



**IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION
AT ARUSHA**

**(Coram: Nestor Kayobera, P.; Geoffrey Kiryabwire, VP; Sauda Mjasiri,
Anita Mugeni and Kathurima M'Inoti, JJA.)**

APPEAL NO 4. OF 2021

BETWEEN

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA..... APPELLANT**

AND

HON. MARTHA WANGARI KARUA.....RESPONDENT

AND

**HON. ANNE MUMBI WAIGURU
HON. PETER NDABIRE.....INTERVENERS**

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica K. Mugenyi (Principal Judge), Hon. Dr. Justice Charles O. Nyawello and Hon. Charles A. Nyachae, JJ.) dated 30th November, 2020 in Reference Number 20 of 2019, Martha Wangari Karua-V- The Attorney General of the Republic of Kenya]

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JUDGMENT OF THE COURT

INTRODUCTION

1. This is an Appeal by the Attorney General of the Republic of Kenya (the Appellant) against the Judgment of the First Instance Division of this Court (hereinafter referred to as “the Trial Court”) dated 30th November 2020 arising from Reference No. 20 of 2019, by which the Trial Court allowed the Reference in the following terms: “

- i. *A DECLARATION is hereby issued that the Respondent State, through the acts and/or omissions of its judicial organ, violated its commitments to the fundamental and operational principles of the EAC, specifically the principle of Rule of Law guaranteed under Articles 6(d) and 7(2) of the EAC Treaty.*
- ii. *A DECLARATION is hereby issued that the Respondent State infringed on the Applicant’s right to access to justice.*
- iii. *Compensation in general damages in the sum of USD 25,000 (twenty-five thousand) is hereby awarded to the Applicant.*
- iv. *Simple interest at 6% per annum is awarded against the compensation designated in paragraph 70 (iii) hereof from the date of this judgment until payment in full.*
- v. *Costs are awarded to the Applicant.”*

2. It is the case of the Respondent that the impugned Decision of the Supreme Court of Kenya, in Petition No.3 of 2019, failed to uphold the rule of law knowing that she was not at fault.

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alia that the said High Court of Kenya at Kerugoya, Kirinyaga County misapprehended the Appellant's State's Constitution and electoral laws and that it was demonstrably biased against the Respondent, as a result of which it arrived at a legally untenable decision.

9. On 2nd March 2018, the Court of Appeal at Nyeri rendered a judgment and agreed with the Respondent and set aside the order striking out the Respondent's High Court Election Petition No. 2 of 2017, remitted the Respondent's Petition back to the High Court of Kenya at Kerugoya, Kirinyaga County, for hearing on the merits. The said High Court at Kerugoya, Kirinyaga County proceeded with the hearing and concluded the High Court Election Petition No.2 of 2017 without undertaking any inquiry into the mysterious disappearance or theft of the Respondent's video evidence which she had filed as part of her Petition with the said High Court.

10. On 14th June 2018, the High Court of Kenya at Kerugoya, Kirinyaga County dismissed the Respondent's Petition, *inter alia* making a finding that the said video evidence was never filed.

11. Being aggrieved by the above Decision of the High Court, the Respondent filed Election Appeal No.12 of 2018, in the Court of Appeal at Nyeri, on the grounds, *inter alia*, that the said High Court of Kenya at Kerugoya, Kirinyaga County misapprehended the Appellant's Constitution and electoral laws and that it was demonstrably biased against the Respondent.

12. On 20th December 2018, the Court of Appeal, sitting in Nairobi, dismissed the Respondent's Appeal, on the grounds that the Court lacked jurisdiction, because 6 months had elapsed since the filing of the

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Respondent's Election Petition when the Court of Appeal in Nyeri allowed the Respondent's Appeal No.1 of 2017 aforementioned.

13. On 29th January 2019, the Respondent, being aggrieved by the above Decision of the Court of Appeal in Election Appeal No.12 of 2018, appealed to the Supreme Court of Kenya, in Petition No.3 of 2019, on the grounds, *inter alia* that the Court of Appeal misapprehended the Appellant's State's Constitution and especially the right to access to justice and to fair hearing as provided for under the said Constitution.

14. On 7th August 2019, the Appellant's State's Supreme Court delivered its judgment dismissing the said Appeal on the grounds that it lacked jurisdiction on the basis that the hearing of the Petition commenced after the 6 months period provided for in the Appellant's Elections Act.

15. The Respondent emphasized that the Supreme Court of Kenya, in the said Petition No. 3 of 2019, failed to uphold the Rule of Law in knowingly dispensing injustice to the Respondent while acknowledging that it was not her fault.

16. The Respondent argued that above failure by the judicial arm of the Appellant's State breached the EAC Treaty, and in particular Articles 6(d) and 7 (2) which obligate Partner States to uphold good governance, democracy, the Rule of Law and Human and Peoples' rights.

17. Finally, the Respondent argued that the Appellant's State's Supreme Court violated the Respondent's right to access to justice and fair hearing.

18. On 9th February 2019, the Respondent filed at the Trial Court, Reference No. 20 of 2019 against the Attorney General of the Republic of



Kenya in his capacity as the Principal Legal Advisor of the Republic of Kenya, seeking, *inter alia*: “

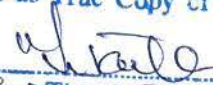
- a) A DECLARATION that the Respondent State, through the acts and/ or omissions of its judicial organ, violated its commitments to the fundamental and operational principles of the EAC Treaty, specifically the principle of good governance, democracy, the rule of law and human and peoples' rights, guaranteed under Articles 6(d) and 7(2) of the EAC Treaty;
- b) A DECLARATION that the Respondent State infringed on the Applicant's right to access to justice and a fair trial;
- c) That this Honorable Court be pleased to award damages to the Applicant.”

AN ORDER that the costs and incidental to the Reference be met by the Respondent.

RESPONSE TO THE REFERENCE

19. The response by the Appellant opposed the Reference and asked the Trial Court to dismiss the Reference with costs on the following grounds: -

- i. i. “This Court lacks jurisdiction to entertain appeals from decisions of domestic courts;
- ii. ii. The Reference was filed in breach of Article 30(2) of the EAC Treaty and it was accordingly time-barred;

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- iii. iii. The matters raised in the Reference are res judicata, and thus the Reference is in essence a disguised appeal;
- iv. iv. The Respondent's case was decided in accordance with publicly promulgated laws that are equally enforced;
- v. v. The Respondent's case was adjudicated by independent and impartial courts;
- vi. vi. The proceedings and decisions of the domestic courts depict the principles of supremacy, equality before the law, accountability to the law, fairness in the application of the law, separation of powers and procedural and legal transparency."

INTERVENERS

Following their admission to the case by consent of the Parties, the interveners were directed to file a Statement of Intervention in the matter. The Interveners:

- i. i. Urged the Court to find that it lacks jurisdiction to entertain the Reference in so far as it seeks to have the Court sit in appellate jurisdiction over a decision of the apex municipal court of Kenya, a jurisdiction the Court does not have.
- ii. ii. Contested the Respondent's challenge to the decisions of the High Court and the Court of Appeal of Kenya, urging that it is time-barred, the decisions having been rendered well outside the two-month period prescribed in Article 30(2) of the Treaty.

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- iii. iii. Contended that the decisions of the municipal courts that have been questioned were arrived at after hearing all parties in their respective cases, as required under Article 50 of the Kenyan Constitution.
- iv. iv. Argued that allegation of breach of the Respondent's right to a fair hearing or violation of the rule of law remains baseless and unsubstantiated.
- v. v. Contended further that it does not amount to breach of the right to access to justice or fair hearing for a court to decline to entertain a matter on account of lack of jurisdiction. On the contrary, the absence of jurisdiction automatically halts a court's intervention.

DECISION OF THE TRIAL COURT

20. In its judgment, the Trial Court elaborated that it is trite law that nation states can be held internationally responsible for the actions of any state organ, including the judicial organs. The Court is also clothed with jurisdiction to entertain a challenge to the judicial decision of municipal courts, including apex courts as this was conclusively settled in the **East African Civil Society Organisations' Forum (EACSO) vs. The Attorney General of the Republic of Burundi & Others**, EACJ Appeal No. 4 of 2016.

21. The First Instance Division of this Court concluded: firstly, that it had jurisdiction to hear and determine the Reference; secondly, that the Reference was filed within the time prescribed by the Treaty; thirdly that the Republic of Kenya had breached Articles 6(d) and 7(2) of the Treaty.

The Court then proceeded to grant the declarations and orders sought by the Respondent/Applicant in the following terms:

Uphold the Reference.

