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

**THE MATTER OF**

**HAMIS SHABAN alias HAMIS USTADH**

**V.**

**UNITED REPUBLIC OF TANZANIA**

**APPLICATION NO. 026/2015**

**JUDGMENT**

**2 DECEMBER 2021**

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**The Court composed of**: Blaise TCHIKAYA, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO – 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 9(2) of the Rules of Court (hereinafter referred to as "the Rules")[1], Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the Matter of
Hamis SHABAN alias Hamis USTADH
*Self-represented*

Versus

UNITED REPUBLIC OF TANZANIA
*Represented by;*

i. Mr Gabriel P. MALATA, Solicitor General, Office of the Solicitor General
ii. Ms Sarah MWAIPOPO, Director, Division of Constitutional Affairs and Human Rights, Principal State Attorney
iii. Mr Baraka LUVANDA, Director of Legal Affairs; Ministry of Foreign Affairs East Africa and International Cooperation
iv. Ms Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers
v. Mrs Venosa MKWIZU, Principal State Attorney, Attorney General's Chambers
vi. Ms Richard KILANGA, Senior State Attorney, Attorney General's Chambers
vii. Mr Elisha SUKA, Foreign Service Officer, Ministry of Legal Affairs and International Cooperation

[1] Formerly, Rule 8(2) of the Rules of Court, 2 June 2010.

After deliberation,

*Renders this Judgment*:

## I. THE PARTIES

1. Mr. Hamis Shaban alias Hamis Ustadh (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who at the time of filing the Application was serving a thirty (30) year prison sentence at the Butimba Central Prison, in the Mwanza region, following a conviction of an unnatural offence of sodomy of a ten (10) year old girl. He challenges the lawfulness of his trial.

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 Charter") on 21 October 1986, and to the Protocol, on 10 February 2006. The Respondent State also on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications directly from individuals and Non-Governmental Organizations (NGOs) on Human and Peoples' Rights (hereinafter referred to as "the Declaration"). On 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration with the Chairperson of the African Union Commission. The Court held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit. [2]

[2] *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 § 38.

## II. SUBJECT OF THE APPLICATION

### A. Facts of the matter

3. It emerges from the record, that the Applicant was arrested on 16 November 2001 and subsequently charged before the District Court of Nyamagama at Mwanza with the unnatural offence of sodomy of a ten (10) year old girl. On 5 April 2004, he was convicted, sentenced to thirty (30) years' imprisonment and ordered to pay compensation of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) to the victim.

4. On 7 March 2005, the Applicant appealed his conviction and sentence to the High Court of Tanzania at Mwanza, and on 30 June 2006, the High Court dismissed his appeal for lack of merit.

5. On 7 September 2010, the Applicant appealed to the Court of Appeal of Tanzania sitting at Mwanza and on 14 March 2013, the Court of Appeal dismissed his appeal for lack of merit.

6. On 29 September 2014, the Applicant filed before the Court of Appeal an Application for review which was registered as Criminal Application No.09/2014 and was pending at the time the Applicant filed his Application before this Court, that is, on 2 October 2015.

### B. Alleged violations

7. The Applicant alleges the following:
    i. That the procedure in the Court of Appeal relating to his appeal was unfair and therefore, a violation of his right to be heard;

ii. That the denial of free legal assistance violated his rights under Articles 7(1) (c) and (d) of the Charter, “same as Article 13(6) (A) and 107 a 2(b) of the country Constitution 1977”;
iii. That his rights to equality before the law and equal protection of the law and to a fair trial were violated due to the delay by the Court of Appeal in the hearing of his application for review.

8. However, subsequently, the Applicant withdrew the allegation on the delay of the hearing of the review after his application for review was heard. He thus contests the decision on his application for review which, according to him, occasioned a miscarriage of justice.

## III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

9. The Application was filed on 2 November 2015 and served on the Respondent State on 4 December 2015. It was also transmitted to the entities listed under Rule 42(4) of the Rules[3] on the same date.

