AFRICAN UNION

الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

APPLICATION 002/2017

FOR INTERPRETATION OF THE JUDGMENT OF 3 JUNE 2016

IN THE MATTER OF MOHAMED ABUBAKARI

V.

UNITED REPUBLIC OF TANZANIA

JUDGMENT

28 SEPTEMBER 2017

The Court composed of: Sylvain ORÉ, President, Ben KIOKO, Vice-President; Gérard NIYUNGEKO, El Hadji GUISSÉ, Rafâa BEN ACHOUR, Solomy B. BOSSA, Angelo V. MATUSSE, Ntyam S. O. MENGUE, Marie-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Judges; and Robert ENO, Registrar.

In the Request for Interpretation of the Judgment of 3 June 2016 in the Matter of Mohamed Abubakari v. United Republic of Tanzania,

Given that Judges Elsie N. THOMPSON, Fatsah OUGUERGOUZ and Duncan TAMBALA who heard the substantive case are no longer members of the Court, Rule 66 (4) of the Rules of Court (herein-after referred as "the Rules) was applied.

After deliberation,

renders the following Judgment:

I. PROCEDURE

1. The United Republic of Tanzania, pursuant to Article 28 (4) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (herein-after referred to as "the Protocol") and Rule 66(1) of the Rules, filed before the Court an Application for interpretation of the Judgment of 3 June 2016 on the above-mentioned matter.

2. Dated 24 January 2017, the Application was received at the Registry of the Court on 30 January 2017.

3. On 2 February 2017, the Registry served a copy of the Application on Mr. Mohamed Abubakari and invited the latter to submit his written observations, if

any, within thirty (30) days from receipt thereof, in accordance with the provisions of Rule 66(3) of the Rules.

4. On 28 March 2017, Mr. Mohamed Abubakari filed his observations, after the expiry of the 30 days deadline, and prayed the Court to accept the said observations.

5. On 2 April 2017, the Court examined the Applicant's request and decided to grant the same in the interest of justice.

6. By notice dated 11 April 2017, the Parties were notified of the Court's decision to close the written procedure. The Court did not deem it necessary to hold a public hearing.

II. THE REQUEST FOR INTERPRETATION

7. As indicated above, the instant Application for interpretation concerns the Judgment rendered by the Court on 3 June 2016 in the Matter of *Mohamed Abubakari v. The United Republic of Tanzania* (Application 007/2013), the relevant paragraphs of which are worded as follows in the operative provisions:

"For these reasons, the Court,

Unanimously,

(...)

ix) Rules that the Respondent State has violated Article 7 of the Charter and Article 14 of the Covenant as regards the Applicant's rights to defend himself and have the benefit of a Counsel at the time of his arrest; to obtain free legal assistance during the judicial proceedings; to be promptly given the documents in the records to enable him defend himself; his defense based on the fact that the Prosecutor before the District Court had a conflict of interest with the victim of the armed robbery, to be considered by the Judge; not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification

parade; and to have his alibi defense given serious consideration by the Respondent State's Police and Judicial Authorities;

(...)

(xii) Orders the Respondent State to take all appropriate measures within a reasonable time frame to remedy all violations established, excluding a reopening of the trial, and to inform the Court of the measure so taken within six (6) months from the date of this Judgment

(...)"

8. Referring to Rule 66(1) of the Rules, the United Republic of Tanzania avers that it is encountering difficulties in the implementation of the Judgment due to varied interpretations by the actors involved in the administration of criminal justice at the national level, who are required to implement the Judgment.

9. Consequently, it prays the Court to provide it with clarifications on the meaning of the expression "all appropriate measures" used in point xii of the operative provisions of the Judgment, adding that the interpretation of the said terms will enable it to take tangible and definitive action.

10. The United Republic of Tanzania also seeks to understand what the Court means by the expression "remedy all violations established" given, it emphasizes, that the acts concerned have already been carried out.

III. OBSERVATIONS OF MR. MOHAMED ABUBAKARI

11. Mohamed Abubakari first indicates that the Application for interpretation seems to have been filed within the time frame prescribed under Rule 66 of the Rules; that, however, the time frame under the said Rule 66 cannot be interpreted in isolation; and that the other measures in the operative provisions of the Court's Judgment of 3 June 2016 must be taken, in consideration of the clause which enjoins the United Republic of Tanzania to notify the Court of the measures taken to remedy the violations established within six (6) months following the date of the Judgment.