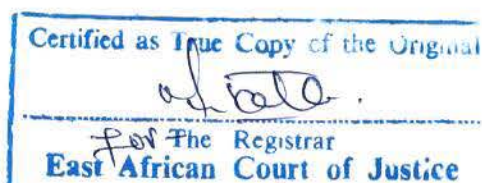
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- i. *“A DECLARATION is hereby issued that the Respondent State, through the acts and/ or omissions of its judicial organ, violated its commitments to the fundamental and operational principles of the EAC, specifically the principle of rule of law guaranteed under Articles 6(d) and 7(2) of the Treaty.*
- ii. *A DECLARATION is hereby issued that the Respondent State infringed on the Applicant’s right to access to justice.*
- iii. *Compensation in general damages in the sum of USD \$ 25,000 (twenty-five thousand) is hereby awarded to the Applicant.*
- iv. *Simple interest at 6% per annum is awarded against the compensation designated in paragraph 70 (iii) hereof from the date of this judgment until payment in full.*
- v. *Costs are awarded to the Applicant.”*

THE APPEAL

22. Aggrieved by the said decision of the First Instance Division of this Court, the Appellant on 09th February 2021 lodged this Appeal based on eight grounds of appeal which were listed in the Memorandum of Appeal as follows:

- i. *“The Trial Court erred in law by exercising a human rights jurisdiction, which jurisdiction the Honorable Court does not have by dint of the provisions of Articles 27(2) of the Treaty.*
- ii. *The Trial Court erred in law by exercising an appellate jurisdiction over the interpretation of the Constitution of Kenya by the Supreme Court of Kenya.*

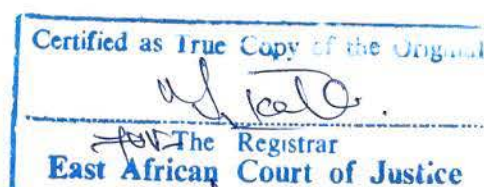


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- iii. The Trial Court erred in law by failing to appreciate that the interpretation of Kenya municipal law by Kenya's apex court is binding on international courts and tribunals.
- iv. The Trial Court erred in law in arriving at a finding that leads to a situation where there are multiple versions of the correct interpretation of Kenyan law issued by two different sources.
- v. The Trial Court erred in law by infringing on the reserved domain of domestic jurisdiction.
- vi. The Trial Court erred in law by treating the Supreme Court of Kenya as a court of first instance thereby misapplying the principles on when the time starts to run for purposes of computing limitation of time under the Treaty.
- vii. The Trial Court erred in law in awarding compensation: general damages in the sum of USD 25,000 to the Respondent in the circumstances of the case.
- viii. The Trial Court erred in law in its interpretation of the Kenyan Law."

23. The Appellant further prayed that the Appeal be allowed and that the Court set aside in totality the Decisions of the Trial Court with costs to the Appellant.

24. The Appellate Division of the Court is mandated to hear and dispose of this Appeal under Article 23 and 35A of the Treaty establishing the East African Community.



SCHEDULING CONFERENCE

25. At the scheduling conference of the Appeal, held on 20th May 2021, the eight grounds of appeal were consolidated into four substantive issues namely:

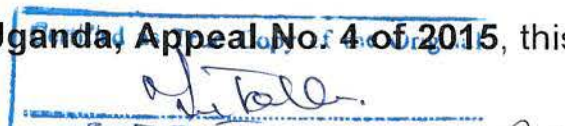
1. Whether the First Instance Division erred in law by exercising an appellate jurisdiction over the interpretation of the Constitution of Kenya by the Supreme Court of Kenya;
2. Whether the First Instance Division erred in law by exercising a Human Rights jurisdiction which jurisdiction the Honorable Court does not have;
3. Whether the First Instance Division erred in law by treating the Supreme Court of Kenya as a court of First instance thereby misapplying the principles on which time starts to run for purposes of computing the limitation of time;
4. Whether the Respondent was entitled to the remedies granted by the First Instance Division of the Court.

26. After the scheduling conference, the parties, in compliance with the Court's directions filed written submissions which they highlighted on 18th November 2021.

MANDATE OF THE COURT

27. As rightly submitted by the Parties to this Appeal, the jurisdiction of the Appellate Division to hear appeals proffered from the Trial Court is provided for under Article 35A of the Treaty establishing the East African Community. Such an appeal shall be on "...points of law, grounds of lack of jurisdiction, or procedural irregularity..." (See **Angela Amudo vs the Secretary General of the EAC, Appeal No.4 of 2014**)

28. In the case of **Simon Peter Ochieng & Another Vs The Attorney General of the Republic of Uganda, Appeal No. 4 of 2015**, this Court made

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it clear that the right of appeal to this Division is restricted to the scope provided for under the said Article 35A of the EAC Treaty. Furthermore, the burden of proof falls on the party alleging the error who must advance arguments in support of the contention and explain how the error invalidates the decision. The Parties must bear in mind that this Court does not undertake a hearing *de novo* of the questions of fact and law examined by the Trial Court.

THE PARTIES SUBMISSIONS

In his written submissions, Counsel for the Appellant, Deputy Chief State Counsel Mr. Emmanuel Bitta opted to start his arguments with the 3rd framed issue relating to limitation of time, then to the 1st framed issue relating to lack of appellate jurisdiction by the EACJ over the Kenyan's Supreme Court decisions and lastly on the 2nd framed issue relating to lack of human rights jurisdictions.


However, the Court decided to determine the issues as framed during the Scheduling Conference.

ISSUE No. 1: Whether the First Instance Division erred in law by exercising an appellate jurisdiction over the interpretation of the Constitution of Kenya by the Supreme Court of Kenya;

APPELLANT'S SUBMISSIONS

29. The Appellant, through Deputy Chief State Counsel Mr. Emmanuel Bitta submitted that the substantive ground of appeal against the decision of the Trial Court acted as an appellate court over the interpretation of Kenya law by Kenya's apex court: the Supreme Court of Kenya.

30. The learned Counsel submitted that the Trial Court's mind on the issues raised was that what was being sought was an alternative interpretation of

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Kenya's constitution differing with the one expressed as applicable by Kenya's apex court on the correct interpretation of Kenyan law.

31. Learned Counsel further submitted that the Trial Court proceeded to interpret several provisions of the Kenyan Constitution which the Court believed the Supreme Court of Kenya ought to have considered and arrived at its own interpretation of what the Trial Court believed ought to have been the legal position of Kenya's municipal law, correcting interpretation of Kenya's municipal law as determined by Kenya's apex court.

32. The Appellant, through his learned Counsel referred the definition of an appeal from the **Black's Law Dictionary, 9th Edition (WEST) at page 112** which defines an appeal as:

"A proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court or agency's decision court for review and possible reversal."

33. Counsel further borrowed from **Stroud's Judicial Dictionary of Words and Phrases, 7th Edition (London Sweet & Maxwell 2006) Volume 1, at page 157** which defines an appeal as:

*".....An appeal in the context of an ouster clause means re-examination by a superior judicial authority of both the findings of fact and conclusions of law to the legal consequences of those facts made by an inferior tribunal in the exercise of a jurisdiction conferred upon it by statute to decide questions affecting legal rights of others, and the substitution of the superior judicial authority's own findings of fact and conclusions of law for those of the inferior tribunal...."***(Attorney General v Ryan (1980) A.C. 718 at 729, HL, per Lord Diplock).**

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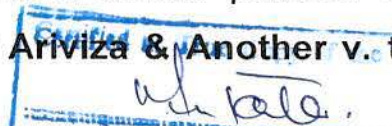
34. It is the case for the Appellant in his submissions, that the Trial Court was for all intents and purposes purporting to exercise an appellate jurisdiction over the Supreme Court of Kenya on the Supreme Court's interpretation of Kenyan municipal law which jurisdiction is expressly not conferred upon the EACJ under the Treaty.

35. Counsel for the Appellant submitted that this position on lack of an appellate jurisdiction being conferred upon EACJ was acknowledged by the Court in **Hon Sitenda Sebalu v The Secretary General of the EAC and 3 others**, Reference No. 1 of 2010, where the Court while considering the question whether the EACJ could exercise an appellate jurisdiction over decisions of apex courts of Member countries stated that:

“Among the latter Articles, only Article 23 has anything to do with appellate jurisdiction; but such appellate jurisdiction is internal within the EACJ itself, namely, from the First Instance Division to the Appellate Division, not any type of appellate jurisdiction as Article 27(2) envisages.

A plain reading of Article 27(2) clearly reveals, inter alia, that the provision for appellate jurisdiction relates to the future via the mechanism of a protocol, which is yet to be concluded. In the circumstances, it is this Court's findings that Article 27 of the Treaty does not confer appellate jurisdiction on the EACJ over the decision of the Supreme Court of Uganda in Election Petition Appeal No.6 of 2009, Hon. Sitenda Sebalu v. Hon. Sam K. Njuba and Electoral Commission of Uganda.”

