


027/2015
21/09/2018
(000201-000167) ON

000201

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

THE MATTER OF

MINANI EVARIST

v.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 027/2015

JUDGMENT

21 SEPTEMBER 2018



[Handwritten signatures in blue ink]
Tukam.
e ↑

TABLE OF CONTENTS

TABLE OF CONTENTS	i
I. THE PARTIES	2
II. SUBJECT OF THE APPLICATION.....	2
A. Facts of the Matter	2
B. Alleged Violations	3
III. SUMMARY OF THE PROCEDURE BEFORE THE COURT.....	4
IV. PRAYERS OF THE PARTIES	4
V. JURISDICTION	5
A. Objections to material jurisdiction.....	5
B. Other aspects of jurisdiction	6
VI. ADMISSIBILITY OF THE APPLICATION	7
A. Conditions of admissibility in contention between the Parties	8
i. Objection based on the alleged failure to exhaust local remedies	8
ii. Objection on the ground that the Application was not filed within a reasonable time.....	10
B. Conditions of admissibility that are not in contention between the Parties	11
VII. MERITS	12
A. Alleged violations of the right to a fair trial	12
i. The alleged violation of the right to have his cause heard by a court of law	12
ii. Alleged violation of the right to legal aid	14
B. Alleged violation of the right to equal protection of the law	16
VIII. REMEDIES SOUGHT	17
IX. COSTS	19
X. OPERATIVE PART.....	19

[Signature] → [Signature] Sulam.

TABLE OF CONTENTS

TABLE OF CONTENTSi

I. THE PARTIES2

II. SUBJECT OF THE APPLICATION2

 A. Facts of the Matter2

 B. Alleged Violations.....3

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT4

IV. PRAYERS OF THE PARTIES4

V. JURISDICTION5

 A. Objections to material jurisdiction5

 B. Other aspects of jurisdiction6

VI. ADMISSIBILITY OF THE APPLICATION.....7

 A. Conditions of admissibility in contention between the Parties8

 i. **Objection based on the alleged failure to exhaust local remedies** 8

 ii. Objection on the ground that the Application was not filed within a reasonable time
10

 B. Conditions of admissibility that are not in contention between the Parties11

VII. MERITS12

 A. Alleged violations of the right to a fair trial12

 i. The alleged violation of the right to have his cause heard by a court of law12

 ii. Alleged violation of the right to legal aid14

 B. Alleged violation of the right to equal protection of the law16

VIII. REMEDIES SOUGHT17

IX. COSTS.....19

X. OPERATIVE PART19

[Handwritten signatures and notes in blue ink]

Subcom.

me & A

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

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

In the Matter of

MINANI EVARIST,
self-represented

versus

UNITED REPUBLIC OF TANZANIA,
represented by:

- i. Ms. Sarah MWAIPOPO, Principal State Attorney and Director of Division of Constitutional Affairs and Human Rights, Attorney General's Chambers;
 - ii. Mr. Baraka H. LUVANDA, Ambassador, Director, Legal Unit, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation;
 - iii. Ms. Nkasori SARA KIKYA, Deputy Director, Human Rights, Principal State Attorney, Attorney General's Chambers;
 - iv. Mr. Mark MULWAMBO, Principal State Attorney, Attorney General's Chambers;
 - v. Ms. Aidah KISUMO, Senior State Attorney, Attorney General's Chambers;
- and

- vi. Mr. Elisha E. SUKA, Foreign Service Officer, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation.

after deliberation,

delivers the following Judgment:

I. THE PARTIES

1. The Applicant, Mr. Minani Evarist, is a national of the United Republic of Tanzania, currently serving a thirty (30) years' prison term for the crime of rape at Butimba Central Prison in Mwanza.
2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October, 1986 and also became a Party to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, the Respondent State deposited the declaration prescribed under Article 34(6) of the Protocol on 29 March 2010.

II. SUBJECT OF THE APPLICATION

A. Facts of the Matter

3. According to the records, in Criminal Case No. 155/2005 before the District Court of Ngara, the Applicant was convicted and sentenced on 30 March 2006, to 30 years imprisonment for having committed the crime of rape of a fifteen (15) year old girl, an offence punishable under Sections 130(1) and (2)(e) and Section 131(1) of the Tanzanian Penal Code, as Revised in 2002.
4. The Applicant filed Criminal Appeal No. 43/2006 before the High Court of Tanzania at Bukoba (hereinafter referred to as 'the High Court'); and Criminal

Suka
2
Ang
mes
@

Appeal No. 124/2009 before the Court of Appeal of Tanzania at Mwanza (hereinafter referred to as 'the Court of Appeal').

