counsel."

158. The Respondent avers further that "the Applicants have always had legal representation, they have never requested for legal aid vide the Legal Aid Criminal Proceedings Act [Cap 21 RE 2002], and are yet to request and apply for legal aid vide the provisions of Cap 21, therefore, it will be unfair for the Court to issue such a declaration, as the Applicants have not even made it known to the Respondent that they require legal aid and legal representation".

159. It would appear from the facts before this Court that Applicants have been represented all along by counsel which they or their relatives engaged. It is not clear whether if they had not engaged counsel, the Respondent would have provided them with counsel. What is important however is that they had counsel, at least up to when their counsel deserted them. It is also clear from the pleadings that the Applicants are not claiming that the Respondent should have provided them with counsel throughout the trial, and it is not correct to expect the Respondent to provide legal aid to Applicants who already had counsel of their choice.

160. However, in its Response during the public hearing, the Respondent confirmed that it was "aware that Counsel withdrew himself in Criminal Case No. 2 of 2006. However, as the Applicants did not complain that they were aggrieved by their Advocates' departure and required legal assistance, the Respondent did not take any action. We reiterate that there was no attempt by the Applicants to apply for legal assistance vide the Legal Aid Criminal Proceedings Act [Cap 21 RE 2002]".

161. It should be noted that when Applicants filed this Application before this Court, they had been deserted by their counsel and still had cases pending against them in the Respondent's Courts. The Respondent was aware of the situation.

162. In determining whether or not the Respondent has violated the Applicants' right to fair trial by not providing legal aid, the Court will have recourse to the elements of the right to fair trial guaranteed under the African Charter and other international human rights instruments ratified by the Respondent.

163. The relevant provision of the African Charter in this regard is Article 7(1)(c) of the Charter. It provides that:

> *"Every individual shall have the right to have his cause heard. This comprises:*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) the right to defense, including the right to be defended by counsel of his choice;"*

164. Article 7 of the Protocol provides that:

> *"The Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the State concerned."*

165. In view of the fact that the Respondent ratified the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976, in accordance with Article 7 of the Protocol, the Court can not only interpret Article 7(1)(c) of the Charter in light of the provisions of Article 14(3)(d) of the ICCPR but also apply the latter provisions.

166. The Court notes that Article 14(3)(d) of the ICCPR is more elaborate than Article 7(1)(c) of the Charter; it reads as follows:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) ...

(b) ...

(c) ...

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

167. Article 14(3)(d) of the ICCPR contains three distinct guarantees. First, the provision stipulates that accused persons are entitled to be present during their trial. Second, the provision refers to the right of the accused to defend himself or herself, whether in person or through legal assistance of their own choosing. Third, the provision guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case, if they do not have sufficient means to pay for it.

168. Given the serious nature of the offence that the Applicants had been charged with, the Court is of the view that all necessary measures should have been taken by the Respondent, in the interest of justice, to ensure that the Applicants were afforded legal assistance.

169. The Court is fortified in its reasoning by the decisions of the African Commission, the United Nations Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights, which are courts of similar

jurisdiction. Declarations and Guidelines of the African Commission on the right to legal aid are equally instructive in this matter.

170. In its case law, the Commission has indeed emphasized the importance of legal assistance. In Communication 231/99, Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) vs. Burundi, "the Commission emphatically recalls that the right to legal assistance is a fundamental element of the right to fair trial. More so, where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case".[14]

171. This Court also draws inspiration from the jurisprudence of the Human Rights Committee on the interpretation and application of Article 14 (3) (d) of the ICCPR. This is with respect to Communication No. 377/89, Anthony Currie vs. Jamaica, whose circumstances are similar to those of the Applicants in the case before this Court, as both raised issues of compliance with constitutional guarantees of their rights to fair trial in their criminal trials and appeals. In its observations relating to this communication, the Human Rights Committee held that:

> *"The author has claimed that the absence of legal aid for the purpose of filing a constitutional motion itself constitutes a violation of the Covenant. The Committee notes that the Covenant does not contain an express obligation as such for a State to provide legal aid for individuals in all cases but only, in accordance with article 14 (3) (d), in the determination of a criminal charge where the interests of justice so require".*

[14] See also African Commission on Human and Peoples' Rights *The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (2003); *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice in Africa* (2006).

172. This Court may further refer to the case law of the European Court. Article 6 (3) (c) of the European Convention of Human Rights indeed contains two minimum distinct guarantees for a person charged with a criminal offence. First, right to defend himself in person or through legal assistance of his choosing. Second, the provision guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it.

