AFRICAN UNION		UNION AFRICAINE
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

MUSSA ZANZIBAR

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 022/2016

JUDGMENT

26 FEBRUARY 2021

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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, and 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 9(2)[1] 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:

Mussa ZANZIBAR

Self-represented

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr Clement J. MASHAMBA, Solicitor General, Office of the Solicitor General;
ii. Ms Sarah MWAIPOPO, Director, Division of Constitutional Affairs and Human Rights, Attorney General's Chambers;
iii. Mr. Baraka LUVANDA, Ambassador, Head of Legal Unit, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation;
iv. Ms. Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers;
v. Mr. Mark MULWAMBO, Senior State Attorney, Attorney General's Chambers;
vi. Mr Richard KILANGA, Principal State Attorney, Attorney General's Chambers; and

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

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

after deliberation,

renders the following Judgment:

I. THE PARTIES

1. Mussa Zanzibar (hereinafter referred to as "the Applicant") is a Tanzanian national. He was convicted of rape and sentenced to thirty (30) years imprisonment. At the time of filing the Application he was incarcerated at Butimba Central Prison, Mwanza, Tanzania.

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 the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. 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,* ACHPR, 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 Application that on 27 June 2011, the Applicant was charged in the District Court of Chato with the offence of rape. On 6 October 2011, the Applicant was convicted and sentenced to thirty (30) years' imprisonment.

4. Aggrieved by the decision of the District Court, the Applicant appealed to the High Court at Bukoba but on 5 September 2012 his appeal was dismissed. The Applicant lodged another appeal with the Court of Appeal at Bukoba which was also dismissed on 10 March 2014.

B. Alleged violations

5. The Applicant alleges, notably, that:

   i. The trial court erred in convicting him on the basis of the evidence of a single witness without satisfying itself that the witness was telling the truth;
   ii. The trial court erred by failing to resolve the contradictions and inconsistencies in the prosecution evidence;
   iii. The trial court failed to warn itself of the need for evidence beyond reasonable doubt before convicting him.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Application was filed on 13 April 2016 and served on the Respondent State on 13 May 2016.

7. After several extensions of time were granted to the Respondent State, it filed its Response on 18 May 2017.

8. The Applicant filed his submissions on reparations on 27 September 2018 and this was served on the Respondent State on the same day giving it thirty (30) days within which to file its Response. The Respondent State did not file any Response within the time prescribed.

9. Pleadings were closed on 6 November 2020 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

10. The Applicant prays the Court to "restore justice where it was overlooked and quash both conviction and sentence imposed upon him and set him at liberty." He further prays that the Court may "grant other order(s) or relief(s) sought that may deem fit in the circumstances of the complaints."

11. On reparations, the Applicant prays that:

> …after the Court finding to remedy more violation, it shall make an order of my acquittal as basic reparation and adding reparation of the payment which shall be considered and assessed by the Court according to the custody period per the national ratio of a citizen per year in the country.

12. The Respondent State prays the Court to grant the following orders with respect to the jurisdiction and admissibility of the Application:
    i. That, the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate this Application.
    ii. That, the Application has not met the admissibility requirement provided by Rule 40(5) of the Rules of the Court.

iii. That, the Application has not met the admissibility requirement provided by Rule 40(6) of the Rules of Court.

iv. That, the Application be declared inadmissible and duly dismissed.

13. The Respondent State further prays the Court to make the following orders on the merits of the Application:

i. That, the United Republic of Tanzania has not violated the Applicant's rights provided under Article 3(1) and (2) of the African Charter on Human and Peoples' Rights.

ii. That, the Application be dismissed in its totality for lack of merit.

iii. That, the Applicant's prayers be dismissed.

iv. That, the Applicant continue to serve his lawful sentence.

V. JURISDICTION

14. 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 State concerned.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

15. Furthermore, in terms of Rule 49(1) of the Rules[3], "the Court shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

16. In view of the foregoing, the Court must, in every application, conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

[3] Formerly Rule 39(1) of the Rules of 2 June 2010.

17. In this Application, the Court notes that the Respondent State has raised one objection to its jurisdiction.

A. Objection to material jurisdiction

18. The Respondent State argues that the Court is not "vested with jurisdiction to adjudicate over this Application." According to the Respondent State:

> Article 3 of the Protocol does not provide the Honourable Court with the mandate or jurisdiction to sit as a Court of first instance or sit as an Appellate Court and adjudicate of point of law and evidence finalised by the highest Court of a state party.