Counsel further argued that a similar position was arrived at by the Appellate Division in **Mary Ariviza & Another v. the Attorney General**



of Kenya and the Secretary General of the EAC (Appeal NO.3 of 2012) where the Court held that:

“...Next, we consider the more complex question of whether in this appeal, this Division can and should deal with the facts of this case. First and foremost, the East African Court of Justice (EACJ) is not a Court of Appeal vis- a – vis decisions of the municipal courts and tribunals of the Partner States. Neither the First Instance Division, nor the Appellate Division, has jurisdiction to review the judicial decisions and judgments of those municipal courts and tribunals. This is because initial jurisdiction of the EACJ pertains only to the interpretation and application of the provisions of the Treaty. Indeed, Article 27(2) makes it crystal clear that the wider ‘appellate’ jurisdiction for the EACJ over decisions of the municipal courts and tribunals of the Partner States, will be determined by the Council of Ministers at a suitable subsequent date, for which the Partner States shall conclude a Protocol to operationalize the extended jurisdiction.”

36. It is further stated in the Appellant’s Counsel submission that quite apart from the fact that the EAC Treaty specifically does not provide for the exercise of an appellate jurisdiction by the EACJ save where the same is specifically provided for via a protocol, it is the practice of international courts and tribunals not to exercise appellate jurisdiction over municipal courts in respect to their interpretation of municipal law in public international law.

37. In elucidating the above, Counsel referred to **Ian Brownlie in his treatise ‘Principles of Public International Law’**, at page 41, (4th Edition, Clarendon Press, Oxford) where he writes that:

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(a)“Interpretation of their own laws by national courts is binding on an international tribunal. This practice rests in part on the concept of the reserved domain of domestic jurisdiction and in part on the practical need of avoiding contradictory versions of the law of a state from different sources.

(b)International tribunals cannot declare the internal invalidity of rules of national law since the international legal order must respect the reserved domain of domestic jurisdiction.”

38. Finally on the first issue, Counsel for the Appellant submitted that if the decision of the Trial Court were to be allowed to stand, it would create an absurd position where there are two different legal interpretations on the same issue emanating from two distinct legal sources inimical to all principles of good governance.

INTERVENERS’ SUBMISSIONS

The interveners, through their Counsel Mr. Patrick Baraza largely agreed with and adopted the arguments of the Appellant’s submissions for all the framed issues and there will be no use of repeating the same.

RESPONDENT’S ARGUMENTS

39. Before making their submissions on the framed issues, Counsel for the Respondent made a number of preliminary observations indicating, among others that (a) issues 1 & 2 allege a lack of jurisdiction of the Court, even though the Appellant characterizes them as errors (points) of law and (b) issue 3 alleges a error (point) of law in computing the limitation period for the Respondent to have filed her Reference in Trial Court, which equally, might have been an allegation of lack of jurisdiction.



40. In their preliminary observations, Counsel for the Respondent referred us to the law of the Respondent's State, especially the **Constitution of Kenya 2010** in its provisions which guarantee access to justice (Article 48) and to fair hearing (article 50) as fundamental rights and the **Elections Act, No. 24 of 2011 (as amended)**. Counsel further indicated these fundamental rights are equally guaranteed by the **EAC Treaty, especially in its Articles 6 and 7**; the **African Charter, especially in its Articles 3 and 7** and International Human Rights instruments and norms, including the **Universal Declaration on Human Rights (UDHR)** and the **International Covenant on Civil and Political Rights (ICCPR)**.

41. Counsel for the Respondent underlined further that there is no provision in the Constitution of Kenya or the Elections Act regulating timelines for hearing of a remitted petition upon successful appeal by a petitioner as was the Respondent's case; and that it is left to the court to interpret both the Constitution and the law on what to do in such circumstances. It is the Respondent's Counsel submissions as preliminary observations that the Appellant State was in contravention of its own Constitution and subsequently it offended the provisions of the EAC Treaty specifically Articles 6 and 7 as well as the African Charter on Human and Peoples' Rights specifically Articles 3 and 7.

42. Counsel referred us to the case of **Henry Kyarimpa (Supra)** where this Court held that:

"In a nutshell, the activities of Partner States must be transparent, accountable and undertaken within the confines of both their municipal laws and the Treaty." (Emphasis ours)

43. Submitting on the first issue, Counsel for the Respondent had vigorously argued in reply to the Appellant's submissions that the Judicial arm

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of the Appellant State was obliged to interpret the Constitution and laws of the Appellant State in a manner that promotes the purpose and principles of the Constitution, and in a manner that advances not undermines the principles that justice must not only be done but must also be manifestly seen to be done.

44. Counsel submitted that the Court is clothed with jurisdiction to entertain a challenge to the judicial decision of municipal courts, including apex courts and referred the Court to its earlier Decision in the **East African Civil Society Organisations' Forum (EACSO) vs. The Attorney General of the Republic of Burundi and Others, EACJ Appellate Division, Appeal No.4 of 2016** which conclusively settled (which reasoning we also agree with in the present Appeal) that:

“The Reference before the Trial Court was not a further appeal from the Decision of the Constitutional Court of Burundi. It was a reference on the Republic of Burundi’s international responsibility under international law and the EAC Treaty attributable to it by reason of an action of one of its organs namely the Constitutional Court of Burundi. The Trial Court had a duty to determine this international responsibility and in so doing, it had a further duty to consider the international laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty”
(Emphasis ours)

45. Counsel further referred to paragraph 27 of the impugned judgment where the Court held that:

“Accordingly, this Court is well within the purview of its mandate to interrogate the decision of the Supreme Court of Kenya that has been

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impugned in this Reference, with a view to determine its compliance with the Treaty.”


46. Counsel submitted that references to the definition of “appeal” in **Black’s Law Dictionary and Stroud’s Judicial Dictionary of Word and Phrases** by the Appellant are misplaced and inappropriate for the present Appeal, because:

(a) The Trial Court did not consider itself and did not say that it was a “higher authority” or “higher judicial authority” over the Supreme Court of Kenya; and certainly did not consider, nor did it say that the Supreme Court of Kenya was a “lower authority”, “lower agency”, or “inferior tribunal”.

(b) It is trite law that these are different Courts, created by different legal instruments and applying the different legal instruments and different legal standards as their point of departure. In particular, the Trial Court was interpreting, and applying, and insuring compliance with the EAC Treaty as its point of departure.

47. Counsel also referred us to the case of **Burundi Journalists Union v. The Attorney General of Burundi, EACJ Reference No.7 of 2013** where the Trial Court held (in a matter where the Constitutional Court of Burundi, the highest Court of Burundi in constitutional matters and whose decisions are not appealable under the Burundi Constitution), at paragraph 40 and 41 where the Court held that:

“With tremendous respect to the Respondent, what is before this Court is not a question whether the Press Law meets the Constitutional muster under the Constitution of the Republic of Burundi but whether it meets the expectations of Articles 6(d) and 7(2) of the Treaty. The above jurisdiction



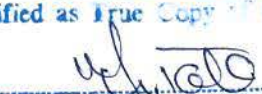
differs from that conferred by Article 27(1) which provides that this Court shall “initially have jurisdiction over the interpretation of the Treaty. The proviso thereof is irrelevant for purposes of this Reference, but suffice it to say that in interpretation of the question as to whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court’s jurisdiction”.

48. Counsel for the Respondent further referred us to the case of **Baranzira Raphael & Ntakiyica Joseph v. The Attorney General of Burundi, EACJ Reference No. 15 of 2014** (again in a matter where the Constitutional Court of Burundi had rendered a final judgment) where the Trial Court held that:

“This Court has jurisdiction to interrogate matters of Treaty interpretation notwithstanding a previous decision of a superior court of a Partner State.”

Counsel also argued that in addition to the question of whether the 1st Instance Division is acting as an appellate Court to the Superior Court of States Parties, the Trial Court of this Honorable Court has stated in the case of **Manariyo Desire v. The Attorney General of the Republic of Burundi, EACJ Reference No. 8 of 2015** where the Respondent had raised similar objection, that: “

55. In the instant case, the Supreme Court’s adjudication process and the resultant judgment have been alleged to violate Article 6(d) and 7(2) of the Treaty as well as Article 15(10) and 14 of the Protocol and African Charter respectively. Quite clearly this Court does have jurisdiction to consider the said proceedings and Judgment with a view to determining

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whether they contravene Burundi's obligations under Article 6(d) and 7(2) of the Treaty.

56. That is not at all to suggest, as has been intimated by the Respondent herein, that this Court would be invoking an appellate jurisdiction over the Burundi Supreme Court. There is a clear distinction between what constitutes an appellate review of a subordinate court's decision, and the dialectical approach which is synonymous with the international review of domestic judgments.

[...]