5. The High Court and the Court of Appeal upheld the sentence on 29 March 2007 and 16 February 2012, respectively; and the Applicant filed an Application for review before the Court of Appeal on 19 August 2014. The Applicant alleges that this Application is still pending at the time of filing of the Application.

B. Alleged Violations

6. The Applicant alleges that:
 - i. The Court of Appeal of Tanzania "...handed down erroneously its judgment against the Applicant on 16/02/2012; and then caused him severe harm when it did not schedule for a hearing his review request, whereas other applications lodged after his had been registered and scheduled for hearing."
 - ii. The Court of Appeal "...had not considered all the grounds of his defence, and clustered them into three grounds. This legal proceeding was detrimental to the Applicant insofar as it violated his fundamental right to have his cause heard by a court of law as provided for in Article 3(2) of the Charter."
 - iii. As the Respondent State did not afford him legal representation during his trial, he "...was deprived of his right to have his cause heard, which had a prejudicial effect on him. He alleges that this procedure constitutes a violation of the Applicant's fundamental rights as set out in Article 7(1)(c) and (d), of the Charter, and of Sections 1 and 107(2)(b) of the Tanzanian Constitution of 1997" (hereinafter referred to as "the Tanzanian Constitution").
7. In summary, the Applicant alleges the violation of Articles 3(2) and 7(1)(c) and (d) of the Charter.

Handwritten signatures and initials in blue ink at the bottom of the page. The signatures are written in a cursive style. One signature appears to be 'James A' with a large 'A' at the end. Another signature is partially visible as 'James A'. There are also some initials and a date '2014' written in blue ink.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. The Application was filed on 10 October 2015 and served on the Respondent State by a notice dated 23 December 2015, directing the Respondent State to file the list of its representatives within thirty (30) days and to file its Response to the Application within sixty (60) days of receipt of the notice, in accordance with Rules 35(2) (a) and 35(4) (a) of the Rules of Court (hereinafter referred to as "the Rules").
9. The Respondent State filed the names and addresses of its representatives on 22 February 2016.
10. On 31 March 2016, the Application was transmitted to the Chairperson of the African Union Commission and through him to the Executive Council of the African Union and to the State Parties to the Protocol, in accordance with Rule 35(3) of the Rules.
11. The Respondent State submitted its Response on 22 May 2017, which was served on the Applicant by a notice dated 30 May 2017.
12. On 28 June 2017, the Applicant filed the Reply to the Response and this was served on the Respondent State by a notice dated 17 July 2017.
13. The Court decided to close the written pleadings with effect from 9 October 2017, pursuant to Rule 59(1) of the Rules and the Registry duly informed the Parties by a notice dated 9 October 2017.
14. On 6 April 2018, the Parties were informed that the Court would not hold a public hearing indicating that written submissions and the evidence on file were sufficient to determine the matter.

IV. PRAYERS OF THE PARTIES

15. The Applicant prays the Court to:
 - i. Render justice by annulling the guilty verdict and the sentence meted out to him and order his release;

Handwritten signatures and initials in blue ink at the bottom of the page, including a large signature on the right and several smaller ones on the left and center.

- ii. Grant him reparations for the violation of his rights; and
- iii. Order such other measures or remedies that the Court may deem fit to grant.

16. The Respondent State prays the Court to rule that:

- i. the Court has no jurisdiction to hear the matter and that the Application is inadmissible;
- ii. the Respondent State "has not violated Articles 3(2), 7(1), 7(1)(c) and 7(1)(d) of the Charter";
- iii. the Respondent State "should not pay reparations to the Applicant";
- iv. the Application should be dismissed as being baseless; and
- v. the costs be borne by the Applicant.

V. JURISDICTION

17. In accordance with Rule 39(1) of its Rules, "The Court shall conduct preliminary examination of its jurisdiction...".