19. The Respondent State contends that the Applicant is inviting the Court to sit as a court of first instance and deliberate on allegations that were never raised in municipal courts. It further argues that the Applicant is also calling upon the Court to "adjudicate on matters already finalised by the Court of Appeal…". For the preceding reasons, the Respondent State prays that the Application should be dismissed.

20. The Applicant did not respond to this objection.

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21. 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.[4]

[4] *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 18.

22. The Court notes that the Respondent State's objection is two–pronged in that it simultaneously questions the Court's jurisdiction to sit as a first instance court as well as its power to sit as an appellate court.

23. In relation to the allegation that the Court is being invited to sit as a court of first instance, the Court reaffirms that its jurisdiction, under Article 3 of the Protocol, extends to any application submitted to it, provided that an applicant invokes a violation of rights protected by the Charter or any other human rights instrument ratified by the Respondent State. The Court notes, however, that the Applicant has not specified the particular provisions of the Charter or any other international human rights instrument allegedly violated by the Respondent State. Nevertheless, the Court reiterates the fact that it has jurisdiction to examine alleged violations of human rights even when an applicant does not specify the articles of the Charter which were allegedly violated as long as the alleged violations substantively implicate rights protected in the Charter.[5]

24. As regards the contention that the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's domestic courts, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[6] At the same time, however, and even though it is not an appellate court *vis a vis* domestic courts, it retains the power to assess the propriety of domestic proceedings as against standards set out in international human rights instruments ratified by the State concerned.[7] In conducting the aforementioned task, the Court does not thereby become an appellate court and neither does it need to sit as one.

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[5] *Frank David Omary and others v United Republic of Tanzania* (28 March 2014) 1 AfCLR 358 § 74, *Peter Joseph Chacha v United Republic of Tanzania* (28 March 2014) 1 AfCLR 398 §118 and *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45.

[6] *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.

[7] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Werema Wangoko Werema and Another v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520 § 29 and *Alex Thomas v. United Republic of Tanzania* (Merits) (20 November 2015) 1 AfCLR 465, § 130.

25. Considering the allegations made by the Applicant, which all implicate the right to a fair trial which is protected under Article 7 of the Charter, the Court finds that the said allegations are within the purview of its material jurisdiction. [8] The Court, therefore, holds that it has material jurisdiction in this matter and dismisses the Respondent State's objection.

B. Other aspects of jurisdiction

26. The Court observes that none of the Parties has raised any objection in respect of its personal, temporal or territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, the Court must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

27. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State withdrew its Declaration made under Article 34(6) of the Protocol. The Court further recalls that it has held that the withdrawal of a Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the withdrawing of the Declaration.[9] This Application, having been filed before the Respondent State deposited its instrument of withdrawal, is thus not affected by it.

28. In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

29. In respect of its temporal jurisdiction, the Court recalls that the Respondent State deposited its Declaration on 29 March 2010 while the judgment of the District Court at Chato, which is the genesis of the Applicant's case, was

[8] Cf. *Alex Thomas v. Tanzania* (merits) § 130. See also, *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 29; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 28 and *Ingabire Victoire Umuhoza v. Republic of Rwanda* (merits) (24 November 2017) 2 AfCLR 165 § 54.

[9] *Andrew Ambrose Cheusi v United Republic of Tanzania,* §§ 35-39 and *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67

delivered on 6 October 2011. Given that the Application was filed after the Respondent State had already deposited its Declaration, the Court finds that it has temporal jurisdiction to examine the Application.

30. The Court also notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that its territorial jurisdiction in this matter is established.

31. In light of all the above, the Court holds that it has jurisdiction to determine the present Application.

VI. ADMISSIBILITY

32. 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".

33. In accordance with Rule 50(1) of the Rules, "[t]he 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."

34. Rule 50(2) of the Rules[10], which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all of the following conditions:
>
> a) Indicate their authors even if the latter request anonymity;
> b) Are compatible with the Constitutive Act of the African Union and with the Charter;
> c) Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
> d) Are not based exclusively on news disseminated through the mass media;
> e) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

[10] Formerly Rule 40 of the Rules of 2 June 2010.

f) Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and

g) Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, the Charter of the Organisation of African Unity or the provisions of the Charter.

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

A. Objections to the admissibility of the Application

i. Objection based on non- exhaustion of local remedies

36. The Respondent State contends that although the Applicant is alleging violation of his rights as provided under the Charter, which rights are also provided for under its Constitution, there is no evidence showing that the Applicant filed a constitutional petition at its High Court. The failure to file a constitutional petition, the Respondent State further contends, “is clear evidence that the Applicant did not provide the Respondent an opportunity to redress the alleged wrong within the framework of its domestic legal system before it is dealt with at the international level.”

