

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

LIVINUS DAUDI MANYUKA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 020/2015

RULING

(JURISDICTION and ADMISSIBILITY)

28 NOVEMBER 2019

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The Court composed of: Sylvain ORÉ, President; Ben KIOKO, Vice-President; Rafaê 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 (hereinafter referred to as "the Protocol") and Rule 8(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Imani D. ABOUD, member of the Court and a national of Tanzania, did not hear the Application.

In the matter of

Livinus Daudi MANYUKA

represented by:

William Ernest KIVUYO, East Africa Law Society

Versus

UNITED REPUBLIC OF TANZANIA

represented by:

- i. Dr Clement J MASHAMBA, Solicitor General, Attorney General's Chambers
- ii. Ms. Sarah MWAIPOPO, Director of Constitutional Affairs and Human Rights, Attorney General's Chambers
- iii. Mr. Baraka LUVANDA, Ambassador, Director of Legal Unit, Minister of Foreign Affairs and International Cooperation
- iv. Ms. Nkasori SARA KIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers
- v. Mr Venosa MKWIZA, Principal State Attorney, Attorney General Chambers
- vi. Mr. Elisha E. SUKA, Foreign Service Officer, Legal Affairs Unit, Ministry of Foreign Affairs and International Cooperation

- vii. Mr. Mark MULWAMBO, Principal State Attorney, Attorney General's Chambers

After deliberation,

renders the following Judgment:

I. THE PARTIES

1. Livinus Daudi Manyuka (hereinafter referred to as “the Applicant”), is a national of Tanzania who, at the time of filing the present Application, was serving a sentence of thirty (30) years imprisonment for the offence of robbery with violence at Ukonga Prison in Dar-es-Salaam.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as the “Respondent State”) which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as the “the Charter”) on 21 October 1986 and the Protocol on 10 February 2006. It also deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

ii. SUBJECT MATTER OF THE APPLICATION

i. Facts of the matter

3. It emerges from the Application that on 4 November 1999 the Applicant, and two other individuals, were charged with the offence of robbery with violence in the District Court at Mbinga, Ruvuma Region. On 15 May 2000, they were convicted and each sentenced to twenty (20) years imprisonment.
4. The Applicant affirms that he and his co-accused persons filed an appeal before the High Court at Songea. On 9 August 2001, the High Court upheld the

conviction but quashed the District court's sentence and enhanced it to a term of thirty (30) years imprisonment and twelve (12) strokes of the cane. Dissatisfied with that decision they further appealed to the Court of Appeal which, on 9 April 2003, dismissed their appeal.

ii. Alleged violations

5. The Applicant submits that the Respondent State has violated Article 2 of the Charter in that it has unlawfully imprisoned him for a non-existing offence hence curtailing his freedom of movement, association and of access to other amenities of life. The Applicant further submits that the Respondent State's conduct is in contravention of Articles 1 and 7(2) of the Charter and Article 13(6) (c) of the Respondent State's Constitution.
6. The Applicant contends that the enhancement of his sentence from twenty (20) years to thirty (30) years imprisonment by the High Court was an excessive order which violates his right to equality before the law as provided under Article 3 of the Charter.
7. The Applicant alleges that the Respondent State has also violated Articles 4 and 5 of the Charter through the High Court judgment which ordered him to be caned twelve (12) strokes. The Applicant submits that the imposition of caning violates the right to respect, dignity and integrity of a person as protected under the Charter.
8. The Applicant also alleges that the Respondent State has violated the Charter by not according him "the right to legal representation."

iii. SUMMARY OF THE PROCEDURE BEFORE THE COURT

9. The Application was filed on 16 September 2015 and was served on the Respondent State on 15 October 2015. The Respondent State was requested to file its Response within sixty (60) days of receipt of the Application.