10. On 4 January 2016, the Applicant requested for legal aid from the Court. His application was subsequently considered by the Court but denied because he did not meet the Court’s criteria for provision of legal aid. He was subsequently notified of this decision.

11. The Respondent State filed its Response on 6 February 2017 and this was transmitted to the Applicant on 9 February 2017.

12. On 21 March 2017, the Applicant filed a Reply to the Response of the Respondent State, which was transmitted to the Respondent State on 16 June 2017.

[3] Formerly Rule 35(3) of the Rules of Court 2 June 2010.

13. Pleadings were closed on 16 June 2017 and the Parties were duly notified.

14. On 9 March 2018, pleadings were re-opened to allow the Applicant to submit "additional evidence" relating to his Application for Review No 09/2014 filed on 4 January 2018 and on 23 February 2018. The Applicant informed the Court that, the Court of Appeal sitting at Mwanza had heard his application for review and issued its decision on 2 December 2017. In view of the above circumstance, he decided to withdraw the allegation in relation to the violation of his right to equality before the law and to equal protection of the law as well as to a fair trial. However, he also submitted "additional evidence" relating to the Court of Appeal's judgment on his application for review.

15. On 9 March 2018, the Respondent State was requested to file a Response to the additional evidence, within thirty (30) days of receipt thereof.

16. On 2 July 2018, the Parties were informed that the Court had decided to consider the merits and reparations jointly, and the Applicant was requested to file his submissions on reparations within thirty (30) days of receipt of the notice.

17. On 6 August 2018, the Applicant filed his submissions on reparations and these were served on the Respondent State on 21 August 2018 requesting the Respondent State to file its submissions on reparations within thirty (30) days of receipt thereof.

18. On 3 July 2019 the Respondent State filed its Response to the Applicant's additional evidence and this was transmitted to the Applicant on 31 July 2019 for his Reply thereto within thirty (30) days of receipt thereof.

19. On 16 September 2020, the Applicant was reminded to file his reply but did not do so. Furthermore, the Respondent State was sent a reminder, to file its

Response on the submissions of reparations within thirty (30) days of receipt thereof. However, the Respondent State did not respond.

20. Pleadings were closed on 18 October 2021 and the Parties were duly notified.

## IV. PRAYERS OF THE PARTIES

21. The Applicant prays the Court to:
    i. Restore justice where it was overlooked and quash both conviction and sentence imposed upon him and set him at liberty;
    ii. Grant him reparations pursuant to Article 27 (1) of the Protocol;
    iii. Grant any other order(s) or reliefs it deems fit in the circumstances of the complaint.

22. The Respondent State prays the Court with respect to the merits of the Application, to find that:

    i. The Government of the United Republic of Tanzania did not violate Article 3(1) of the African Charter on Human and Peoples' Rights.
    ii. The Government …. did not violate Article 3(2) of the African Charter on Human and Peoples' Rights.
    iii. The Government ….. did not violate Article 7(1)(c) of the African Charter on Human and Peoples' Rights.
    iv. The Government ….. did not violate Article 7(1)(d) of the African Charter on Human and Peoples' Rights.
    v. The Government…. did not contravene Article 107A (2) (b) of the Constitution of the United Republic of Tanzania, 1977.
    vi. The Government ….. Tanzania did not contravene Article 107A (2)(c) and 107B of the Constitution of the United Republic of Tanzania, 1977.
    vii. The Government … did not contravene Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977.

viii. The Application be dismissed for lack of merit.

ix. The costs of this Application be borne by the Applicant.

## V. JURISDICTION

23. The Court notes 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 instruments ratified by the states concerned.
>
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

24. The Court notes that in accordance with Rule 49(1) of the Rules[4]; "[t]he Court shall conduct preliminary examination of its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

25. On the basis of the above-cited provision, the Court must in every application, conduct preliminary assessment of its jurisdiction and dispose of objections thereto, if any.