37. Apart from confirming that he took his case to the Respondent State’s Court of Appeal, the Applicant did not make any submissions on this objection.

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38. The Court notes that under Article 56(5) of the Charter, whose provisions are reiterated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The Court confirms that 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.[11]

39. The Court recalls that an applicant is only required to exhaust ordinary judicial remedies.[12] The Court further recalls that in several cases involving the Respondent State, it has consistently held that the remedy of constitutional petition, as framed in the Respondent State's judicial system, is an extraordinary remedy that an applicant is not required to exhaust prior to seizing this Court.[13] In the instant case, the Court observes that the Court of Appeal dismissed the Applicant's appeal on 10 March 2014. There being no other court above the Court of Appeal, the Court holds, that the Applicant exhausted ordinary judicial remedies.

40. In light of the foregoing, the Court dismisses the Respondent State's objection based on non-exhaustion of local remedies.

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

41. The Respondent State argues that it took two (2) years after the Court of Appeal dismissed the Applicant's appeal for him to file his Application before the Court. It thus submits that this period is not reasonable within the meaning of Rule 40(6) of the Rules.[14] The Respondent State, relying on the decision of the

[11] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.
[12] *Alex Thomas v. Tanzania* (merits) § 64. See also, *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.
[13] See, *Alex Thomas v Tanzania* (merits) § 65; *Mohamed Abubakari v Tanzania* (merits), §§ 66-70; *Christopher Jonas v Tanzania* (merits), § 44.
[14] Corresponding to Rule 50(2) (f) Rules of Court 2020.

African Commission on Human and Peoples' Rights in *Michael Majuru v. Republic of Zimbabwe,* prays the Court to declare the Application inadmissible.

42. The Applicant did not respond to the Respondent State's objection.

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43. The Court recalls that neither the Charter nor the Rules set a definite time limit within which an application must be filed before it. Article 56(6) of the Charter, which is recaptured in Rule 50(2)(f) of the Rules, simply alludes to the fact that applications must be filed within a reasonable time after the exhaustion of domestic remedies or "from the date the Commission is seized with the matter." In the circumstances, the reasonableness of a time limit for seizure will depend on the particular circumstances of each case and should be determined on a case by case basis. Some of the factors that the Court has used in its evaluation of the reasonableness of time are imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal and the use of extra-ordinary remedies.[15]

44. In the present case, the Court notes that the Court of Appeal dismissed the Applicant's appeal on 10 March 2014[16] and the Applicant filed this matter on 13 April 2016. A period of two (2) years and thirty-three (33) days, therefore, lapsed between the time the Applicant exhausted domestic remedies and the time he filed his Application. The Court must, therefore, decide, whether, on the facts of this Application, the period of two years (2) and thirty-three (33) days is reasonable.

[15] *Jibu Amir alias Mussa and another v. United Republic of Tanzania,* §§ 49-50; *Ally Rajabu and others v. United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations), §§ 50-52; *Livinus Daudi Manyuka v. United Republic of Tanzania*, ACtHPR, Application No. 020/2015, Ruling of 28 November 2019 (jurisdiction and admissibility), §§ 52-54 and *Godfrey Anthony and another v United Republic of Tanzania*, ACtHPR, Application No. 015/2015. Ruling of 26 September 2019 (jurisdiction and admissibility) §§ 46-49.

[16] *Mussa Zanzibar v The Republic*, Criminal Appeal No. 287 of 2012 (Bukoba).

45. The Court also notes that the Applicant did not have the benefit of counsel during his trial before the District Court at Chato as well as during his appeals before the High Court and the Court of Appeal.[17] Given the Applicant's incarceration and his lack of counsel, the Court finds that the period of two (2) years and thirty-three (33) days is reasonable.[18]

46. The Court, therefore, dismisses the Respondent State's objection based on failure to file the Application within a reasonable time.

B. Other conditions of admissibility

47. The Court notes, from the record, that the Application's compliance with the requirements in Article 56 sub-articles (1),(2),(3),(4) and (7) of the Charter, which requirements are reiterated in sub-rules 2(a), 2(b), 2(c), 2(d), and 2(g) of Rule 50 of the Rules, is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

48. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) of the Rules is fulfilled since the Applicant has clearly indicated his identity.

49. The Court also finds that the requirement laid down in Rule 50(2)(b) of the Rules is also met, since no request made by the Applicant is incompatible with the Constitutive Act of the African Union or with the Charter.