173. In its case law, the European Court has held that a violation of Article 6 (3) (c) had occurred because the domestic court did not act despite being aware of the applicant's problems with the appointed lawyer.

174. In *Artico v. Italy,*[15] *the* Applicant had been granted legal aid for his appeal to the Court of Cassation. The lawyer who had been assigned to the applicant did not in effect act for him at all and requested to be replaced, claiming other work commitments and ill-health. The court did not respond to that request, and the applicant's numerous subsequent requests to the court for substitute counsel were denied on the grounds that the applicant already had a lawyer appointed to represent him and was as a result forced to represent himself at the hearing.

175. Recalling that the Convention was intended to guarantee not rights that are theoretical and illusory, but rights that are practical and effective, particularly so for the rights of the defence in view of the prominent place held in a democratic society by the right to fair trial from which they derive, the Court found that the right to free legal assistance in Article 6 (3) (c) is not satisfied simply by the formal appointment of a lawyer, but requires that legal assistance must be effective. It added that the state must take "positive action" to ensure that the applicant effectively enjoys his or her right to free legal assistance.[16]

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[15] Judgment of May 13, 1980
[16] Artico case, paragraphs 33-35

176. While a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes, it is for the competent authorities to take steps to ensure that the applicant effectively enjoys the right in any particular circumstance.[17]

177. In its case-law, the European Court has identified four factors that should be taken into account, either severally or jointly, when determining if the "interest of justice" necessitates free legal aid, namely:

    a. The seriousness of the offence;
    b. The severity of the potential sentence;
    c. The complexity of the case and;
    d. The social and personal situation of the defendant.

178. In *Benham vs. The United Kingdom*[18], the applicant had been charged with non-payment of a debt and faced a maximum penalty of three (3) months in prison. The European Court held that this potential sentence was severe enough that the interests of justice demanded that the applicant ought to have benefited from legal aid. In *Salduz vs. Turkey*, the same Court held that legal aid should be available for people accused or suspected of a crime, irrespective of the nature of the particular crime and that legal assistance is particularly crucial for people suspected of serious crimes.[19]

179. In a similar vein, the Inter-American Court of Human Rights has found violations of Article 8 of the American Convention on Human Rights which provides for the right to a fair trial, similar to the provisions of Article 7 of the Charter. Of note is the *Case of Suárez-Rosero v Ecuador* where the Inter-American Court of Human Rights affirmed the minimum guarantees to which every person is entitled under Article 8(2)(c), (d) and (e) of the American Convention on Human Rights, with full equality.[20]

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[17] Ibid, paragraph 36.
[18] Application 19380/92, Judgment of 10 June 1996 (Grand Chamber).
[19] Application No. *36391/02*, *Salduz v Turkey*, Judgment of 27 November 2008 (Grand Chamber) paragraph 54.
[20] Judgment of 12 November, 1997 (Merits) paragraph 82. These guarantees include "[a]dequate time and means for the preparation of his defense; [t]he right of the accused to defend himself personally or to be

180. This Court also notes that legal aid is specifically guaranteed in the legal system of the Respondent State, including the Constitution and other legislation, and that various judgments of the High Court and Court of Appeal have emphasized the need for legal aid.[21]

181. Given the serious nature of the charges against the Applicants, this Court is of the opinion that the Respondent was under an obligation to provide them with legal aid or at least inform them of their right to legal aid, when it became clear that they were no longer represented. It does not matter whether the case is at pre-trial, trial or appeals stage. The Applicants are entitled to legal aid at all stages of the proceedings.

182. The Court does not accept Respondent's argument that the Applicants did not complain that they were aggrieved by their Advocates departure and required legal assistance. Legal aid is a right and must be enjoyed whether requested by the accused or not. The essence of providing legal aid is to ensure a fair judicial process and avoid the possibility of miscarriage of justice. Where the Applicant is not informed of this right or does not invoke this right, the onus is on the judicial authorities to activate the right. The Applicants were under no obligation to apply for legal aid to the Respondent to provide the same, but the Respondent was under an obligation to ensure they were represented. See Judgment on Application 005 of 2013 *Alex Thomas v. United Republic of Tanzania delivered on 20 November 2015.*

183. In light of all the above, the Court concludes that the Applicants were entitled to legal aid and need not have requested for it. The Court notes that even though the Respondent was aware that the Applicants' Counsel had abandoned them, the

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assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; [and] the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law..."