61. We would therefore disallow the Respondent's contention that by determining the present Reference, the Court would be usurping or undermining the appellate jurisdiction of the Burundi Supreme Court. We are satisfied that this is a matter that is justiciable before us under Articles 23(1), 27(1) and 30(1) of the Treaty".

COURT'S DETERMINATION ON THE FIRST ISSUE

49. We have carefully read and considered the pleadings and submissions together with the supporting legal authorities cited by the opposing parties for which we are grateful. We now tackle issue number one as hereunder.

50. In this issue, it is the case for the Appellant that the Trial Court acted as an appellate court over the interpretation of Kenyan law by Kenyan's apex Court: the Supreme Court of Kenya.

51. In the case of **Alcon International v. Standard Chartered Bank of Uganda & 2 Others, Appeal No.3 of 2013**, it was held that this Honorable Court being an international Court exercises jurisdiction like any other international court in accordance with international law. In this case, the issue

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of jurisdiction revolves around whether the EACJ has jurisdiction over decisions made by the Supreme Court of Kenya: the apex court of a Partner State.

52. In the case of **East African Civil Society Organizations Forum (Supra)**, the Trial Court held that:

“what is before us is not any question regarding due process before the Constitutional Court of Burundi but the correctness of its decision in the context of the Republic of Burundi and the Arusha Agreement. Only by undertaking an interrogation of that decision as to its correctness can we revise, review and quash it? Such remedies are available only upon a review or appeal against the said decision and not whether it was made in violation of the principles of the Rule of Law as was the approach taken by this Court in determining the issues raised in the Burundian Journalists case (supra).

53. However, in **EACSOFF v. The Attorney General of the Republic of Burundi and 2 Others, Appeal No.4 of 2016 (Judgment of 24th May 2018)** the Appellate Division of this Court disagreed with the above holding of Trial Court for the following reasons (which reasons are also applicable to the present Appeal):

- i. *The Reference before the Trial Court was not a further appeal from the Decision of the Constitutional Court of Burundi. It was a reference on the Republic of Burundi’s international responsibility under international law and the EAC Treaty attributable to it by reason of an action of one of its organs namely the Constitutional Court of Burundi. The Trial Court had a duty to determine this international responsibility and in so doing, it had a further duty to consider the international laws of the Partner*

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State and apply its own appreciation thereof to the provision of the Treaty.

- ii. *The interrogation of a decision of a State Organ, like a domestic Court, to determine the international responsibility of a State, goes beyond having regard to the due process before that said domestic court and extends to every act or omission it may make. (EMPHASIS OURS)*

54. *In the same holding and subsequent to the above reasons of disagreeing with the finding of the Trial Court in the EACSOA Appeal case (supra), the Appellate Division went further and held that:*

“ In not carrying out this duty, we find that the Trial Court disavowed itself of the jurisdiction to determine whether or not the impugned decision of the Constitutional Court of Burundi was in violation of Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and (c) and 8(5) of the EAC Treaty. In so exercising its duty, the Trial Court is not expected to review the impugned decision as is the case under Article 35(3) and Rule 72(2) of the Rules of this Court looking for new evidence or some mistake, fraud or error apparent on the face of the record. The Trial Court will however have to sift through the impugned decision and evaluate it critically with a view of testing its compliance with the EAC Treaty and then make a determination. In so making the said determination, the Trial Court does not quash the impugned decision as if it were a court exercising judicial review powers as known in the municipal laws of the Partner States, but rather makes declarations as to the ~~decision’s compliance with the EAC Treaty.~~” (Emphasis)

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55. Pursuant to the EAC Treaty, Partner States have undertaken to abide by and carry out the obligations as provided for therein. This at international law creates state responsibility to each and every Partner State that is attributable to them.

56. It is therefore the duty of this Court under Article 23(1) of the Treaty to “...ensure the adherence to law in the interpretation and application of and compliance with this Treaty...”.


57. The case before us raises the question of what is the responsibility of States for internationally wrongful acts committed by its judicial organ, as was alleged by the Respondent here and in the Trial Court.

58. The **International Law Commission (ILC) commentary on the Responsibility of States for internationally wrongful acts (November 2001 hereinafter referred to as the “ILC Commentary”)** in Article 1 provides that:

“... Every internationally wrongful act of a State entails the international responsibility of that State...”.

59. The State therefore takes international responsibility for any wrongful act of an organ of that State. This is the principle of State responsibility.

Further, the **ILC Commentary in Article 4** when dealing with the conduct of an organ of a State provides that:

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“... 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territory unit of the State...”(Emphasis ours)

60. It therefore follows that a State under international law assumes international responsibility for the wrongful acts of the judicial organ of the that State.

61. The position in the European Community law as outlined in the book by Anthony Arnall **“ The European Union and its Court of Justice” 2nd Edition Oxford Publishers (p.313)** is that:

“ ...the principle of State liability for the acts and omissions of supreme courts can be acknowledged as a general principle of Community law...”.

It therefore follows that State liability for domestic courts at international law is quite wide as it covers both acts and omissions.

62. In the **European Court of Justice (ECJ) in the case of Gerhard Kobler vs Replik Osterreich [2003] ECR I-10239** held that:

“...the principle of State liability would apply to violations of EU law by national courts of final appeal. In so making the said findings, the ECJ dismissed arguments against the said application by reason of state liability to the conduct of courts of last instance based on principles like legal certainty, res judicata, the independence and authority of the

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judiciary (see the book *EU LAW Text, Cases and Materials 5th Edition Paul Crag Oxford Publishers p. 245*).

63. While analyzing the above authorities from the European Court of Justice in the **Appeal case of EACSOFF** (*supra*), this Division held on **p.31, para 53 of the Judgment** that:

“We find these authorities of the ECJ to be persuasive in our situation under the EAC Treaty. So, like EU Member States in terms of the EEC Treaty, EAC Partner States are bound to follow the law created by the EAC Treaty and have it applied by their courts.”

64. As was held the in the **Kyarimpa case** (*supra*):

“...When the Court has to consider whether particular actions of a Partner State are unlawful and contravene the Principle of the Rule of Law under the Treaty, the Court has jurisdiction, and, indeed, a duty to consider the international laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty. The Court does not and should not abide the determination of the import of such internal law by the Courts...”. (Emphasis)

65. This reasoning was also done by the Trial Court in the **EACSOFF Reference case** (*supra*) where the Court held that this Court has not been shy in the context of the EAC Treaty to interpret domestic laws and constitutions.

66. In the **Burundi Journalists Union case** (*supra*), **para 40 and 41 of the Judgment**) this Court rightly found that:

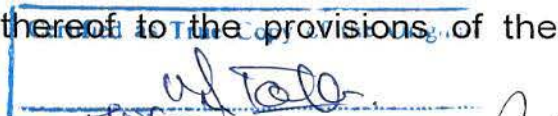
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“where a superior court of a Partner State has made a final determination as to the constitutionality of a domestic law, which is not appealable to a higher court, such a determination would not stop this Court from still interrogating whether that domestic law was in violation of the EAC Treaty and reach a different conclusion from that of the superior domestic court .”

67. There has been a lot of legal debate as to what powers this Court has, if at all, over domestic courts and in particular its apex courts. From the above review of the decisions of this Court, the EACJ has pronounced itself on this debate and settled this question. It is therefore established jurisprudence by the EACJ that this Court has jurisdiction to interrogate matters of Treaty interpretation notwithstanding a previous decision of a superior Court of a Partner State on the same matter.

68. From the above cited jurisprudence of this Court, from the European Court of Justice and the underlined authorities, the contention by the Appellant that the Trial Court decided the case as exercising appellate jurisdiction over the interpretation of the Constitution of Kenya by the Supreme Court of Kenya does not stand.

69. The East African Court of Justice (EACJ) has never ruled in any matter that it has appellate jurisdiction over national judiciaries, including the Supreme Court of Kenya, but as has been clearly stated in a number of its previous cases, including the **Henry Kyarimpa case** (supra), when the Court has to consider whether particular actions or omissions of a Partner State are unlawful and contravene the Principle of the Rule of law and access to justice under the EAC Treaty, the Court has jurisdiction, and, indeed, a duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty in



accordance with the provisions of Articles 23(1) and 27(1) of the EAC Treaty.

70. In view of our findings above, we accordingly answer issue Number One in the negative.

ISSUE NO.2 WHETHER THE FIRST INSTANCE DIVISION ERRED IN LAW BY EXERCISING A HUMAN RIGHTS JURISDICTION WHICH JURISDICTION THE COURT DOES NOT HAVE.


ARGUMENTS OF THE APPELLANT

71. Counsel for the Appellant submitted that the Appellant was aggrieved by the decision of the Trial Court to exercise for all intents and purposes a human rights jurisdiction and to award damages on account of breach of human rights contrary to express provisions of the EAC Treaty.