A. Objections to material jurisdiction

18. The Respondent State objects to the Court's jurisdiction to adjudicate on the matters raised by the Applicant arguing that, in praying the Court to re-examine the matters of fact and law examined by its judicial bodies, set aside their rulings and order the release of the convicted individual, the Applicant is in effect asking the Court to sit as an appellate body, whereas this is not within its powers as set out in Article 3(1) of the Protocol and Rule 26 of the Rules. To this end, the Respondent State makes reference to the Court's Decision in Application No. 001/2013: *Ernest Francis Mtingwi v. Republic of Malawi*.

19. The Applicant rebuts the Respondent State's allegation and asserts that the Court shall have jurisdiction as long as there is a violation of the provisions of the Charter or of any other relevant human rights instruments, which bestow on the Court the power to review decisions rendered by domestic courts, review

5 Aug 2013
 @me AS
 Sukam

evidence and set aside the sentence and acquit the victim of human rights violations.

20. In response to the objection to its material jurisdiction, this Court reiterates its position as affirmed in *Ernest Mtingwi v Republic of Malawi*¹ that it is not an appeal court with respect to decisions rendered by national courts. However, as the Court underscored in its Judgment of 20 November 2015 in *Alex Thomas v United Republic of Tanzania*, and reaffirmed in its Judgment of 3 June, 2016 in *Mohamed Abubakari v United Republic of Tanzania*, that this situation does not preclude it from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is a Party.² Indeed, this falls within the very scope of the powers of the Court as provided for under Article 3(1) of the Protocol.
21. Accordingly, the Court dismisses this objection and holds that it has material jurisdiction.

B. Other aspects of jurisdiction

22. The Court notes that its personal, temporal and territorial jurisdiction has not been contested by the Respondent State, and nothing in the pleadings indicates that the Court lacks jurisdiction. The Court thus holds that:
- i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has deposited the Declaration required under Article 34(6) thereof, which enabled the Applicants to access the Court in terms of Article 5(3) of the Protocol;
 - ii. it has temporal jurisdiction on the basis that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers an unfair process;

¹ Application No. 001/2013. Decision of 15/3/2013, *Ernest Francis Mtingwi v. Republic of Malawi* (hereinafter referred to as "*Ernest Francis Mtingwi v. Malawi Decision*"), para. 14.

² Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania* (hereinafter referred to as "*Alex Thomas v Tanzania Judgment*"), para. 130 and Application No.007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v. United Republic of Tanzania* (hereinafter referred to as "*Mohamed Abubakari v. Tanzania Judgment*"), para. 29.

S. O. Ag...
Ag...
me Ag

- iii. it has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

23. From the foregoing, the Court concludes that it has jurisdiction to hear the instant case.

VI. ADMISSIBILITY OF THE APPLICATION

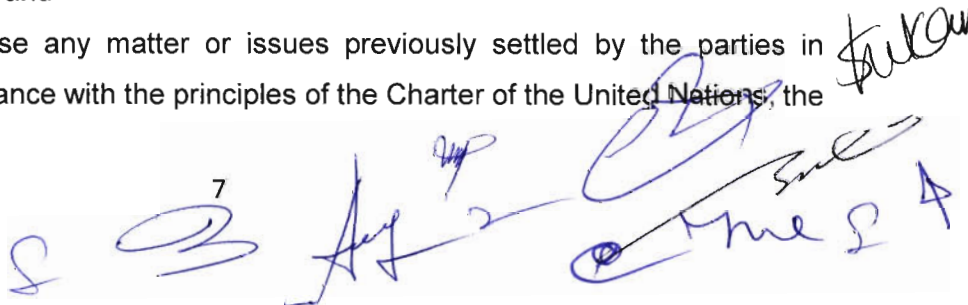
24. In terms of Article 6(2) of the Protocol "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

25. Pursuant to Article 39(1) of the Rules, "the Court shall conduct preliminary examination of (...) the admissibility of the application in accordance with articles 50 and 56 of the Charter and Rule 40 of these Rules."

26. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:

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

7

 The bottom of the page features several handwritten signatures and initials in blue ink. On the left, there is a large, stylized signature. In the center, there are initials that appear to be 'A. J.' followed by a checkmark. On the right, there is a signature that looks like 'The S A' and another signature that is partially obscured by the word 'Tulawa' written vertically.

Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.”