10. On 5 January 2016, the Registry received the Respondent State's Response.
11. On 14 July 2016, the Registry received the Applicant's Reply.
12. After several reminders from the Registry, on 15 July 2019, the Applicant's Counsel informed the Registry that he was unable to file submissions on reparations since the Applicant could not be traced following his release from prison and that efforts to reach him had proven futile.

iv. PRAYERS OF THE PARTIES

13. The Applicant prays the Court for the following reliefs:
 - i. Declaration that the respondent state violated his rights as guarantee under Article 1, Article 2, Article 3, Article 4, Article 5, and Article 7 (c) and 2 of the Charter.
 - ii. Consequently, an order compelling the respondent state to release the applicant from prison.
 - iii. That the applicant also seeks an order for reparations should this Honourable court find merit in the application and in the prayers.
 - iv. That the applicant seeks an order of this honourable court to supervise the implementation of the court's order and any other decisions that the court may make if they go to the favours the Applicant." [sic]
14. The Respondent State prays the Court for the following orders with respect to the jurisdiction and admissibility:
 - i. That the Honourable African Court on Human and Peoples 'Rights lacks jurisdiction to handle the Application and it should be dismissed.
 - ii. That the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court and be declared inadmissible.

- iii. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of the Court and be declared inadmissible.
- iv. That the Application be dismissed in accordance to Rule 38 of the Rules of Court ”

15. The Respondent State prays the Court to find that it has not violated Articles 1, 2, 3, 4, 5, 7(c) and 7(2) of the Charter. It further prays the court to:

- i. **Dismiss** the Application for **lacking merit**.
- ii. **That the** Applicant should not be released from prison.
- iii. The Applicant’s prayer for reparations be dismissed.

v. JURISDICTION

16. The Court observes that Article 3 of the Protocol provides as follows:

- “1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
- 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.”

17. The Court further observes that in terms of Rule 39(1) of the Rules “[T]he Court shall conduct preliminary examination of its jurisdiction ...”

18. On the basis of the above-cited provisions, therefore, the Court must, preliminarily, conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

A. Objections to material jurisdiction

19. The Respondent State raises two objections in relation to the Court's material jurisdiction. Firstly, that the Court is being asked to sit as a court of first instance, and, secondly, that the Court is being asked to assume appellate jurisdiction.

ii. Objection on the ground that the Court is being asked to sit as a court of first instance

20. The Respondent State avers that the Applicant, by challenging the constitutionality of his sentence and claiming that it is in violation of Article 13(6) of its Constitution, is inviting the Court to address a matter that has never been considered in the domestic courts and, therefore, inviting the Court to sit as a court of first instance.

21. The Respondent State submits that this Application is the first time that the Applicant is challenging the constitutionality of his sentence under the Minimum Sentences Act.

22. The Applicant submits that this Court has jurisdiction *ratione materiae* because the allegations in the Application raise violations of the Charter. The Applicant also avers that this Court has jurisdiction *ratione personae* as he is a citizen of the Respondent State which has ratified the Protocol and filed the Declaration under Article 34(6) thereof. The Applicant supports his submission by referring the Court to its judgment in *Frank David Omary and Others v. United Republic of Tanzania*.

23. In the present case, the Court notes that the Applicant's allegations directly relate to rights guaranteed in the Charter. The Court further notes that the Applicant is not asking the Court to sit as a court of first instance but rather invoking the Court's jurisdiction under the Charter to determine if the conduct that he is complaining of is a violation of the Charter.

24. The Court recalls that it has consistently held that so long as the Application alleges violations of rights protected in the Charter or any other international instrument to which the Respondent State is a party it possesses jurisdiction.¹ On this point, the Court recalls that in *Armand Guehi v United Republic of Tanzania* it expressed itself thus "...with respect to whether it is called to act as court of first instance, [the Court is of the view] that, by virtue of Article 3 of the Protocol, it has material jurisdiction so long as the Application alleges violations of provisions of international instruments to which the Respondent State is a party."²
25. Since the Applicant is alleging violation of the Charter, to which the Respondent State is a party, the Court finds that it will not be sitting as a court of first instance in adjudicating on the Applicant's allegations and, accordingly, dismisses the Respondent State's objection in this regard.

iii. Objection on the ground that the Court is being requested to assume appellate jurisdiction

26. The Respondent State avers that the Court lacks jurisdiction to examine the present Application since the Applicant is asking it to sit as an appellate Court and deliberate on matters already concluded by the Court of Appeal.
27. The Respondent State cites, in support of its contentions, the judgment of the Court in *Ernest Francis Mtingwi v. Republic of Malawi* where the Court held that it does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and/or regional courts.
28. The Applicant submits that the Court has jurisdiction as per Article 3 of the Protocol. The Applicant relies on the Court's decision in *Alex Thomas v. United Republic of Tanzania* to justify the admissibility of the Application.