[17] *The Republic v Mussa Zanzibar,* Criminal Case No. 47/2011 (Bukoba) Judgment of 6 October 2011; *Mussa Zanzibar v The Republic*, HC Criminal Appeal No. 20 of 2012 (Bukoba) Judgment of 5 September 2012 and *Mussa Zanzibar v The Republic*, Criminal Appeal No. 287 of 2012 (Bukoba) Judgment of 10 March 2014.

[18] Cf. *Job Mlama v United Republic of Tanzania*, ACtHPR, Application No. 019/2016, Judgment of 25 September 2020 (merits and reparations) § 51.

50. The Court also notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.

51. Regarding the condition contained under Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

52. Finally, with respect to the requirement laid down in Rule 50(2)(g) of the Rules, the Court finds that the present case 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 or the provisions of the Charter.

53. As a consequence of the foregoing, the Court finds that the Application fulfils all the admissibility requirements set out under Article 56 of the Charter as restated in Rule 50(2) of the Rules, and accordingly declares it admissible.

VII. MERITS

54. As the Court has earlier pointed out, the Applicant has not invoked the violation of any specific provisions of the Charter. Nevertheless, the Court has noted that the Applicant has, in effect, pleaded a violation of his right to a fair trial which is covered under Article 7 of the Charter. For this reason, the Court will assess the alleged violations together under Article 7 of the Charter.

55. Article 7 of the Charter provides as follows:

> 1. Every individual shall have the right to have his cause heard. This comprises:
>   a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
c) The right to defence, including the right to be defended by counsel of his choice;
d) The right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

i. Alleged violation of the right to a fair trial due to the partial treatment of the evidence

56. The Applicant argues that the District Court at Chato erred in convicting him by relying on the evidence of a single witness without satisfying itself as to the credibility of the witness and that the Court of Appeal also erred in not acknowledging and rectifying this oversight. He further argues that the District Court erred by failing to resolve the contradictions and inconsistencies in the prosecution evidence. It is also the Applicant's contention that the District Court failed to take into consideration, the need for the prosecution to prove the case beyond reasonable doubt before convicting him.

57. The Respondent State submits that the District Court's reliance on the evidence of a single witness and her credibility was dealt with by the Court of Appeal which held that corroboration was not always necessary in rape cases as long as the credibility of the witness was established. The Respondent State also submits that the District Court considered the credibility of the prosecution witness and concluded that their evidence was reliable.

58. In respect of the alleged failures to resolve contradictions and inconsistencies in the prosecution evidence, the Respondent State argues that the Applicant has failed to specify the contradictions and inconsistencies which were not

resolved. It has also been submitted that this argument was raised by the Applicant before the Court of Appeal which considered the same and dismissed it. The Respondent State thus submits that the allegation lacks merit and should be dismissed.

59. As to the need for the prosecution to prove its case beyond reasonable doubt, the Respondent State submits that the District Court clearly directed its mind to the nature of the evidence required to convict the Applicant and concluded that the prosecution had discharged its duty. The Respondent State has referred the Court to passages in the judgment of the District Court where the standard of proof was dealt with. The Respondent State thus prays that the Applicant's allegations be dismissed.

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60. As the Court has held:

> …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. [19]

61. The above notwithstanding, the Court can, in evaluating the manner in which domestic proceedings were conducted, intervene to assess whether domestic proceedings, including the assessment of the evidence, was done in consonance with international human rights standards.

62. In the present case, the Court has had the opportunity to consider the record of the proceedings in respect of the Applicant's trial before the District Court as well as his appeals before the High Court and the Court of Appeal.[20] From the

[19] *Kijiji Isiaga v. United Republic of Tanzania* (21 March 2018) 2 AfCLR 218 § 65.
[20] *The Republic v Mussa Zanzibar,* Criminal Case No. 47/2011 (Bukoba) Judgment of 6 October 2011; *Mussa Zanzibar v The Republic*, HC Criminal Appeal No. 20 of 2012 (Bukoba) Judgment of 5 September 2012 and *Mussa Zanzibar v The Republic*, Criminal Appeal No. 287 of 2012 (Bukoba) Judgment of 10 March 2014 .

record of the trial before the District Court, it is noted that the prosecution called five (5) witnesses. Admittedly, only PW1 - the complainant – testified to the actual occurrence of the crime at issue, being rape. Nevertheless, the District Court considered the evidence of PW1 together with the evidence of other witnesses and concluded that PW1 was a credible witness. During the first appeal to the High Court, the credibility of PW1 was also considered and the High Court concluded that PW1 was a credible and truthful witness. On further appeal, the Court of Appeal held that there were no grounds for interfering with the findings of the two lower courts especially since corroboration is not always necessary in rape cases.