72. Counsel argued that the term 'jurisdiction' contained in Article 27(2) of the Treaty is defined in **Words and Phrases Legally Defined (2nd Edition, Volume 3)**, inter alia, to mean:

“ ...the authority which a court has to determine matters that are litigated before it or to take cognizance of matters presented in a formal way for its decisions. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means...”

73. Counsel referred to this Court previous decisions in **the Attorney General of the Republic of Kenya and Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011 of and in James Katabazi & 21 Others v The**

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EAC Secretary General & The Attorney General of Uganda, Reference No. 1 of 2007 where this Court held that:

“ while the Court will not assume jurisdiction to adjudicate Human Rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violations”.

74. Counsel further argued that the significance of the **Katabazi case (supra)** is not so much in the Court’s famous refusal “ **not to abdicate**” its jurisdiction. Rather that it was the Court’s ability to find and supply, through interpretation of the Treaty, the source and basis for the Court’s jurisdiction in the circumstances of the case then before the Court; and that the Court in the **Katabazi case (supra)** proceeded to probe, to examine and to assess at great length and in great depth the source that allowed the Court to claim and exercise jurisdiction in the matter.

75. Counsel also submitted that the right to access to justice and the right to a fair trial are fundamental rights which as appreciated by the EACJ First Instance Division are specifically expressed as such under **Articles 48 and 50 of the Constitution of Kenya**.

76. Counsel further referred to **Articles 31-33 of the Vienna Convention on the Law of Treaties** which instruct treaty interpreters to construe treaties in good faith in accordance with the ordinary meaning given to them in their context and in the light of the treaty’s object and purpose. He therefore argued that to construe the EAC Treaty in a manner that allows the EACJ to hear claims premised on allegations of breach of human rights, to determine the question of whether such violations have taken place and to proceed to award damages for violations of such rights under the guise that what is

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being exercised is an interpretative jurisdiction of the EAC Treaty cannot under any stretch of imagination be good faith interpretation of the EAC Treaty. Counsel also argued that in doing so, the EACJ would be rendering the express intention of the parties to the Treaty, who reserved the exercise of human rights jurisdiction of the EACJ to future agreement of the parties via a protocol.

77. Counsel also argued that it is apparent that the Trial Court purported to exercise a human rights jurisdiction over the reference and that the Court did not attempt to disguise itself in doing so, issuing a declaration of infringement of the Respondent's right to access to justice (a human right) and not for breach of all express provision of the EAC Treaty.

RESPONDENT'S SUBMISSIONS TO THE SECOND ISSUE

78. Counsel for the Respondent submitted that the instant Appeal can be determined purely on the jurisprudence of this Honorable Court with regard to its jurisprudence. He indicated that both divisions of the Court have made it clear that they will grant audience and dispose of a matter so long as it is pegged on to a discernible provision of the EAC Treaty any subsequent EAC Protocol, Act of the East African Legislative Assembly (EALA) or a Regulation or Directive of the EAC Council of Ministers and that this is the settled jurisprudence of the EACJ, right from the famous and oft-cited **Katabazi case** Decision to the present time.

79. Counsel further submitted that it would not matter whether the Trial Court articulated human or peoples' rights, explicitly or implicitly, because the Trial Court made it abundantly clear that its point of departure, for purposes of the judgment, is Articles 6 and 7 of the EAC Treaty and that it bases its decision-making very squarely on those provisions which it is obliged to do;

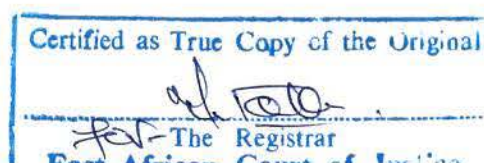
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and that trying to impute a “human rights jurisdiction” to the Decision of the Trial Court in that regard is a red herring.

80. Counsel argued that both Articles 6(d) and 7(2) highlight the concept of “**social justice**”, which is an even broader term than “access to justice” and that as such, one right, social justice, is already expressly articulated. Counsel indicated further that labour rights of the EAC organs and Institutions (Article 31 of the EAC Treaty) are human rights (economic and social rights) which is a jurisdiction that the Court has had from the outset.

81. Counsel for the Respondent also submitted that while inquiring into national constitutions or laws, one of the matters that either Divisions of this Honorable Court may be called upon to interrogate is adherence to the Bill of Rights within the national constitution, as it was done in the cases of **Burundi Journalists Union (*supra*) and Media Council of Tanzania and 2 Others vs the Attorney General of the United Republic of Tanzania, Reference 2 of 2017**. Counsel argued that in this respect, the EACJ is already interpreting, applying and ensuring compliance with human and peoples’ rights and that the international standard that the Court would use for this interpretation is expressly stipulated in Article 6 (d), i.e. the African Charter on Human and Peoples’ Rights.

82. Counsel further argued that in any case, human and peoples’ rights are inherent in any judicial forum whether international, regional, national or community based and that the very moment one is adjudicating or arbitrating over natural persons, issues of rights are immediately and inexorably invoked. He argued that a court would lose its judicial or jurisdictional relevance if it disavowed itself of this inherent jurisdiction.



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83. Counsel concluded his submissions by submitting that the EAC Treaty imports the African Charter on Human and Peoples' Rights as its Bill of Rights.

COURT'S DECISION ON THE SECOND ISSUE


84. We have carefully read, analyzed and considered the pleadings and submissions together with the supporting legal authorities and jurisprudence cited by the opposing parties for which we are grateful. We now resolve Issue No. 2 as hereunder.

85. We agree with Counsel for the Appellant that Article 27(2) of the EAC Treaty provides that the Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date and that the Partner States shall conclude a protocol to operationalize the extended jurisdiction.

86. We also agree with Counsel for the Appellant that the right to access to justice and the right to a fair trial are fundamental rights which as appreciated by the Trial Court are specifically expressed as such under Articles 48 and 50 of the Constitution of Kenya.

87. We further agree with both Parties that this Court is a judicial body mandated under Article 23(1) of the EAC Treaty to ensure the adherence to law in the interpretation and application of and compliance with this Treaty.

88. The crux of the Appellant's case is very simple: namely that since the matter in issue relates to the Respondent's right to access to justice, this is a human rights issue and therefore the Reference was ill-conceived and it ought not to have been entertained by the Trial Court because the Partner

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States have reserved the exercise of human rights jurisdiction of the EACJ to future agreement of the parties via a protocol.

89. According to the pleadings and submissions by the Appellant's State through his learned Counsel, any allegations relating to access to justice is a human rights allegation and the EACJ does not have legal jurisdiction/mandate to ensure adherence over its interpretation and application of and compliance with the EAC Treaty. Counsel indicates that the right to access to justice and the right to a fair trial are fundamental rights which as appreciated by the Trial Court are specifically expressed as such under Articles 48 and 50 of the Constitution of Kenya.

90. With due respect to the Appellant, it is regrettable to hear from the reasoning of a Partner State that failure to accord access to justice by a judicial body of that State to its citizen should not be entertained by this Court.

91. We wish to state that by dint of Article 30 (1) of the EAC Treaty, legal and natural persons resident in the Partner States (as it is for the Respondent/ Martha Wangari Karua who is a resident in the Republic of Kenya) are granted the right to refer for determination by this Honorable Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provision of the EAC Treaty including Article 6(d) and 7(2) which obligate Partner States to govern their residents in accordance with the fundamental principles of good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunity, gender equality, ***as well as the recognition, promotion and protection of Human and Peoples Rights in accordance with the***

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provisions of the African Charter on Human and Peoples' Rights.
(Emphasis ours)

92. Counsel for the Appellant tried to navigate around the Decisions by this Honorable Court which Decisions, unfortunately do not favor his case.

93. For instance, in the case of **James Katabazi (supra)** while determining an issue related on lack of human rights jurisdiction by the EACJ, this Court conclusively held that:

“ While the Court will not assume jurisdiction to adjudicate human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of Human rights violations”.


94. The same reasoning to human rights jurisdiction as in the **Katabazi case (supra)** was underlined in the case of **Attorney General of Kenya v Independent Medical Legal Unit (supra)** in which the Appellate Division of this Honorable Court held that:

“ In these circumstances, we are of the view that the decision taken by the First Instance Division that it would not abdicate its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violations was sound, because the EACJ is the institution mandated to determine whether a Partner State has or has not breached, infringed, violated or otherwise offended the provisions of the Treaty”.
(Emphasis ours)

95. Relying on the same **Independent Medical Legal Unit case** reasoning (*supra*), this Court affirmed that

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“ The respective Partner State’s responsibilities to their citizens and residents have, through those States’ voluntary entry into the EAC Treaty, been scripted, transformed and fossilized into the several objectives, principles and obligations now stipulated in, among others, Articles 5,6, and 7 of the Treaty, the breach of which by any Partner State, gives rise to infringement of the Treaty. It is that alleged infringement of the Treaty which, through interpretation of the Treaty under Article 27(1), constitutes the cause of action in a Reference such as the instant Reference. It is not the violation of human rights under the Constitutions and other Laws of [the Partner State] or the international Community, that is the cause of action in the Reference at hand”.