¹ See, Application No. 025/2016. Judgment of 28/03/2019 (Merits and Reparations), *Kenedy Ivan v. United Republic of Tanzania* § 20-21. Application No. 006/2015. Judgment of 23/03/2018 (Merits), *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* § 36.

² Application No. 001/2015. Judgment of 7/11/2018 (Merits and Reparations) § 31.

29. The Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.³ Nevertheless, while it does not have appellate jurisdiction in relation to domestic courts, the Court retains the power to assess the propriety of domestic proceedings in the light of a State's international commitments.⁴
30. Regarding the Respondent State's objection, the Court notes that the essence of the objection is that the Applicant is asking the Court to deliberate on matters that were already concluded by its domestic courts. The Court further notes that the allegations by the Applicant are within the purview of its jurisdiction given that they invoke rights protected under the Charter.
31. As established by the Court's jurisprudence, examining a State's compliance with its international obligations does not amount to the Court sitting as an appellate court.⁵ The Court, therefore, dismisses the Respondent State's objection in this regard.
32. Based on the foregoing, the Court finds that it has material jurisdiction to deal with the Application.

iv. Other aspects of jurisdiction

33. The Court notes that other aspects of its jurisdiction are not contested by the Parties and nothing on the record indicates that the Court lacks jurisdiction. The Court, therefore, holds that:
 - i. It has personal jurisdiction given that the Respondent State is a party to the Protocol and it is deposited the required Declaration.

³ *Armand Guehi v. Tanzania*, *Ibid*, § 33. See, also, *Alex Thomas v. Tanzania* (2015) (Merits) 1 AfCLR 465 §§ 60-65.

⁴ See, *Armand Guehi v. Tanzania*, *Ibid* note 2, § 33.

⁵ *Kenedy Ivan v Tanzania*, *supra* note 1, § 26-27.

- ii. It has temporal jurisdiction as the alleged violations were continuing at the time the Application was filed, which is after the Respondent State became a party to the Protocol and deposited its Declaration.
- iii. It has territorial jurisdiction given that the alleged violations occurred within the territory of the Respondent State.

34. In light of the foregoing, the Court finds that it has jurisdiction to hear the Application.

vi. ADMISSIBILITY

35. Pursuant to Article 6(2) of the Protocol, “[t]he Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter”. In terms of Rule 39 of its Rules, “[t]he 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.”

36. 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:

- i. disclose the identity of the Applicant notwithstanding the latter’s request for anonymity;
- ii. comply with the Constitutive Act of the Union and the Charter;
- iii. not contain any disparaging or insulting language;
- iv. not be based exclusively on news disseminated through the mass media;
- v. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- vi. 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

- vii. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.”

37. While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections in relation to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies and the second objection relates to whether the Application was filed within a reasonable time or not.

A. Conditions of admissibility in contention between the Parties

i. Objection relating to non-exhaustion of local remedies

38. The Respondent State avers that, with respect to the allegation that the sentence imposed on the Applicant was unconstitutional, the Applicant could have challenged this through the procedure provided under the Basic Rights and Duties Enforcement Act. The Respondent State further contends, with regard to the allegation that the thirty (30) year sentence was inappropriate, that the Applicant had the opportunity to argue this before the Court of Appeal which he did not do despite being represented by an advocate.

39. The Respondent State also submits that, with regard to the allegation that the Applicant was denied legal aid, the Applicant could have raised this issue before the trial court. The Respondent State thus submits that the Applicant had legal remedies at his disposal which he did not utilise and that it is, therefore, premature of him to institute this Application.

40. For his part, the Applicant submits that he took his case to the Court of Appeal which is the highest court in the Respondent State and that he, therefore, exhausted local remedies.