12. He argues that the United Republic of Tanzania filed a report on the measures it has taken outside the specified time of six (6) months set by the Court, and that the said report represents only partial implementation of the measures ordered by the latter.

13. Abubakari further maintains that had the United Republic of Tanzania sought to have all or part of the Judgment interpreted, it could have so requested as soon as possible and in any case, prior to the expiry of the time frame ordered by the Court to receive the Respondent's report; and that the Application for interpretation should therefore have preceded the report on implementation.

14. He further contends that there are various options, either taken alone or in combination, which the United Republic of Tanzania effects in compliance with Court's Order to "take all appropriate measures within a reasonable time frame to remedy all the violations established"; that the United Republic of Tanzania legislation provides for many possible remedies for wrongfully convicted persons such as himself; that these remedies include, but not limited to, the following:

    a) Remission of sentence, provided for under the Tanzanian Penal Code CAP 16 which at section 27 (2) provides for the remission of prison sentence in respect of which the United Republic of Tanzania could have filed an Application at the Court of Appeal for the remission of Applicant's thirty (30) years prison sentence.

    b) Outright release or conditional release, provided under section 38 of the Tanzanian Penal Code which confers on the Court which convicted an offender the power to order his absolute or conditional discharge, provided that the offender does not commit another offence during the period of conditional discharge, and such period must not exceed 12 months. In this regard, since the Applicant has already served twenty (20) years of his thirty (30) years' sentence, and considering the favourable Judgment of this Court and his conduct during his imprisonment, the United Republic of Tanzania could have taken this measure.

c) Presidential pardon, provided under section 45 of the Constitution of the United Republic of Tanzania, pursuant to which the President of the United Republic of Tanzania may grant pardon, with or without condition, to any person convicted of an offence by a national Court.

15. Lastly, Mr. Abubakari submits that the delay in implementing the Court's Orders and in submitting the relevant report on compliance thereof, has aggravated and unduly prolonged the violation of his rights; and for these reasons, he prays the Court to:

" i) rule that the United Republic of Tanzania has not complied with the Order of this Court enjoining it to file a report on the implementation of its Orders within six (6) months of delivery of the Judgment";

ii) declare the Application frivolous, vexatious and an abuse of the process of this Honourable Court;

iii) order his release pending the Judgment on reparations."

IV. JURISDICTION OF THE COURT

16. As indicated above, the instant Application for interpretation concerns the Judgment rendered by the Court on 3 June 2016.

17. In terms of Article 28 (4) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (herein-after referred to as "the Protocol") "... the Court may interpret its own decision".

18. The Court consequently finds that it has jurisdiction to interpret the said Judgment.

V. ADMISSIBILITY OF THE APPLICATION

19. Rule 66 (1) and (2) of the Rules provide as follows:

"1. Pursuant to Article 28 (4) of the Protocol, any party may, for the purpose of executing a judgment, apply to the Court for interpretation of the judgment within twelve months from the date the judgment was delivered unless the Court, in the interest of justice, decides otherwise."

2. The Application shall be filed in the Registry. It shall state clearly the point or points in the operative provisions of the judgment on which interpretation is required."

20. It emerges from these provisions that an Application for interpretation of a Judgment can be declared admissible only when it fulfills the following three conditions:

a) its objective must be to facilitate the execution of the Judgment;

b) it must be filed within twelve (12) months following the date of the delivery of the Judgment unless the Court, "in the interest of justice decides otherwise; and

c) it must clearly state the point or points of the operative provisions of the Judgment on which interpretation is required.

21. As regards the purpose of the instant Application, the United Republic of Tanzania requests interpretation of the expression "all appropriate measures" used in the operative provisions of the Judgment.

22. The Court notes that this request actually aims to clarify a point in the operative provisions of the Judgment rendered by the Court on 3 June 2016, and thus facilitate its execution.

23. Consequently, it finds that the Application fulfills the first condition provided under Rule 66(1) of the Rules.

24. With regard to the time limit within which an Application should be filed, the Court notes that the applicable time limit is that which is prescribed under Rule 66 (1) of the Rules, and not the time frame of six (6) months allowed by the Court for the Respondent to notify it of the measures taken.