[21] [See for example Article 13(6) and 15(2) of Tanzania, Section 310 of the Criminal Procedure Act of Tanzania, Section 3 of the Legal Aid (Criminal Procedure Act) , the Court of Appeal judgment in *Moses Muhagama Laurance v. Government of Zanzibar* and the High Court Judgment in *Alimasi Kalumbeta v. R* 1982 TLR 329.

Respondent proceeded with the case against them and eventually convicted them without counsel.

184. Having considered all these circumstances, the Court finds that it was incumbent upon the trial magistrate and Appellate Judges to ensure that, the Applicants were provided with legal aid. Therefore, the Respondent failed to comply with its obligations under the African Charter to provide the Applicants with legal representation in respect of Criminal Case 002 of 2006 for which some of them were eventually convicted and sentenced to 30 years.

X. Reparations

185. In their Application, the Applicants request reparations for the violations alleged, should the Court rule in their favour.

186. The Respondent on the other hand, in its oral submissions at the public hearings prayed that the "Applicants should not be awarded any reparations with regard to claims and allegations made in this Application against the United Republic of Tanzania".

187. The Respondent further states that "the Applicants have never sought reparations before the municipal Courts of the Respondent State, therefore this legal redress cannot now be sought from the African Court, adding that, the Respondent has not violated the provisions of the African Charter on Human and Peoples' Rights to warrant an order for reparations, and that the Applicants have to move the Court through a formal request for Reparations, and in this regard seeking reparations through the Application is premature".

188. Article 27(1) of the Protocol gives the Court powers to make orders for reparations. It reads as follows: *"if the Court finds there has been violation of human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation"*.

189. In this regard, Rule 63 of the Rules specifies that "the Court shall rule on the request for reparations submitted in accordance with Rule 34 (5) of the Rules, by the same decision establishing the violation of human and peoples' rights or, if the circumstance so require, by a separate decision".

190. The Court will provide for some kinds of reparation in the operative part of the present judgment and will decide on the other forms of reparation in a further judgment, taking into consideration the further submissions of the Parties in this matter.

XI. Costs

191. Both Parties to the present case prayed for costs to be borne by the other party. The Court notes that Rule 30 of the Rules states that *"Unless otherwise decided by the Court, each party shall bear its own costs."*

192. The Court will rule on this issue in its judgment on the other forms of reparation.

193. For these reasons:

The Court unanimously:

i. *Dismisses* the Respondent's preliminary objections on the jurisdiction *ratione materiae* and *ratione personae* of the Court to hear the Application;

ii. *Decides* that it has jurisdiction to examine the Application;

iii. *Dismisses* the Respondent's preliminary objection based on the fact that the Application does not comply with the requirement of Rule 34(1) of the Rules of Court;

iv. *Dismisses* the Respondent's preliminary objection on the admissibility of the Application on the ground that it is incompatible with the African Charter and the Constitutive Act of the African Union;

v. *Dismisses* the Respondent's preliminary objection on the admissibility of the Application on the ground that Applicants have failed to exhaust local remedies;

vi. *Dismisses* the Respondent's preliminary objection on the admissibility of the Application on the ground that Application was not filed within a reasonable time.

vii. *Decides* that the Application is admissible;

viii. *Holds* that there has been a violation of Article 7(1) (c) and (d) of the Charter by the Respondent;

ix. *Orders* the Respondent to provide legal aid to the Applicants for the proceedings pending against them in the domestic courts.

x. *Orders* the Respondent to take all necessary measures within a reasonable time to expedite and finalise all criminal appeals by or against the Applicants in the domestic courts.

xi. *Orders* the Respondent to inform the Court of the measures taken within six months of this judgment.

xii. In accordance with Rule 63 of the Rules of Court, the Court directs the Applicant to file submissions on the request for other forms of reparation within thirty (30) days thereof and the Respondent to reply thereto within thirty (30) days of the receipt of the Applicant's submissions.

Done, at Arusha, this 18th day of March 2016, in the English and French languages, the English text being authoritative.

Signed:

Elsie N. THOMPSON, Vice President;
Gérard NIYUNGEKO, Judge
Fatsah OUGUERGOUZ, Judge
Duncan TAMBALA, Judge
Sylvain ORÉ, Judge
Ben KIOKO, Judge
Rafâa Ben ACHOUR, Judge
Solomy B. BOSSA, Judge
Angelo MATUSSE, Judge
and Nouhou DIALLO, Deputy Registrar

2016-03-18

Judgement in Wilfred ONYANGO NGANYI Et Al Delivered on 18 March 2016

African Court on Human and Peoples' Rights

African Court on Human and Peoples' Rights