41. Concerning the filing of a constitutional petition for violation of his rights, the Applicant submits that the Court has consistently ruled that the application for review of a Court of Appeal decision amounts to an extraordinary measure which need not be exhausted for admissibility before the Court. In support of this argument he relies on the Court's decision in *Alex Thomas v United Republic of Tanzania*.

42. The Applicant also contends that, with regard to the Respondent State's submission that he could have raised the issue of legal aid during his trial, being a layman, he had the right to be informed of his right to free legal aid and be facilitated to access the same.

43. The Court notes that subsequent to the Applicant's conviction by the District Court at Mbinga, Ruvuma Region, he filed an appeal before the High Court and, subsequently, before the Court of Appeal. The High Court dismissed the Applicant's appeal on 9 August 2001 and the Court of Appeal also dismissed his appeal on 9 April 2003. The Applicant, therefore, accessed the highest court in the Respondent State with regard to his grievances.

44. The Court also notes that the alleged violations of his rights relate to the domestic judicial proceedings that led to his conviction and sentence. The allegations raised by the Applicant, therefore, form part of the bundle of rights and guarantees that were related to or were the basis of his appeals and which the domestic authorities had ample opportunity to redress even though the Applicant did not raise them explicitly.⁶

45. Concerning the filing of a constitutional petition for violation of the Applicant's rights after the Court of Appeal dismissed his appeal, the Court has already established that this remedy, in the Respondent State's judicial system, is an extraordinary remedy that an Applicant is not required to exhaust prior to seizing the Court.⁷

⁶ See, *Alex Thomas v. Tanzania* (Merits), *supra* note 3, § 60-65; Application No 027/2015. Judgment of 21/09/2018 (Merits and Reparations), *Minani Evarist v. United Republic of Tanzania* § 35.

⁷ *Alex Thomas v Tanzania* (Merits), *supra* note 3, §§ 63-65.

46. Accordingly, the Court finds that the Applicant exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 40(5) of the Rules and, therefore, dismisses the Respondent State's objection in relation to non-exhaustion of local remedies.

ii. Objection relating to failure to file the Application within a reasonable time

47. The Respondent State submits that the period of five (5) years and six (6) months that the Applicant took to file this Application, after the Court of Appeal delivered its judgment, is unreasonable within the meaning of Rule 40(6) of the Rules. In support of its argument, the Respondent State refers to the decision of the African Commission on Human and Peoples' Rights (hereinafter "the Commission") in *Michael Majuru v. Republic of Zimbabwe* and prays the Court to declare the matter inadmissible.

48. The Applicant contends that the Application must be considered to have been filed within a reasonable time given the circumstances of the matter and his situation as a lay, indigent and incarcerated person.

49. The Court notes that Article 56(6) of the Charter does not set a limit for the filing of cases before it. The Court also notes that Rule 40(6) of the Rules simply refers to 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..." without prescribing any specific period of time.

50. As the Court has held "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case by case basis."⁸ A non-exhaustive list of circumstances that the Court has

⁸ *Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe de Droits de l'Homme et des Peuples v Burkina Faso (Preliminary Objections)* (2014) 1 AfCLR 197 § 121.

considered in determining the reasonableness of time before the filing of an Application include the following: imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisals and the use of extraordinary remedies.⁹

51. In the present matter, the Court notes that the Court of Appeal dismissed the Applicant's appeal on 9 April 2003 and that the Applicant filed this Application on 16 September 2015. The Court further notes that the Respondent State deposited its Declaration under Article 34(6) on 29 March 2010, allowing individuals and non-governmental organisations to directly access the Court. In total, therefore, the Applicant filed this Application five (5) years and six (6) months after the Respondent State deposited its Declaration. The question that remains, therefore, is whether, in the circumstances of the case, the period of five (5) years and six (6) months is reasonable.
52. The Court notes that in *Amiri Ramadhani v United Republic of Tanzania*¹⁰ and *Christopher Jonas v United Republic of Tanzania*¹¹ it held that the period of five (5) years and one (1) month was reasonable owing to the circumstances of the Applicants. In these cases, the Court took into consideration the fact that the Applicants were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not have the assistance of a lawyer in their trials at the domestic court, were illiterate and were not aware of the existence of the Court. Again, in *Werema Wangoko and another v. United Republic of Tanzania*,¹² the Court decided that the Applicants, having used the review procedure, were entitled to wait for the review judgment to be delivered and that this justified the filing of their Application five (5) years and five (5) months after exhaustion of local remedies.