26. The Respondent State raises an objection to the material jurisdiction of the Court.

[4] Formerly, Rule 39(1) of the Rules of Court, 2 June 2010.

## A. Objection to material jurisdiction

27. The Respondent State contends, that the Court is not vested with the powers to consider this Application since the Applicant is requesting the Court to sit as an appellate Court over matters already finalized by its Court of Appeal, being the highest Court in its judicial system. This is especially since the order to set the Applicant at liberty would require this Court so act as such.

28. Citing the Court's jurisprudence in *Alex Thomas v United Republic of Tanzania,* the Respondent State further contends that some of the allegations in the Application were never raised before the national courts and are being raised for the first time before this Court. These allegations are, that the Applicant "was isolated from the procedure of the Court of Appeal", that the Applicant had no legal representative and that he was deprived of the right to be heard.

29. The Respondent State further cites Article 3(1) of the Protocol, and Rule 26 of the Rules,[5] and argues that the Court has jurisdiction only with respect to cases concerning the application and interpretation of the Charter, the Protocol, and any other relevant human rights instrument ratified by the State concerned. It concludes that for these reasons, the Court should find that it does not have jurisdiction to consider this Application.

30. The Applicant contends that the Court has jurisdiction to consider this Application. The Applicant further argues that the rights alleged to have been violated by the Respondent State, are rights protected under the Charter to which the Respondent State is Party.

[5] Currently, Rule 29 of the Rules of the Court, 25 September 2020.

31. The Applicant therefore, prays, the Court to disregard the argument of the Respondent State on the issue, and consider his matter in the interests of justice.

***

32. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[6]

33. The Court recalls, its established jurisprudence, "that it is not an appellate body with respect to decisions of national courts".[7] However "this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[8]

34. The Court notes that, the Applicant alleges the violation of his right to a fair trial and to equality before the law and equal protection of the law which are provided for in the Charter to which the Respondent State is a party. Thus, the Court is not being requested to sit as an appellate court or as a court of first instance as alleged by the Respondent State, but rather is acting within the confines of its powers.[9]

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[6] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465 §§ 45 ; *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65 § 34 -36 ; *Jibu Amir alias Mussa and another v. United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits and reparations) § 18; *Massoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No. 008/2016 Judgment of 25 June 2021 (merits and reparations) § 21.

[7] *Ernest Francis Mtingwi v. Malawi* (jurisdiction) § 14.

[8] *Kenedy Ivan v. United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations), § 26; *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 247 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

[9] *Massoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No. 008/2016, judgment of 25 June 2021 (merits and reparations), § 22.

35. In view of the foregoing, the Court therefore rejects the Respondent State's objection and finds that it has material jurisdiction to consider this Application.

## B. Other aspects of jurisdiction

36. The Court observes that even though no objection has been raised with respect to its personal, temporal or territorial jurisdiction, pursuant to Rule 49(1) of the Rules, the Court must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

37. The Court notes, with respect to its personal jurisdiction that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited the Declaration provided for under Article 34(6) of the Protocol with the African Union Commission. On 21 November 2019, it deposited an instrument withdrawing the Declaration with the African Union Commission.

38. The Court recalls its jurisprudence that, the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have retroactive effect and it also has no bearing on matters pending prior to the filing of the Declaration, as is the case of the present Application.[10]

39. In view of the above, the Court finds that it has personal jurisdiction.

40. With respect to its temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains incarcerated on the basis of what he considers an

[10] *Ingabire Victoire Umuhoza v. Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67; *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 37-39.

unfair process. Consequently, the Court holds that it has temporal jurisdiction to consider the Application.[11]

41. The Court also notes that it has territorial jurisdiction given that the alleged violations occurred in the Respondent State's territory.

42. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

## VI. ADMISSIBILITY

43. Pursuant to 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".

44. In accordance with Rule 50(1) of the Rules[12], the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules".

45. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> b. comply with the Constitutive Act of the Union and the Charter;
> c. not contain any disparaging or insulting language;
> d. not be based exclusively on news disseminated through the mass media;

[11] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71 - 77.

[12] Formerly, Rule 40(1) of the Rules of Court, 2 June 2010.

e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

f. 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

g. 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."

## A. Objections to the admissibility of the Application

46. The Respondent State objects to the admissibility of this Application on the ground that the Applicant did not exhaust local remedies before filing the Application before this Court.

47. The Respondent State contends that the requirement to exhaust local remedies is a fundamental principle under international law, and that a complainant is required to exhaust all legal remedies available within his national judicial system before seizing an international judicial body like this Court.

48. The Respondent State submits that its enactment of the Basic Rights and Duties Enforcement Act (2002) was to provide the procedure for enforcing constitutional rights and related matters, and that the Applicant has not explored this option available to him at its national courts before filing this Application. It therefore prays the Court to dismiss this Application with costs, for failure to meet the admissibility requirements under the Rules.

49. The Applicant argues that his Application satisfies the admissibility requirements under the Rules. He further argues, that having appealed to the

Court of Appeal which is the highest court of the Respondent State, the Application satisfies this admissibility requirement.

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50. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2) (e) of the Rules, any application filed before it, has to fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.[13]

51. The Court recalls its jurisprudence that, in so far as the criminal proceedings against an applicant have been determined by the highest appellate court, the Respondent State will be deemed to have had had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[14]

52. In the instant case, the Court notes from the record that, the Applicant's appeals against his conviction and sentence were considered and dismissed by the High Court of Tanzania. On 14 March 2013, the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, upheld the judgment of the High Court. The Respondent State thus had the opportunity to redress the alleged violations. It is therefore clear that the Applicant has exhausted the available domestic remedies.

53. Consequently, the Court dismisses the objection that the Applicant has not exhausted local remedies.

[13] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017), 2 AfCLR 9, §§ 93-94.
[14] *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016), 1 AfCLR 599 § 76.

## B. Other conditions of admissibility

54. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2)(a), (b), (c), (d), (f) and (g) of the Rules. Even Nevertheless, the Court must, in accordance with Rule 50(1) of the Rules cited above, satisfy itself that these conditions have been met.

55. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

56. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is, the promotion and protection of human and peoples' rights. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union. Therefore, the Court holds that the requirement of Rule 50(2)(b) of the Rules is met.

57. The Court finds that the language used in the Application is not insulting or disparaging to the Respondent State or its institutions in compliance with Rule 50(2)(c) of the Rules.

58. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment with Rule 50(2)(d) of the Rules.

59. With respect to Rule 50(2)(f) on filing an Application within a reasonable time after exhaustion of local remedies, the Court notes that the Court of Appeal’s judgment against the Applicant was delivered on 14 March 2013, while the Application was filed on 2 October 2015, that is, two (2) years, six (6) months and eighteen (18) days after exhaustion of local remedies. The Court notes

that the Applicant is incarcerated, lay, and the facts of the case occurred between 2001 and 2013, which is in the early years of the Court's operation when members of the general public, let alone persons in the situation of the Applicant in the present case, could not necessarily be presumed to have sufficient awareness of the rules governing proceedings before this Court.

60. The Court also notes that the Applicant was self-represented in the proceedings before the domestic courts. Therefore, the Court holds that the two (2) years, six (6) months and eighteen (18) days taken to seize the Court is reasonable.[15]

61. Furthermore, the Court finds that the Application does not concern a case which has already been 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 instruments of the African Union.

62. Based on the foregoing, the Court declares that this Application is admissible.

## VII. MERITS

63. The Applicant alleges the violation of his right to a fair trial in respect of:
    i. the proceedings at the Court of Appeal;
    ii. the delay in the determination of his application for review and
    iii. the denial of free legal assistance.