A. Conditions of admissibility in contention between the Parties

27. While some of the above conditions are not in contention between the Parties, the Court notes that the Respondent State raised two objections: one relating to the exhaustion of local remedies and the other, regarding the timeframe for filing the Application before the Court.

i. Objection based on the alleged failure to exhaust local remedies

28. The Respondent State argues that “[t]he exhaustion of domestic remedies is a fundamental principle of international law and that the Applicant should have used all domestic remedies before submitting the case to an international body such as the African Court on Human and Peoples’ Rights”.

29. To buttress its assertions, the Respondent State relies on the African Commission on Human and Peoples’ Rights’ (hereinafter referred to as “the Commission”) jurisprudence in *Communication No. 333/20 – SAHRINGON and Others v. Tanzania* and *Communication No. 275/03, Article 19 v. Eritrea*.

30. The Respondent State contends that the alleged violation of the provisions of Articles 1 and 107A(2)(b) of the Tanzanian Constitution, 1977 should have been challenged in a constitutional petition³, as provided by Article 30(3) of the Tanzanian Constitution and in the Basic Rights and Duties Enforcement Act, Revised Edition, 2002.

31. The Respondent State also claims that the right to legal aid is provided under the Legal Aid Act (Criminal Proceedings), Revised Edition, 2002, but the Applicant never requested for it before the domestic courts.

32. The Applicant refutes the Respondent State’s assertion that the Application is inadmissible, arguing that he could not file a constitutional petition since the

³ Petition to the High Court against violations of the fundamental rights and duties provided for in Articles 12 to 29 of the Constitution.

violation had been committed by the Court of Appeal; nor could he file such a petition before a single High Court Judge against a ruling by the highest court in Tanzania made up of a panel of three Judges.

33. The Court notes that the Applicant filed an appeal and had access to the highest court of the Respondent State, namely, the Court of Appeal, to adjudicate on the various allegations, especially those relating to violations of the right to a fair trial.
34. Concerning the filing of a constitutional petition for violation of the Applicant's rights, the Court has already established that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust prior to seizing this Court.⁴
35. With regard to the allegation that the Applicant did not raise the issue of legal aid during domestic proceedings but chose to bring it before this Court for the first time, the Court, in accordance with the Judgment rendered in *Alex Thomas v. United Republic of Tanzania*, is of the view that the violation occurred in the course of the domestic judicial proceedings that led to the Applicant's conviction and sentence to thirty (30) years' imprisonment; that the allegation forms part of the "bundle of rights and guarantees" relating to the right to a fair trial which was the basis of the Applicant's appeals. The domestic judicial authorities thus had ample opportunity to address the allegation even without the Applicant having raised it explicitly. It would therefore be unreasonable to require the Applicant to file a new application before the domestic courts to seek redress for these claims.⁵
36. Accordingly, the Court finds that the Applicant has exhausted the local remedies as envisaged under Article 56(5) of the Charter and Rule 40(5) of the Rules. The Court therefore overrules this preliminary objection to the admissibility of the Application relating to the exhaustion of local remedies.

⁴ *Alex Thomas v. Tanzania* Judgment, *op. cit.*, paras. 60 – 62; *Mohamed Abubakari v. Tanzania* Judgment, *op. cit.*, paras. 66 – 70; Application No.011/2015. Judgment of 28/9/2017, *Christopher Jonas v United Republic of Tanzania* (hereinafter referred to as "*Christopher Jonas v Tanzania* Judgment", para. 44.

⁵ *Alex Thomas v. Tanzania* Judgment, *op. cit.*, pars. 60 – 65.

9


ii. **Objection on the ground that the Application was not filed within a reasonable time**

37. The Respondent State argues that, should the Court find that the Applicant has exhausted domestic remedies, it should still dismiss the Application because it was not filed within a reasonable time after local remedies were exhausted.

38. It further contends that, even though Article 40(6) of the Rules of Court is not specific on the issue of reasonable time, international human rights case-law has established that six months would be a reasonable time limit within which the Applicant should have filed the Application, maintaining that such was the position of the Commission in Communication No. 308/05, *Michael Majuru v. Zimbabwe*.

39. The Respondent State also maintains that three (3) years and six (6) months had elapsed between the decision of the Court of Appeal of Tanzania (16 February 2012) and the date this Court was seized (10 October 2015), and that this timeframe is not reasonable given that the Applicant had no difficulty in filing the Application earlier.