25. The United Republic of Tanzania, having filed its Request for interpretation on 30 January 2017, that is, within the time frame of eight (8) months and twenty-seven (27) days, the Court finds that the United Republic of Tanzania seized the Court of its Application for interpretation within the statutory time frame of twelve (12) months provided under Rule 66 (1) of the Rules.

26. Lastly, the United Republic of Tanzania clearly stated the points in the operative provisions of the Judgment on which interpretation is required, namely, the terms and expressions used in point xii of the operative provisions of the Judgment.

27. In view of the aforesaid, the Court finds that the instant Application for interpretation fulfills all the conditions of admissibility.

VI. INTERPRETATION OF THE JUDGMENT

28. In its Judgment of 3 June 2016, the Court ordered the United Republic of Tanzania to take all appropriate measures to remedy the violations found.

29. On the first question, the United Republic of Tanzania prays the Court to interpret the expression "all appropriate measures" used in point xii of the operative provisions of the Judgment.

30. The Court notes that, in examining an Application for interpretation, it does not complete or modify the decision it rendered - it being a final decision with the effect of *res judicata* - but clarifies the meaning and scope thereof.

31. In the context of the instant request for interpretation, the Court wishes to recall the principle generally applied by international jurisdictions that reparation should, as far as possible, erase the consequences of an unlawful act and restore the state which would have presumably existed if the act had not been committed.

32. In this regard, Article 27(1) of the Protocol provides that: "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

33. As has been stated above, the most appropriate form of remedy for violation of the right to a fair trial is to act in such a way that the victim finds him/herself in the situation that he/she would have been had the violation found not been committed. To attain this objective, the United Republic of Tanzania has two options: it should either reopen the case in compliance with the rules of a fair trial or take all appropriate measures to ensure that the Applicant finds himself in the situation preceding the violations.

34. As regard the first option, the Court is of the view that reopening the case would not be a just measure, in as much as the Applicant has already spent nineteen (19) years in prison, more than a half of the prison sentence, and given that a fresh judicial procedure could be long.[1] Accordingly, the Court has excluded such a measure.

[1] Application No. 007/2013 Mohamed Abubakari v. United Republic of Tanzania, Judgment of 3 June 2016, Paragraph 235.

35. Concerning the second option, the Court intended to offer the United Republic of Tanzania room for evaluation to enable it to identify and activate all the measures that would enable it to eliminate the effects of the violations established by the Court.

36. The Court specifies in this respect that in its Judgment of 3 June 2016, it did not state that the Applicant's request to be set free was unfounded. It merely indicated that it could order such a measure directly, only in special and compelling circumstances which have not been established in the instant case.

37. The second question posed reads as follows " ... given that these acts have already been carried out, the United Republic of Tanzania would like to understand how to remedy the violation and interpret the term "remedy".

38. The Court clarifies that the expression "all appropriate measures" includes the release of the Applicant and any other measure that would help erase the consequences of the violations established, restore the pre-existing situation and re-establish the rights of the Applicant.

39. The Court further clarifies that the expression "remedy all violations established" should mean to "erase the effects of the violations established" through adoption of the measures indicated in the preceding paragraph.

VII. COSTS

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

41. Taking into account the circumstances of this matter, the Court decides that each Party should bear its own costs.

42. For these reasons,

The Court,

Unanimously:

(i) *Declares* that it has jurisdiction to hear the instant Application

(ii) *Declares* that the Application is admissible

(iii) *Rules* that by the expression "all appropriate measures", the Court was referring to the release of the Applicant or any other measure that would help erase the consequences of the violations established, restore the pre-existing situation and re-establish the rights of the Applicant

(iv) *Rules* that the expression "remedy the violations established" means "erase the effects of the violations established" through the adoption of the measures indicated in point iii above

(v) *Rules* that each Party shall bear its own costs.

Signed:

Sylvain ORÉ, President

Ben KIOKO, Vice-President

Gérard NIYUNGEKO, Judge

El Hadji GUISSÉ, Judge

Rafâa BEN ACHOUR, Judge

Solomy B. BOSSA, Judge

Angelo V. MATUSSE, Judge

Ntyam S. O. MENGUE, Judge

Marie-Thérèse MUKAMULISA, Judge

Tujilane R. CHIZUMILA, Judge

Chafika BENSAOULA, Judge

Robert ENO, Registrar.

Done at Arusha this Twenty Eighth Day of September in the Year Two Thousand and Seventeen, in English and French, the English text being authoritative.