[15] See *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018), 2 AfCLR 218, §§ 54-56; *Anaclet Paulo v United Republic of Tanzania* (merits) (21 September 2018), 2 AfCLR 446, §§ 47-50; *Dismas Bunyerere v United Republic of Tanzania,* ACtHPR, Application No. 031/2015, Judgment of 28 November 2019 (merits), §§ 47and 48.

### i. Allegation relating to the proceedings at the Court of Appeal

64. The Applicant alleges that the judgment of the Court of Appeal was delivered after an unfair procedure resulting in the miscarriage of justice. According to the Applicant, two (2) exhibits were missing from the record of the Court of Appeal which he would have relied upon during the hearing. He further alleges, that the Court of Appeal made reference to the missing evidence without considering his own reliance on this evidence.

65. The Applicant alleges that since he could not make reference to the missing document, the Court of Appeal ought to have resolved the issue by complying with Articles 107B, and 107A (2) C of the Constitution of the United Republic of Tanzania 1977, rather than resorting to foreign judicial authorities.

66. The Applicant further contends, that on the basis of the missing documents, the Court of Appeal ought to have set him free in accordance with Rule 4(2) of its own Rules (2009), in order to achieve substantive justice under Rule 2 of the same Rules.

*

67. The Respondent State disputes the Applicant's allegation and notes that, the latter agreed to proceed with the hearing without making reference to the missing exhibits, and also, to abandon the second and third grounds of his appeal which made reference to the said missing evidence.

68. The Respondent State further argues, that the Applicant's appeal was heard and decided without any regard to the discarded evidence that made reference to the lost exhibits as complained by the Applicant but was rather decided on the basis of the available jurisprudence.

69. The Respondent State further contends, that in upholding the Applicant's conviction, there was sufficient evidence against the Applicant, and as such, the Court of Appeal did not have any reason to resort to the evidence in the missing documents. It argues further, that in doing this, the Court of Appeal did not violate any provision of its Constitution relevant to the case. It thus prays the Court to dismiss this allegation for lack of merit.

***

70. Article 7(1) of the Charter provides that "every individual has the right to have his cause heard".

71. The Court recalls its jurisprudence that:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[16]

72. Furthermore, the Court notes from the record, that the Court of Appeal of the Respondent State acknowledged the missing documents which it described as "... PF3 and a medical report…", and both of which were relied upon by the prosecution during the trial of the Applicant at the lower courts. The Court further notes, that at the hearing of the Court of Appeal on 11 March 2013, the Applicant himself agreed to proceed with his appeal without making reference to the said missing documents in the case file, and the Court of Appeal accepted the Applicant's proposal, by disregarding any evidence that made reference to the said missing exhibits.

[16] *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 65.

73. The Court also observes that, the Applicant elected to abandon two (2) grounds of his appeal, which touched on the said missing exhibits. The Court of Appeal thereafter proceeded to hear the Applicant's appeal on the above terms and concessions, including resorting to other evidence in its record that were not contested by the Applicant.

74. The Court thus considers that the manner in which the Court of Appeal, conducted its proceedings regarding the assessment of the evidence, does not reveal any manifest error, which occasioned a miscarriage of justice to the Applicant requiring its intervention.
75. The Court therefore concludes that the Respondent State did not violate the Applicant's right to be heard.

**ii. Allegation relating to the application for review before the Court of Appeal**

76. The Applicant alleges that the Court of Appeal delayed in determining his application for review of its decision, which he filed on 29 September 2014. He contends that the said application for review, No. 09 of 2014 was yet to be listed for hearing, by the time he filed the Application before this Court, while others which were filed later than his own had been listed for hearing.