40. The Applicant refutes the Respondent State's allegations regarding the reasonableness of the timeframe for seizing the Court, arguing that there is no provision in the Rules for assessment of the reasonable time for filing applications before the Court. To this end, he cites the Court's decision in Application No. 013/2011: *Beneficiaries of Late Norbert Zongo and Others v. Burkina Faso*, that the Court had established that the "reasonableness of a timeframe of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."

41. The Applicant then states that he was awaiting the decision of the Court of Appeal of Tanzania on his application for review of the decision of 16 February 2012, which took a long time.

10

The bottom of the page contains several handwritten signatures and initials in blue ink. On the left, there is a signature that appears to be 'S. B.' with the number '10' written below it. To the right, there are several other signatures, including one that looks like 'Julian' and another that is more stylized. There are also some initials and marks scattered around.

42. The Court observes that the question at issue is whether the time that elapsed between the exhaustion of local remedies and filing of the case before it, is reasonable within the meaning of Rule 40 (6) of the Rules.
43. The Court notes that the ordinary judicial remedies available in the Respondent State were exhausted on 16 February 2012, the date of the Court of Appeal decision and that the Application was filed before the Court on 10 October 2015. Between the Court of Appeal's decision and the filing of the Application at this Court, three (3) years, seven (7) months and twenty-four (24) days had elapsed.
44. In its Judgment *in the Matter of the Beneficiaries of late Norbert Zongo and Others v. Burkina Faso*, the Court set out the principle that "... the reasonableness of the timeline for referrals to it depends on the circumstances of each case and must be assessed on case-by-case basis."⁶
45. The Court notes that the Applicant is lay, indigent and incarcerated person without counsel or legal assistance⁷, as well as his attempt to use extraordinary measures, that is, the application for review of the Court of Appeal's decision⁸, and holds that all these constitute sufficient grounds to justify the filing of the Application after three (3) years, seven (7) months and twenty-four (24) days following the Court of Appeal decision.
46. In view of the aforesaid, the Court dismisses this objection to admissibility relating to the filing of the Application within a reasonable time.

B. Conditions of admissibility that are not in contention between the Parties

47. The conditions regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union, the language used

⁶ Application No. 013/2011. Ruling on preliminaries objections of 21/06/2013, *Beneficiaries of late Zongo and Others v. Burkina Faso*, para. 121. See also Application No. 005/2013, *Alex Thomas v. Tanzania* Judgment, *op. cit.*, para. 73; Application No. 007/2013, Judgment of 3/6/2013, *Mohamed Abubakari v. Tanzania* Judgment, *op. cit.*, para. 91; Application No. 011/2015. *Christopher Jonas v. Tanzania* Judgment, *op. cit.*, para. 52.

⁷ *Alex Thomas v. Tanzania* Judgment, *op. cit.*, para. 74

⁸ Application No. 006/2015. Judgment of 23/3/2018, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. Tanzania*, para. 61.

Handwritten signatures and initials in blue ink at the bottom of the page, including a large signature that appears to be 'Alex' and another that appears to be 'Seyna'.

in the Application, the nature of the evidence, and the principle that an Application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (Sub-Rules 1, 2, 3, 4, and 7 of Rule 40 of the Rules) are not in contention between the Parties.

48. The Court also notes that nothing on the record suggests that these conditions have not been met in the instant case. The Court therefore holds that the requirements under those provisions are fulfilled.
49. In light of the foregoing, the Court finds that the instant Application fulfils all admissibility conditions set out under Article 56 of the Charter and Rule 40 of the Rules, and accordingly, declares the same admissible.

VII. MERITS

A. Alleged violations of the right to a fair trial

50. The Applicant alleges two violations, which fall within the ambit of the right to a fair trial, namely: the violation of the Applicant's right to have his cause heard by a court of law and the violation of the right to legal aid.

i. The alleged violation of the right to have his cause heard by a court of law

51. The Applicant alleges that the Court of Appeal failed to examine all of his arguments, since it grouped them into three clusters, although each of his grounds of appeal were invoked for different purposes. According to the Applicant, this affected the merits of each of his pleas and consequently violated "... his fundamental right to have his cause heard by a court of law, as provided for in Article 3(2) of the Charter". The Applicant also contends that there should have been a *voir dire* examination of the witnesses before they were allowed to testify.