96. All that the Appellant submitted in substance under this issue is that the Trial Court ought not to have entertained the Reference relating to violation of the right to access to justice (which is a human right) pending future agreement of the parties via a protocol on extended jurisdiction.

97. In fact, this Court would lose the rationale of being a judicial body of the Community entitled to ensure interpretation and application of and compliance with the EAC Treaty (including compliance with the provisions provided for under Articles 6 and 7 of the EAC Treaty), if it closes its eyes over violations to the fundamental rights (such as access to justice) by the judicial organs of the Partner States.

98. From the jurisprudence of this Court in related matters, especially in the **Katabazi case** (*supra*), in the **Independent Medical Legal Unit case** (*supra*), in the **Attorney General of the Republic of Rwanda v. Plaxeda**

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Rugumba, Appeal No. 1 of 2012), the reasoning advanced by the Appellant, through his Counsel is not tenable.

99. Any debate on whether this Court does possess Human Rights jurisdiction can be referred to as academic. This Court is empowered with jurisdiction to ensure adherence to law in the interpretation and application of and compliance with any and each provision of the EAC Treaty, including allegations relating to violations of Articles 6(d) and 7(2) as provided for under Articles 23(1), 27(1) and 30(1) of the EAC Treaty.

100. Accordingly, we answer Issue Number Two in the negative.

ISSUE NO. 3: WHETHER THE FIRST INSTANCE DIVISION ERRED IN LAW BY TREATING THE SUPREME COURT OF KENYA AS A COURT OF FIRST INSTANCE THEREBY MISAPPLYING THE PRINCIPLES ON WHICH TIME STARTS TO RUN FOR PURPOSES OF COMPUTING THE LIMITATION OF TIME

ARGUMENTS OF THE APPELLANT

101. Counsel for the Appellant submitted in a nutshell that on the issue of computation of time, it is an issue that the EACJ Appellate Division has had occasion to pronounce itself on with some clarity and consistency in several of its decisions.

102. Counsel referred us to the **Independent Medical case** (*supra*) and to the **EACJ, Appeal No. 2 of 2012 between the Attorney General of Uganda and Omar Awadh & 6 Others**, where this Court held that:

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“The Treaty does not contain any provision enabling the Court to disregard the time limit of two months and Article 30(2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant”.

103. Counsel argued that guided by the ratio decidendi of the EACJ Appellate Division in the **Independent Medical case (supra)** and **Omar Awadh case (supra)**, the claim before the EACJ First Instance Division fell afoul of the two months limitation period and ought to have been struck out on that account alone.

104. Counsel based his argument on the fact that from the chronology of facts of the case that the proceedings before the Supreme Court of Kenya were appellate proceedings arising from determinations of the Respondent’s election petitions before the Court of Appeal and the High Court on the same subject matter.

105. Counsel also argued that it was the Court of Appeal and not the Supreme Court that initially held that the Respondent’s case was barred by limitation (6 months period). For him, the Respondent’s cause of action if premised on account of the 6 months period accrued from the date of the decision of the Court of Appeal, that is on 20th December, 2018 and not on 6th August, 2019 when the Supreme Court upheld the decision of the Court of Appeal.

106. Counsel further submitted that the EAC Treaty having no requirement for exhaustion of local remedies, time ought to have been computed from 20th December, 2018 and not on the date the decision of the Supreme Court since

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the Respondent did not have an obligation to appeal and could have approached the EACJ Trial Court at the time.

107. Counsel finally submitted that the Reference before the Trial Court was barred under the two months limitation period.

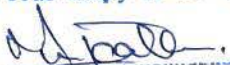
108. The reasoning of the Appellant was supported by the interveners who indicated that the Reference was time-barred by dint of the two months period required under Article 30(2) of the EAC Treaty.

RESPONDENT'S ARGUMENTS ON THE THIRD ISSUE

109. Counsel for the Respondent submitted that in any case, the jurisdiction of this Court in a case like this is to examine the potentially internationally wrongful act of a Partner State, whether that act is committed by the executive, legislative or judicial arm of the government; whether committed by the central, devolved or decentralized government; or whether committed by a superior or lower arm/section of any of these parts of government of a Partner State.

110. Counsel also submitted that it is immaterial whether a judicial action impugned by a legal or natural person was by a Magistrate's Court, Court of Appeal, or the Supreme Court of Kenya. He underlined that the EAC Treaty does not require exhaustion of local remedies, but it enables direct access by any legal or natural person resident in a Partner State of the EAC.

111. Counsel further argued in his submissions that the First Instance Division of this Court has correctly said in its judgment that it is at the discretion of the Applicant, whether to:

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- (a) eschew the national judicial system and come straight to the EACJ;
- (b) engage part of the national judicial system and, at some point, come to the EACJ;
- (c) exhaust the entire hierarchy of national judicial system and, then and only then, come to the EACJ.

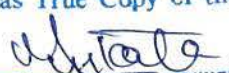
112. Counsel argued that an Applicant in the Trial Court would simply be required to articulate clearly and honestly what in the precise act(s) complained of, and properly link them to distinct provision(s) of the EAC Treaty or EAC Law.

113. It was Counsel further submission that the 1st Instance Division of this Honorable Court did not wrongly apply the principles for computing the limitation of time because:

- (a) The action complained of is the decision of the apex judicial organ of the Appellant State, the Supreme Court of Kenya;
- (b) The Supreme Court of Kenya rendered its Judgment on 7th August 2019, dismissing the Respondent's appeal;
- (c) The Respondent filed Reference No.20 of 2019 before the Trial Court of 5th October 2019, within the 2-month limitation prescribed by Article 30(2) of the EAC Treaty.

114. Finally, Counsel for the Respondent acknowledged reference by the Appellant to the cases of **Independent Medical Legal Unit** (*supra*) and **Omar Awadh** (*supra*), but pointed out that:

- (a) these authorities do not help the Appellant's case in any way;

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- (b) the Respondent filed her Reference well within the 2-month limitation period and neither sought nor received from the 1st Instance Division any dispensation in this regard; and
- (c) the Respondent did not claim “continuing violation” and therefore the exhaustive reference to it in the submissions of the Appellant is irrelevant.

COURT’S DECISION ON THE THIRD ISSUE

115. We have carefully considered the rival written and oral submissions made by the parties on this matter and we now resolve Issue No. 3 as hereunder.

116. Both parties agree that the Court of Appeal of Kenya at Nyeri rendered a judgment on 20th December 2018 dismissing all the Respondent’s grounds of appeal and upholding the interveners cross-appeal.

117. Both parties also agree that the Respondent being aggrieved by the decision of the Court of Appeal, lodged a petition of appeal before the Supreme Court of Kenya on 25th January, 2019 and that on 07th August 2019 the Supreme Court of Kenya rendered its Judgment, dismissing the Respondent’s appeal, on the grounds that it lacked jurisdiction on the basis that hearing of the Respondent’s Election Petition on the merits commenced after the 6 months’ period provided for in the Respondent State’s Elections Act.

118. Both parties also agree that on 05th October, 2019 the Respondent being dissatisfied by the decision of the Supreme Court, filed Reference No.20 of 2019 before the Trial Court; meaning that all parties are in agreement that the action complained of in the decision of the Supreme Court of Kenya taken in the Judgment of 07th August, 2019.

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119. The crux of this issue is that Counsel for the Appellant contends that the Respondent should have filed the Reference to the 1st Instance Division within two months after the decision of the Court of Appeal and not after the Decision of the Supreme Court only because there was no obligation for the Respondent to exhaust local remedies before accessing the EACJ.

120. It is our considered view that the burden of proof applicable to international courts such as the EACJ lies on the Appellant in this regard. As this Court rightly observed in **British American Tobacco Ltd (BAT) vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 7 of 2017**, the burden of proof in international claims was most ably articulated in the case of **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro)**, Judgment, ICJ Reports 2007, p.43 where it was held as follows:

“On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of Military and para-military Activities in and against Nicaragua (Nicaragua vs. United States of America) Judgment, ICJ Reports 1984, p.437 para 101) “it is the litigant seeking to establish a fact who bears the burden of proving it.”

121. The foregoing preposition does reflect the reasoning of this Court in the earlier case of **Raphael Baranzira (supra)** where the cardinal procedural rule that she/he who asserts must prove their case was propounded.