77. The Applicant's 'additional evidence' relating to this claim, is of arguments indicating that the Court of Appeal erred in dismissing his application for review. He states that "there were manifest errors" in the judgment of the Court of Appeal of 14 March 2013, which caused a miscarriage of justice that led the Court of Appeal to review its judgment". The Applicant also argues that the said judgment was 'procured by fraud' or a 'dishonest trick' and that the Court of Appeal overlooked and wrongly dismissed his grounds of application for review and 'misapprehended' them. The Applicant maintains that the Court of Appeal wrongly distinguished his case from that of some cases relating to the

review which had similar circumstances as his case.[17] The Applicant alleges that under the above circumstances, the Court of Appeal's ruling "isolate's him and deprives him of his rights to be heard."

*

78. On its part, the Respondent State contends that a period of one (1) year and four (4) months' delay in hearing an application for review, is not an unreasonable delay in the context of the Respondent State's judicial system. It further argues, that the Court should apply the principles of margin of appreciation in this case, in the computation of what amounts to reasonable time.

79. In response to the Applicant's additional evidence relating to the application for review, the Respondent State argues that applications for review are listed for hearing based on the year in which they were filed and that the Applicant's application for review was duly heard by the Court of Appeal.

80. The Respondent State argues that the Court of Appeal considered all of the Applicant's grounds for review and properly applied its relevant jurisprudence in determining them. The Respondent State further argues that the Court of Appeal found that contradictions and inconsistencies in evidence do not amount to errors which were obvious on the face of the record and that the Applicant failed to prove how the judgment was delivered as a result of the alleged fraud or dishonesty.

[17] *Muhudin Ally alias Muddy and 2 Others v Republic*, Criminal Application No. 2 of 2006 and *Chandrakant Joshu Bhai Patel v Republic* (2004) TLR 2018 or 2006) TLR 219; Mbikima Mpigaa and Another v Republic, Civil Application No. 03 of 2011 (Court of Appeal of Tanznia (unreported).

81. The Respondent State avers that the Applicant was accorded the right to be heard in the course of and through the proceedings at the District Court, the High Court and the Court of Appeal and that this right was not violated

82. The Respondent State concludes that this allegation lacks merits, and prays the Court to dismiss it accordingly.

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83. The Court notes that the Applicant's partial withdrawal of the claim before this Court regarding the Application for review relates to the delay in the listing for hearing of that application. This concerns the alleged violation of his right to equality before the law and equal protection of the law under Article 3(1) and (2) of the Charter. The Court will therefore not make a finding on this aspect of the claim.

84. As regards the allegation that the consideration of the Application for review by the Court of Appeal violated the Applicant's right to a fair trial, the Court finds that the Applicant raises the same arguments as he raised regarding the conduct of his appeal before the Court of Appeal. More importantly, the record before the Court shows that there is nothing relating to those proceedings that indicates that the Court of Appeal's consideration of his Application for review resulted in a miscarriage of justice thus violating his right to a fair trial.

85. The Court therefore dismisses this allegation.

**iii. Allegation relating to the provision of free legal assistance**

86. The Applicant alleges that he had no legal representation during his trial, and as such, his right to a fair trial was violated.

87. The Respondent State disputes this allegation and contends that the right to be represented by a legal counsel is not mandatory under its Criminal Procedure Act. It argues, that there are specific situations where the state may provide free legal aid in the form of defence counsel, where it appears to the certifying authority that it is desirable to do so, and in the interests of justice.

88. The Respondent State further argues, that the provision of legal aid is contingent on the indigence of the accused and if it is in the interests of justice. It argues that since the Applicant was not charged with murder or treason, where legal aid is automatically provided, the Applicant ought to have applied for legal aid, and since he did not, he was never afforded any. The Respondent State also argues, that the fact that the Applicant was not represented by legal counsel does not imply that he was prejudiced in any way, since the Applicant was present at his trial, and that all the evidence in relation to his case was adduced in his presence.

89. The Respondent State prays the Court to dismiss this allegation for lack of merit, and to dismiss the whole Application in its totality, for being unsubstantiated and void of merits.