52. The Respondent State rebuts the Applicant's allegation, and submits that all his arguments were duly examined by the Court of Appeal, which held that of the

12

[Handwritten signatures and initials in blue ink, including names like 'S', 'A', 'T', 'K', 'M', 'J', 'S', 'K']

three arguments submitted only the third was relevant, which states that "... the prosecution has not been able to gather evidence beyond reasonable doubt ..."

53. The Court notes that the Applicant's allegation does not relate to Article 3(2) of the Charter, as he asserts, which provides that "Every individual shall be entitled to equal protection of the law", but rather to Article 7(1), which stipulates that: "Every individual shall have the right to have his cause heard..."
54. The Court observes that the question that arises here is whether the pleas raised in the appeal were duly examined by the Court of Appeal in conformity with the abovementioned Article 7(1) of the Charter. On this point, the Court has consistently ruled that the examination of particulars of evidence is a matter that should be left for the domestic courts, considering the fact that it is not an appellate court. The Court may, however, evaluate the relevant procedures before the national courts to determine whether they conform to the standards prescribed by the Charter or all other human rights instruments ratified by the State concerned.⁹
55. The Court notes that in the appeal before the Court of Appeal, the Applicant raised two issues, namely: the lack of conclusive evidence on the age of fifteen (15) attributed to the victim and the fact that the crime has not been proven beyond reasonable doubt.
56. The Court notes that the Court of Appeal held that the only important matter was whether the material act of rape (penetration) had been committed by the Applicant, and following examination of the same, it concluded that the Applicant committed the act and confirmed the conviction.
57. The Court notes that the Applicant has not provided sufficient evidence to substantiate his claim as to the age of the victim, and has not demonstrated how the *voir dire* examination would have impacted the decision to convict him.

⁹ *Ernest Francis Mtingwi v. Tanzania* Decision, *op. cit.* para. 14; *Alex Thomas v. Tanzania* Judgment, *op. cit.* para 130; *Mohamed Abubakari v. Tanzania* Judgment, *op. cit.*, paras 25 and 26, Application No. 032/2015. *Kijiji Isiaga v. United Republic of Tanzania*, Application No. 032/2015. Judgment, 21/3/2018 (hereinafter referred to as "*Kijiji Isiaga v Tanzania* Judgment") para. 63.

This Court has held in the past that "...general statements to the effect that a right has been violated are not enough. More substantiation is required".¹⁰

58. The Court further notes that nothing suggests that the Court of Appeal's assessment of the evidence was manifestly erroneous. Therefore, the Court holds that the alleged violation has not been proven and accordingly dismisses it.

ii. Alleged violation of the right to legal aid

59. The Applicant submits that "... he was not afforded legal representation, he was deprived of his right to have his cause heard", which had a prejudicial effect on him and that ... "such a position constitutes a violation of his fundamental rights as set forth in Article 7(1)(c) and (d) of the Charter, and also in Articles 1 and 107A(2)(b) of the Tanzanian Constitution."

60. He challenges the Respondent State's arguments, admits that he "... never asked for legal aid", and that domestic law provisions on legal aid "... does not provide for a procedure or directives on how to seek legal aid."

61. The Respondent State refutes the Applicant's allegations that its domestic law does not provide for a procedure as to how to seek legal aid, and requests proof in that regard. It contends that legal aid is provided in Section 310 of the Tanzanian Criminal Procedure Act, Section 3 of the Legal Aid Act and Rule 31(1) of the Court of Appeal Rules, 2009.

62. It further contends that, at any rate, the competent judicial authority applies for legal aid on behalf of the defendant, where required, provided the following conditions have been met: the defendant must be indigent and unable to pay lawyer's fees; and whether the interests of justice so demand.

¹⁰ *Alex Thomas v. Tanzania* Judgment, *op cit.*, para. 140

Handwritten signatures and initials in blue ink at the bottom of the page, including a large signature that appears to be 'Bukam' and other illegible marks.

63. The Respondent State further prays the Court to take into account the fact that legal aid is progressively being made available and that it is mandatory in cases of murder and homicide. It submits that while legal aid is granted by all its courts, there are however constraints that may impede the mandatory nature of the automatic provision of legal aid in all cases, especially the inadequate number of lawyers to meet this need across the country, as well as the constraint of shortage of financial and other resources.