⁹ Application No. 015/2015. Ruling of 26/09/2019 (Jurisdiction and Admissibility), *Godfred Anthony and Ifunda Kisite v United Republic of Tanzania* § 43.

¹⁰ Application No.010 of 2015. Judgment of 11/05/2018 (Merits), *Amiri Ramadhani v. United Republic of Tanzania* § 50.

¹¹ Application No. 011/2015, Judgment of 28/09/2017 (Merits), *Christopher Jonas v. United Republic of Tanzania* § 54.

¹² Application No. 024/2015. Judgment of 7/12/2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania* §§ 48-49.

53. In *Godfred Anthony and another v United Republic of Tanzania*, however, the Court held that a period of five (5) years and four (4) months was an unreasonable lapse of time before the filing of an application. In the preceding case, the Court reasoned that while the applicants were incarcerated and therefore restricted in their movements they had not “asserted or provided any proof that they are illiterate, lay, or had no knowledge of the existence of the Court.”¹³ The Court concluded that while it has always considered the personal circumstances of applicants in assessing the reasonableness of the lapse of time before the filing of an application, the applicants had failed to provide it with material on the basis of which it could conclude that the period of five (5) years and four (4) months was reasonable.¹⁴
54. In the present case, the Court notes that the Applicant has indicated that he is “an indigent incarcerated person operating without legal assistance or legal representation ...” The Applicant has also stated that he is a peasant. The Court observes, however, that aside from the blanket assertion of indigence the Applicant has not attempted to adduce evidence explaining why it took him five (5) years and Six (6) months to file his Application.
55. The Court notes that unlike the applicants in *Amiri Ramadhani v United Republic of Tanzania*¹⁵ and *Christopher Jonas v United Republic of Tanzania* the Applicant in the present case had legal representation in pursuing his appeals both before the High Court and the Court of Appeal. In the absence of any clear and compelling justification for the lapse of five (5) years and Six (6) months before the filing of the Application, the Court finds that this Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter which requirement is restated in Rule 40(6) of the Rules.
56. The Court recalls that the conditions of admissibility under the Charter are cumulative such that if one condition is not fulfilled then the Application

¹³ Application No. 015/2015. Ruling of 26/09/19, (Jurisdiction and Admissibility) § 48.

¹⁴ *Ibid* § 49.

¹⁵ *Amiri Ramadhani v. United Republic of Tanzania*, *supra* note 10 § 50.

becomes inadmissible.¹⁶ In the present case, since the Application has failed to fulfil the requirement under Article 56(6) of the Charter, which is restated in Rule 40(6) of the Rules, the Court, therefore, finds that the Application is inadmissible.

vii. COSTS

57. Both the Applicant and the Respondent did not make any submissions on costs.

58. The Court notes that Rule 30 of its Rules provides that “unless otherwise decided by the Court, each party shall bear its own costs.”

59. In the present Application, the Court decides that each Party shall bear its own costs.

viii. OPERATIVE PART

60. For these reasons,

THE COURT,

Unanimously:

On jurisdiction

- i. *Dismisses* the objections to its material jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objection to the admissibility of the Application based on the lack of exhaustion of local remedies;

¹⁶ Application No. 016/2017. Ruling of 28/03/2019, (Jurisdiction and Admissibility), *Dexter Johnson v Ghana* § 57.

- iv. *Finds* that the Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter;
- v. *Declares* that the Application is inadmissible.

On costs

- vi. *Orders* each party to bear its own costs.

Signed:

Sylvain ORÉ, President;

Ben KIOKO, Vice President;

Rafaâ BEN ACHOUR, Judge;

Ângelo V. MATUSSE, Judge;

Suzanne MENGUE, Judge;

M- Thérèse MAKAMULISA Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

and Robert ENO, Registrar.

Done at Zanzibar, this 28th Day of November in the Year Two Thousand and Nineteen in English and French, the English text being authoritative.