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90. The Court notes that Article 7(1)(c) of the Charter which provides for the right to defence by a counsel of one's choice, does not explicitly provide for the right to legal aid. However, the Court has held that the said provision, when read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR")[18], establishes the right of an accused to free legal assistance when the interests of justice so demands, and

[18] The Respondent State became a party to the International Covenant on civil and Political Rights on 11 June 1976

where he cannot afford one.[19] The interests of justice here contemplated, includes where the Applicant is indigent, where the offence is serious, and where the penalty provided by law is severe.[20]

91. The Court notes from the record that the Applicant had no legal representation at his trial. The Court also notes that on 7 September 2005, during his Appeal at the High Court, Advocate Rutaisire appeared for the Applicant, but promptly informed the Court that he was withdrawing his services, even before the proceedings commenced. The Applicant thereafter was not represented throughout his appeals.

92. The Court further notes that the Respondent State only contends that the Applicant did not make a request for legal assistance. It has not disputed the fact that he was in fact, not afforded legal aid, nor that the offence he was charged with is a serious one.

93. Considering that the Applicant was charged with an offence which carries a minimum sentence of thirty (30) years imprisonment, the Respondent State had a duty to provide the Applicant with free legal assistance without him having to request for it.[21]

94. The Court therefore, finds that the Respondent State violated Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

[19] *Alex Thomas v Tanzania* (merits), §§ 114.
[20] *Alex Thomas v Tanzania* (merits), § 123. See also *Mohammed Abubakari Tanzania*, (merits) §§ 138-139; *Minani Evarist v Tanzania*, (merits) § 68; *Diocles Williams v Tanzania* (merits), § 85; *Anaclet Paulo v Tanzania* (merits) § 92.
[21] *Kalebi Elisamehe v Tanzania* (merits and reparations) § 57.

## VIII. REPARATIONS

95. Article 27 of the Protocol provides that: “if the Court finds that there has been a violation of human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation and reparation”.

96. The Court recalls its established jurisprudence that, “to examine and assess Applications for Reparations of prejudices resulting from human rights violations, it takes into account the principles according to which the State found guilty of an internationally wrongful act, is required to make full reparation for the damage caused to the victim”.[22]

97. Measures that a State may take to remedy a violation of human rights, includes: restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations taking into account the circumstances of each case.[23]

98. The Court further reiterates that the general rule with regard to material prejudice is that there must be a causal link between the established violation and the onus is on the Applicant to provide evidence to justify his prayers.[24] With regard to moral prejudice, the Court exercises judicial discretion in equity.[25]

[22] *Mohammed Abubakari v. Tanzania* (merits), § 242(ix); *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations), (2018) 2 AfCLR 202, § 19.
[23] *Mohamed Abubakari v. United Republic of Tanzania,* ACtHPR, Application No. 007/2013, Judgment of 4 July 2019 (reparations), § 21; *Alex Thomas v. United Republic of Tanzania,* ACtHPR, Application No. 005/2013, Judgment of 4 July 2019 (reparations), § 13.
[24] *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72 § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346 § 15.
[25] *Mohamed Abubakari v. Tanzania* (reparations), § 22*, Alex Thomas v. Tanzania* (reparations), § 14.

## A. Pecuniary reparations

99. The Applicant requests the Court to grant him reparation for the violation of his rights commensurate to the period of time he spent in prison, to be calculated based on the national annual income of an average citizen of the Respondent State.

100. The Respondent State did not respond to this claim.

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101. The Court notes that it did not make a determination regarding the lawfulness or otherwise of the Applicant's imprisonment and it can therefore not grant the Applicant's request to be awarded reparation commensurate with the period of time he spent in prison.