64. The Respondent State further submits that the right to be represented by a Counsel of one's choice is guaranteed to all those who can afford it. As regards legal aid, however, the Respondent avers that it is neither easy nor practical to provide the defendant with a *pro bono* lawyer of his own choice. It, therefore, prays the Court to take into account the fact that legal aid is not an absolute right and that States exercise their discretionary powers in providing the said aid, depending on their capacity to do so; and this is how the extant legal aid system in the country operates.

65. In conclusion, the Respondent State indicates that the process of review of its legal aid system is ongoing, and that the outcome will be communicated to the Court in due course.

66. The Court notes that Article 7(1)(c) of the Charter provides

“Every individual shall have the right to have his cause heard. This comprises:

... c) The right to defence, including the right to be defended by counsel of his choice.”

67. The Court notes that even though this Article guarantees the right to defence, including the right to be assisted by counsel of one's choice, the Charter does not expressly provide for the right to free legal assistance.

68. However, in its judgment in the *Alex Thomas v. United Republic of Tanzania*, this Court held that free legal aid is a right intrinsic to the right to a fair trial, particularly, the right to defence guaranteed in Article 7(1)(c) of the Charter. In its previous jurisprudence, the Court also held that an individual charged with a

Handwritten signatures and initials in blue ink, including a large signature that appears to be 'Alex' and other initials like 'me S' and 'A'.

criminal offence is automatically entitled to the right of free legal aid, even if the individual has not requested for it, whenever the interests of justice so require, in particular, if he/she is indigent, if the offence is serious and if the penalty provided by the law is severe.¹¹

69. In the instant case, the contention that the Applicant was not afforded free legal aid throughout his trial is not in dispute. Given that the Applicant was convicted of a serious crime, that is, rape, carrying a severe punishment of thirty (30) years, there is no doubt that the interests of justice would warrant free legal aid provided that the Applicant did not have the means to pay for the services of a lawyer. In this regard, the Respondent State does not contest the indigence of the Applicant nor does it argue that he was financially capable of hiring Counsel. It is clear in the circumstances that the Applicant should have been provided with free legal aid. The fact that he did not request for it does not exonerate the Respondent State from its responsibility to provide him with free legal aid.

70. As regards the allegations concerning the margin of discretion that the Respondent State should be given in the implementation of the right to legal aid, the non-absolute nature of the right to legal aid and the lack of financial means to offer legal aid to all persons charged with crimes, the Court holds that these allegations are no longer relevant in this instant case, given that the conditions for the compulsory grant of legal aid are all fulfilled.

71. The Court therefore finds that the Respondent State has violated Articles 7 (1) (c) of the Charter.

B. Alleged violation of the right to equal protection of the law

72. The Applicant submits that, although he filed his application for review before the Court of Appeal and provided all the materials and evidence to corroborate the same, the application was not scheduled for hearing, whereas other applications filed subsequently were registered, set down for hearing and determined.

¹¹ *Ibid.* para. 123, see also *Mohamed Abubakari v. Tanzania* Judgment, *op. cit.*, paras. 138 and 139.

Handwritten signatures and initials in blue ink, including a large signature at the top right and several initials below it.

73. The Respondent State merely refutes this claim and calls on the Applicant to provide proof thereof.

74. The Court notes that the situation described by the Applicant as a violation of his right to equal protection of the law relates to Article 3(2) of the Charter, which stipulates that: "Every individual shall be entitled to equal protection of the law."

75. However, the Court notes that the Applicant has made general allegations without sufficient evidence to substantiate them. Relying on its jurisprudence cited in paragraph 57 of this Judgment, the Court therefore holds that the alleged violation has not been proven, and accordingly dismisses the same.

VIII. REMEDIES SOUGHT

76. The Applicant prays the Court to restore justice by setting aside his conviction and sentence; ordering his release from prison; awarding him compensation for the violation of his fundamental rights and, making such other orders as it may deem fit.

77. In its Response, the Respondent State prays the Court to dismiss the Application and the Applicant's prayers in their entirety on the grounds that they are baseless.

78. The Court notes that Article 27(1) of the Protocol stipulates that "If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

79. In this respect, Rule 63 of the Rules provides that "The Court shall rule on the request for the reparation ... by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision".

Handwritten signatures in blue ink, including a large signature at the top, a signature below it, and several smaller initials and marks at the bottom right.