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122. In so doing (in both the **British American Tobacco (supra)** and **Baranzira** cases (supra) this Court relied upon the following exposition of that rule in Shabtai Rosenne, “ **The Law and Practice of the International Court**” 1920 – 2005 Vol. iii Procedure, p.1040) as cited with approval in **Henry Kyarimpa vs. the Attorney General of Uganda** (supra):

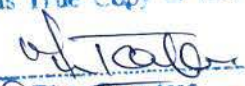
“Generally, in application of the principle of actori incumbit probatio the Court will require the party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given.”

123. With due respect to Counsel for the Appellant, the averment advanced that the Respondent should have filed her Reference to the Trial Court after the Decision of the Court of Appeal and not the Supreme Court of Kenya is unfounded and has no merit.

124. The Respondent had the right to search for justice from the High Court up to the Supreme Court of Kenya in accordance with the Kenyan Constitution and the Elections Act, and she did utilize this constitutional right before coming to the EACJ in accordance with Article 30(1) and (2) of the EAC Treaty.

125. In his own pleadings, paragraph xxi, page 3. Counsel for the Appellant underlined briefly the facts of the case as follows:

“The Respondent being aggrieved by the decision of the Kenya’s Supreme Court, instituted the Reference before the Trial Court, whose decision has necessitated the current Appeal” (emphasis ours).

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With due respect to Counsel for the Appellant, the action complained of by the Respondent is the decision of the Supreme Court of Kenya taken on 07th August 2019 which is materialized by Reference No.20 of 2019.

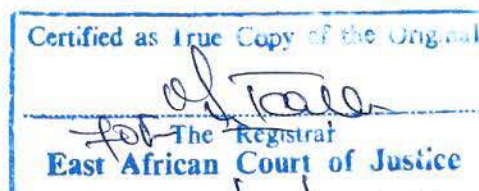
126. The Treaty for the Establishment of the EAC provides, under Article 30(2) that:

“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.”

127. From the pleadings and the submissions by the parties and from the Judgment of the Trial Court, we deduce that the decision complained of by the Respondent is the decision of the Supreme Court of Kenya of 07th August 2019 (and not the decision of the Court of Appeal at Nyeri rendered on 20th December 2018).

128. We also deduce from the records of this Appeal that the Respondent filed her case to the Trial Court on 05th October, 2019 within the two months period as provided for under Article 30(2) of the EAC Treaty and that the Appellant failed to elucidate how and why the Respondent ought to have complained in the Trial Court over decisions rendered by the High Court or the Court of Appeal and not the judgment of the Supreme Court of Kenya rendered on 07th August 2019.

129. Accordingly, we answer issue No. 3 in the negative.



ISSUE NO. 4: WHETHER THE RESPONDENT WAS ENTITLED TO THE REMEDIES GRANTED BY THE FIRST INSTANCE DIVISION OF THIS COURT.


130. The remedies granted to the Respondent by the Trial Court are captured verbatim in paragraph 1(i-v) hereof but it doesn't harm to reproduce them hereunder.

In para 70 of her conclusion, the Trial Court held that:

“ In the result, the Reference is allowed in the following terms:

- i. *A DECLARATION is hereby issued that the Respondent State, through the acts and/or omissions of its judicial organ, violated its commitments to the fundamental and operational principles of the EAC, specifically the principle of rule of law guaranteed under Articles 6(d) and 7(2) of the Treaty.*
- ii. *A DECLARATION is hereby issued that the Respondent State infringed on the Applicant's right to access to justice.*
- iii. *Compensation in general damages in the sum of USD 25,000 (twenty-five thousand) is hereby awarded to the Applicant.*
- iv. *Simple interest at 6% per annum is awarded against the compensation designated in paragraph 70 (iii) hereof from the date of this judgment until payment in full.*
- v. *Costs are awarded to the Applicant. ”*

APPELLANT'S SUBMISSION ON THE FOURTH ISSUE

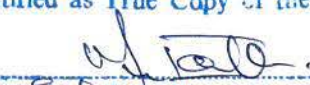
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For The Registrar

131. Surprisingly, Counsel for the Appellant had not submitted on the first two remedies granted by the Trial Court.

132. Counsel argued that to construe the EAC Treaty in a manner that allows the EACJ to hear claims premised on allegations of breach of Human Rights, to determine the question of whether such violations have taken place and to proceed to award damages for violation of such human rights under the guise that what is being exercised is an interpretative jurisdiction of the EAC Treaty cannot under any stretch of imagination be good faith interpretation of the EAC Treaty as required under Articles 31-33 of the Vienna Convention on the Law of Treaties.

133. Counsel further submitted that in doing so, the EACJ would be rendering the express intention of the parties to the treaty who have reserved the exercise of human rights jurisdiction of the EACJ to a future agreement of the parties via a protocol. He also argued that the EACJ has upheld the two-month limitation period on institution of references before it, the statutory period for the determination of electoral disputes in Kenya is equally to be upheld being informed by the Appellant State's public policy considerations and that there is no basis for construing the same as infringing on the right to access to justice.

134. As regard the remedy for general damages, Counsel for the Appellant submitted that there was no basis for award of damages under the provisions of Articles 27, 28 or 29 of the EAC Treaty, and faulted the Trial Court for placing reliance on Articles 35 and 36 of the ILC Articles on State Responsibility to award damages which Articles do not support the court's action .

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For The Registrar
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135. Counsel also submitted that the Respondent's claim was dismissed on the merits both by the High Court and the Court of Appeal and it was improper for the Trial Court to issue damages on hypothetical basis, but this was done despite the First Instance Division acknowledged that the Respondent had not sought any restitution in the Reference before it.

136. Counsel for the Appellant prayed that the Appeal be allowed and the Honorable Court be pleased to find and order as proposed in the memorandum of appeal dated 9th February, 2021.

RESPONDENT'S SUBMISSION ON THE 4th ISSUE

137. Counsel for the Respondent did not submit much on this issue but started reproducing the content of para 61 of the Judgment of the Trial Court where it held that:

"Consequently, with utmost respect, we find that the impugned Supreme Court decision did fall short on the said judicial organ's constitutional duty and curtailed the Applicant's right to access to justice. It thus contravened the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty. Article 4(1) of the ILC Article on State Responsibility provides as follows on the responsibility of States for the actions of their judicial organs:

"The conduct of any State organ shall be considered an act of that State under International law, whether the organ exercises legislative, executive, judicial or any other functions (...)"

138. Counsel further submitted that the Trial Court did give its basis for the award of damages (the ILC principle that every international wrongful act deserves a remedy); and that it did not talk of human rights at this point.

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Ministry of Justice

He indicated that the Appellant merely alleged that Articles 35 and 36 of the ILC Articles do not apply without demonstrating why. For Counsel, they are good law.

139. In his conclusion, Counsel for Respondent submitted that the present Appeal lacks merit on any of the 4 issues that were crystallised for determination and that the Appellant has not been able to prove any of them.

140. Finally, Counsel for the Respondent submitted that the Appellant has dragged this Court and the parties, especially the Respondent, on a journey to nowhere; and that for this reason, the Respondent pleads that she deserves costs.

COURT'S DECISION ON THE FOURTH ISSUE

141. We have answered issue number one, issue number two and issue number three in the negative, meaning that the Appellant has not been able to prove the merit of any of them. We now resolve Issue No. 4 hereunder.

142. On issue number four on whether the Respondent was entitled to the remedies granted by the Trial Court, Counsel for the Appellant has almost not submitted on the declaratory orders made by the Trial Court and failed to show the Court that the Respondent's State has not violated its commitments to the fundamental and operational principles of the EAC, specifically the principle of rule of law guaranteed under Articles 6(d) and 7(2) of the EAC Treaty. Counsel failed also to prove that the Respondent's State, through its judicial organ, had not infringed on the Applicant's right to access to justice.

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143. However, in the Trial Court, the Respondent (Martha Karua) wanted the Court to determine whether or not the Appellant's State, through its Judicial body, accorded her **access to justice** and **fair hearing** as provided for under the Kenyan Constitution which are also fundamental and operational principles which shall govern the achievement of the objectives of the Community by the EAC Partner States.

144. We deem it necessary to reproduce below the pertinent provisions of the Kenyan Constitution as invoked by the Respondent:

" Article 48

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Article 50 (1)

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

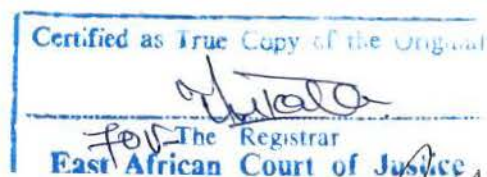
Article 159 (2)

In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

(a)

(b) Justice shall not be delayed;

(c)



(d) Justice shall be administered without undue regard to procedural technicalities; and

(e) The purpose and principles of this Constitution shall be protected and promoted.