102. With regard to the allegation of the denial of free legal assistance, the Court notes its finding of the violation of Article 7(1)(c) of the Charter, read together with Article 14(3)(d) of the ICCPR, for failure to be provided with free legal aid, which caused him moral prejudice. Accordingly, in the exercise of its discretion, the Court awards the Applicant an amount of Tanzania Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[26]

## B. Non-pecuniary reparations

103. The Applicant prays the Court to quash his conviction and sentence, and set him free.

104. The Respondent State did not respond to this claim.

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[26] See *Paulo v. Tanzania* (merits) *op.cit* § 107; *Evarist v Tanzania* (merits) *op.cit* § 85.

105. As regards the prayer to quash his conviction and sentence, the Court notes that it has not determined whether the conviction or sentence of the Applicant was warranted or not as this is a matter to be left to the national courts. The Court is rather concerned with whether the procedures in the national courts comply with the provisions of human rights instruments ratified by the Respondent State. In this regard, the Court is satisfied that there is nothing on the record establishing that the manner in which the Applicant was tried, convicted and sentenced caused him miscarriage of justice to warrant its intervention.

106. With respect to the question of release, the Court has held that this would only be granted "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 that his continued imprisonment would occasion a miscarriage of justice".[27]

107. In the instant case, the Court recalls that it has found that the Respondent State violated the Applicant's right to a fair trial for failing to provide him with free legal assistance. Without minimising the gravity of the violation, the Court considers that the nature of the violation in the instant case does not reveal any circumstance that signifies that the Applicant's imprisonment amounts to a miscarriage of justice or an arbitrary decision. The Applicant also failed to elaborate on specific and compelling circumstances to justify the order for his release.[28]

108. In view of the foregoing, this prayer is therefore dismissed.

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[27] *Mgosi Mwita Makungu v. United Republic of Tanzania*, ACtHPR, Application No. 006/2016 Judgment of 7 December 2018 (merits and reparations) § 84; *Diocles William v. United Republic of Tanzania,* ACtHPR, Application No. 016/2016 Judgment of 21 September 2018 (merits and reparations) § 101*; Minani Evarist v. United Republic of Tanzania* (merits), § 82.

[28] *Jibu Amir alias Mussa and another v. Tanzania* (merits and reparations), § 97; *Kalebi Elisamehe v. Tanzania* (merits and reparations), § 112; and *Minani Evarist v. Tanzania* (merits and reparations), § 82.

## IX. COSTS

109. The Respondent State prays the Court to order that the cost of this proceedings be borne by the Applicant, while the Applicant did not pray for costs.

110. Pursuant to Rule 32(2) of the Rules, “unless otherwise decided by the Court, each party shall bear its own costs, if any”.

111. The Court finds no reason to depart from this provision. Consequently, the Court rules that each party shall bear its own costs.

## X. OPERATIVE PART

112. For these reasons,

The COURT
*Unanimously*:

*On jurisdiction*

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

*On admissibility*

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

*On merits*

v. *Finds* that the Respondent State has not violated the Applicant’s right to have his cause heard under Article 7(1) of the Charter with regard to the proceedings on appeal and review at the Court of Appeal;

vi. *Finds* that the Respondent State is in violation of Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, for failure to provide the Applicant with free legal assistance.

*On reparations*

*Pecuniary reparations*

vii. *Grants* the Applicant's prayer for damages for the moral prejudice he suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300,000);

viii. *Orders* the Respondent State to pay the amount indicated under sub-paragraph (vii) above free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

*Non-pecuniary reparations*

ix. *Dismisses* the Applicant’s prayer to quash his conviction and sentencing and his prayer for release from prison.

*On implementation of the judgment and reporting*

x. *Orders* the Respondent State to submit a report within six (6) months of the date of notification of this Judgment, on measures taken to implement the orders set forth herein, and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*On costs*

xi. *Orders* each party to bear its own costs.

**Signed:**

Blaise TCHIKAYA, Vice-President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Modibo SACKO, Judge;

and Robert ENO, Registrar.

Done at Dar es Salaam, this Second Day of December in the year Two Thousand and Twenty-one, in English and French, the English text being authoritative.