80. The Court notes its finding in paragraph 69 above that the Respondent State has violated the Applicant's rights to be provided with legal aid. In this regard, the Court recalls its position on State responsibility in *Reverend Christopher R. Mtikila v. United Republic of Tanzania*, that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation."¹²
81. As regards the Applicant's prayer to annul his conviction and sentence and order his release, the Court reiterates its decision that it is not an appellate Court for the reasons that it does not operate within the same judicial system as national courts; and that it does not apply "the same law as the Tanzanian national courts, that is, Tanzanian law".¹³
82. The Court also recalls its decision in *Alex Thomas v United Republic of Tanzania* where it stated that "an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances"¹⁴. This would be the case, for example, if an Applicant sufficiently demonstrates or the Court itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice. In such circumstances, the Court has pursuant to Article 27 (1) of the Protocol the powers to order "all appropriate measures", including the release of the Applicant.
83. The Court observes, however, that such a finding does not preclude the Respondent State from adopting such measures should it deem appropriate.
84. The Court further notes that, in the instant case, the Applicant's right to legal aid was violated but this did not affect the outcome of his trial. The Court further notes that the violation it found caused non-pecuniary prejudice to the Applicant who requested adequate compensation therefor in accordance with Article 27(1) of the Protocol.

¹² Application No. 0111/2011. Ruling of 13/6/2014, *Reverend Christopher R. Mtikila v. United Republic of Tanzania*, *op. cit.*, para. 27.

¹³ *Mohamed Abubakari v Tanzania* Judgment *Ibid*, para. 28.

¹⁴ *Alex Thomas v. Tanzania* Judgment, *op. cit.*, para. 157.

Handwritten signatures and initials in blue ink, including a large signature that appears to be 'Juliam' and other initials like 'me' and 'fs'.

85. The Court therefore awards the Applicant an amount of three hundred thousand Tanzania Shillings (TZS 300,000) as fair compensation.

IX. COSTS

86. In its Response, the Respondent prays the Court to rule that the costs of the proceedings be borne by the Applicant.

87. The Applicant has made no specific requests on this issue.

88. The Court notes in this regard that Rule 30 of its Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs."

89. In the instant case, the Court decides that the Respondent State shall bear the costs.

X. OPERATIVE PART

90. For these reasons,

The Court,

Unanimously,

On jurisdiction:

- i. *Dismisses* the objection to the jurisdiction of the Court;
- ii. *Declares* that it has jurisdiction.

On admissibility:

- iii. *Dismisses* the objection to the admissibility of the Application;
- iv. *Declares* the Application admissible.

A collection of handwritten signatures and initials in blue ink, including a large stylized signature, a signature that appears to be 'S', and a signature that appears to be 'Suliam'.

On the merits:

- v. *Finds* that the alleged violation of the Applicant's right to be heard under Article 7(1) has not been established;
- vi. *Finds* that the alleged violation of the Applicant's right to equal protection of the law, provided for in Article 3(2) of the Charter, has not been established;
- vii. *Declares* that the Respondent State has violated the Applicant's right to defence under Article 7(1)(c) of the Charter for failure to provide him free legal assistance.
- viii. *Dismisses* the Applicant's prayer for the Court to annul his conviction and sentence and to order his release from prison;

On Reparations

- ix. *Awards* the Applicant an amount of Three Hundred Thousand Tanzania Shillings (TZS 300,000) as fair compensation;
- x. *Orders* the Respondent State to pay the Applicant the said sum and report to the Court thereon within six (6) months from the date of notification of this Judgment; and

By a majority of Six (6) for, and Four (4) against, Justices Ben KIOKO, Ângelo V. MATUSSE, Tujilane R. CHIZUMILA and Stella I. ANUKAM dissenting:

On costs

- xi. *Orders* the Respondent State to pay the costs.



Signed:

Sylvain ORÉ, President;

Ben KIOKO, Vice- President;

Rafaâ BEN ACHOUR, Judge;

Ângelo V. MATUSSE, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

and

Robert ENO, Registrar.



In accordance with Article 28 (7) and Rule 60 (5) of the Rules, the Individual Opinion of Justice Rafaâ Ben Achour and the Joint Dissenting Opinion of Justices Ben KIOKO, Ângelo V. MATUSSE, Tujilane R. CHIZUMILA and Stella I. ANUKAM on Costs are attached to this judgement.

Done at Arusha, on this Twenty First Day of September in the year Two Thousand and Eighteen, in English and French, the English version being authoritative.