Article 259(1) and (8)

(1) This Constitution shall be interpreted in a manner that:-

- a. promotes its purposes, values and principles.*
- b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.*
- c. permits the development of the law.*
- d. contributes to good governance.*

(2)

(3)

(4)

(5)

(6)

(7)

(8) If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay."

145. After carefully considering these pertinent provisions of the Kenyan Constitution as well as the applicable Sections of the Elections Acts which grant parties the right to contest alleged electoral malpractices in the courts of law of Kenya, the Trial Court observed under para 54 and 55, which observation we also agree with that:

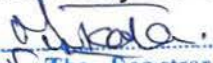
"Accordingly, purely from the access to justice perspective the impugned Supreme Court decision is deeply troubling. The chronology of events in

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this case was that the trial court upheld a point of law that the Applicant's failure to include in her petition the results of the elections and the date of declaration results was fatal. The Applicant undoubtedly had a right to appeal in that matter, which she opted to exercise. The Court of Appeal was also well within its remit to overturn the trial court's decision and refer the matter back to it for determination on its merits; particularly since its appellate jurisdiction in election petitions is limited to questions of law not fact. Unfortunately, the trial court was unable to determine the matter within the time fixed by statute. The Applicant's quest for justice saw her return to the Appellate court to challenge a decision on the merits, albeit one that was delivered beyond the prescribed time-line. On this occasion, she was unsuccessful inter alia on the premise of time-limitation, a decision that was upheld by the apex Court.

Against that background, we respectfully observe that the Applicant did not seek an extension of time from the Supreme Court. No time is designated in the Constitution for remitted cases therefore the issue of extension alluded to by the municipal court would not arise. Secondly, a decision from the Supreme Court that the Court of Appeal 'should have decided to terminate the matter at that stage, well aware that any substantive determination of the petition by the High Court would be an exercise in futility' is extremely troublesome. It suggests that the Applicant's right to access to justice, including exhausting her right of appeal, were unimportant. It does also denote a recommendation for courts to disregard their duty to administer justice purely because in their estimation, to do so would be an exercise in futility."

- 146.** It has been established from the findings of both Divisions and from the Judgment of the Supreme Court of Kenya that the Respondent has not been accorded access to justice by the Judicial body of the Appellant

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State contrary to the spirit and the provisions of the Constitution of Kenya and Articles 6(d) and 7(2) of the Treaty for the Establishment of the EAC Treaty.

As an illustration of the above findings, the **Supreme Court of Kenya in Petition No.3 of 2019, Judgment of 6th August 2019, para 58**, the Court held that:

“ We sympathise with the Petitioner who, without any fault of her own, has been locked out of the seat of justice. We also take note of the long time and the judicial processes that the parties have engaged themselves in. Equally, it is expected that huge financial resources have been spent in prosecuting and defending this matter. Yet, while the general rule is that the successful party ought to be paid costs by the unsuccessful one, where proceedings are declared to be a nullity, no party can claim success.....” (Emphasis ours)

147. The Trial Court observed in paragraph 59 of its Judgment that:

“We take the considered view that is against the totality of the foregoing legal background that Article 259(8) is couched in the terms it is. A historic interpretation of that provision would thus suggest that in the promotion of access to justice, equity and social justice; where a court sitting in interpretation of the Constitution finds that a particular time frame is not prescribed therein, it is urged to construe and remedy the lacuna in such a manner as would ensure that ‘the act shall be done without unreasonable delay.’ In the instant case, therefore, there was a duty upon the Supreme Court to redress the identified lacuna in the law so as to engender equity and social justice in the adjudication process.

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This would not be tantamount to usurping the legislative role of the legislature. But rather a breath of judicial life into the provisions of Article 259(8) of the Constitution to underscore ‘access to justice for all persons’ as guaranteed in Article 48, and ensure that Kenyan law is never silent, always speaking (Article 259(3) of the Kenyan Constitution).”

148. The Trial Court went further and found, in paragraph 60 of its Judgment (which we find in order) that:

“Consequently, with utmost respect, we find that the impugned Supreme Court decision did fall short on the said judicial organ’s constitutional duty and curtailed the Applicant’s right to access to justice. It thus contravened the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty. Article 4(1) of the ILC Articles on State Responsibility provides as follows on the responsibility of States for the actions of their judicial organs:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions.....”

It is from the above findings, the jurisprudence and relevant authorities on record that the First Instance Division of this Honorable Court issued declaratory orders (which the Respondent was fully entitled to) that:

- (i) *“the Respondent State, through the acts and/ or omissions of its judicial organ, violated its commitments to the fundamental and operational principles of the EAC, specifically the principle of rule of law guaranteed under Articles 6(d) and 7(2) of the Treaty; and*

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(ii) *the Respondent State infringed on the Applicant's right to access to justice.*"

149. Regarding the prayer for general damages, Counsel for the Appellant only submitted that there was no basis for the award of damages under the provisions of the Treaty. However, the Trial Court establishing that the impugned decision of the Supreme Court did fall short on its judicial constitutional duty and curtailed the Applicant's right to access to justice on one hand; and that the said decision contravened the rule of law principle enshrined in Articles 6(d) and 7(2) of the EAC Treaty, the Court based its decision on the provision of Article 4(1) of the ILC Articles on State Responsibility (*supra*)."

150. The Trial Court underlined, in para 64 of its Judgment that with regard to the prayer for general damages, it is not in dispute that the Court is clothed with jurisdiction to grant such reliefs to parties. The Trial Court further decided that this was quite conclusively settled in the **case of Honorable Dr. Margaret Zziwa (*supra*)**. In that case, the duty upon the Court with regard to granting appropriate remedies to parties was spelt out as follows:

"The full effectiveness of East African Community Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief by way of appropriate remedies in the event of breach of such laws. Otherwise such laws would be no more than pious platitudes...Articles 23(1) and 27(1) of the Treaty do not confine the Court's mandate to mere Treaty interpretation and the making of declaratory orders but confer on the Court, being an international judicial body, as an aspect of its jurisdiction, the authority

of the Court

to grant appropriate remedies to ensure adherence to law and compliance with the Treaty.”

151. The Trial Court did not grant restitution as there was no prayer in that regard as provided for under Articles 35 and 36 of the ILC Articles on State Responsibility but granted the claim for compensation as provided for under Article 36(1) of the ILC Articles on State Responsibility which provides that :

“The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.”

152. The remedy of damages granted by the Trial Court was also based on the jurisprudence from this Court in the case of **Grand Lacs Supplier S.A.R.L. vs. The Attorney General of the Republic of Burundi, EACJ Reference No.6 of 2016, p. 26, para. 60** where this Court held that:

“The compensation awardable in that regard would be those ...for what is termed moral, non-material or non-pecuniary loss or damage (also referred to as ‘general damages’). In this case, Court awarded USD \$20,000 as general damages for unlawful seizure of a consignment of goods worth USD \$ 130,524; Treaty and Protocols violations; wrongful deprivation of property, and hampering EAC citizens’ business, trade and economic activity”.

153. With the same reasoning as in the **Grands Lacs Supplier case (supra)**, the Trial Court granted an award of USD \$ 25,000 with a simple interest of 6% per annum from the date of the judgment until payment in full. This remedy was also granted in accordance with the provision of

Article 38(1) of the ILC Articles which provides that: ‘interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation.’”

154. Costs to the Respondent was granted by the Trial Court in accordance with Rule 127(1) of this Court’s Rules of Procedure which provides that costs shall follow the event unless the Court for good reason decides otherwise. This Rule was also emphatically reinforced in the case of **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community & Another, EACJ APPEAL NO.2 of 2019** and we find no reason why the Trial Court would depart from this established jurisprudence that the Respondent was entitled to be granted costs of the Reference.

155. Accordingly, we answer Issue 4 in the affirmative.

156. The Appellant failed to prove the merit of all the grounds of appeal and in application of Rule 127(1) of this Court’s Rules of Procedure as reinforced in **the Attorney General of the Republic of Burundi vs the Secretary General of the East African Community and & another case (supra)**, beside bearing costs in the Trial Court, the Appellant shall also bear costs of this Appeal.

CONCLUSION

157. In light of the above considerations and findings, the Appellant has not succeeded on any of the four framed issues. Accordingly, we hold as follows:

1. The Appeal is dismissed.
2. The Judgment of the First Instance Division is upheld.

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3. The Appellant shall bear the Respondent's costs of this Appeal and of the Reference in First Instance Division.

IT IS SO ORDERED

Dated, Delivered, and signed at ARUSHA this ^{28th}... day of February, 2022.



.....
Nestor Kayobera
PRESIDENT



.....
Geoffrey Kiryabwire
VICE PRESIDENT

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For The Registrar
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Suda Mjasiri
JUSTICE OF APPEAL


Anita Mugeni
JUSTICE OF APPEAL


Kathurima M'Inoti
JUSTICE OF APPEAL

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