63. Given the exhaustive manner in which the question of the credibility of PW1 was considered by three courts within the Respondent State's system, the Court finds that the manner in which the evidence of PW1 was evaluated does not manifest errors requiring this Court's intervention.

64. With regard to the Applicant's contention that domestic courts did not resolve contradictions and inconsistencies in the prosecution evidence, the Court notes that he has not specified which contradictions tainted the proceedings leading to his conviction or the failure of his appeals.

65. The above notwithstanding, the Court notes, from the record, that on appeal to the High Court the question of the contradictions, specifically in relation to the evidence of the medical personnel who examined the PW1 subsequent to the commission of the rape, was dealt with. After analysing the evidence, the High Court concluded that there was no contradiction between the evidence of the two medical personnel.[21] This matter was also considered by the Court of Appeal which concluded that there was no contradiction and also that even if there had been a contradiction, the evidence of PW1 by itself was sufficient to

[21] *Mussa Zanzibar v The Republic*, HC Criminal Appeal No. 20 of 2012 (Bukoba) Judgment of 5 September 2012 p.11.

convict the Applicant.[22] Given the foregoing, the Court holds that the Applicant has failed to prove that the domestic courts failed to resolve contradictions in the prosecution's evidence and his allegation of a violation of the right to fair trial is dismissed.

66. In connection to the allegation that the District Court failed to apply itself to the need for the prosecution to prove the case beyond reasonable doubt before convicting him, the Court observes that the District Court applied itself to this issue. After assessing the evidence of all witnesses, the District Court concluded that the case against the Applicant had been proved beyond reasonable doubt. The Court of Appeal also subsequently found that there was no reason for interfering with the findings of the trial court.

67. In the circumstances, the Court finds that the Applicant has not made out a case for a violation of his right to a fair trial on the ground of a partial assessment of the evidence and, therefore, dismisses his allegations.

ii. **Alleged violation of the right to free legal assistance**

68. The Court observes that the Applicant did not specifically plead a violation of his right to free legal assistance. Nevertheless, the Applicant submitted that the decision of the Court of Appeal violated his rights under the Charter and that the Court should "restore justice where it was overlooked…".[23] From its perusal of the records of the domestic proceedings, the Court confirms that the Applicant did not have the benefit of counsel during his trial before the District Court, the High Court as well as the Court of Appeal..

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[22] *Mussa Zanzibar v The Republic*, Criminal Appeal No. 287 of 2012 (Bukoba) Judgment of 10 March 2014, p.8.
[23] Page 2 of Applicant's Application filed with the Court.

69. In this regard, the Court recalls that Article 7(1)(c) of the Charter provides that "[e]very individual shall have the right to have his cause heard. This right comprises: (c) the right to defence, including the right to be defended by counsel of his choice."

70. The Court is mindful that Article 7(1)(c) of the Charter does not explicitly provide for the right to free legal assistance. The Court recalls, however, that it has previously interpreted Article 7(1)(c) in light of article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") and determined that the right to defence includes the right to be provided with free legal assistance. [24]

71. The Court reiterates that an individual charged with a criminal offence is entitled to free legal assistance even if he/she does not specifically request for the same provided that the interests of justice so demand.[25] The interests of justice will inevitably require that free legal assistance be extended to an accused person where he/she is indigent and is charged with a serious offence which carries a severe penalty. In the instant case, the Applicant was charged with a serious offence, to wit, rape, carrying a severe punishment - a minimum sentence of thirty (30) years' imprisonment.

72. In the circumstances, the Court finds that the interests of justice warranted that the Applicant should have been provided with free legal assistance during his trial before the District Court at Chato and also during his appeals both before the High Court and the Court of Appeal. This is an obligation that persists even if the Applicant never requests for legal assistance.

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[24] *Jibu Amir alias Mussa and another v. United Republic of Tanzania* § 75; *Alex Thomas v Tanzania* (merits) § 114 and *Kennedy Owino Onyachi and another v United Republic of Tanzania* (merits) § 104. The Respondent State acceded to the ICCPR on 11 June 1976 - https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

[25] *Jibu Amir alias Mussa and another v. United Republic of Tanzania* § 77 and *Mohamed Abubakari v. United Republic of Tanzania* (merits) §§ 138 -139.

73. In view of the above, the Court finds that the Respondent State has violated Article 7(1)(c) of the Charter, as read together with article 14(3)(d) of the ICCPR, due to its failure to provide the Applicant with free legal assistance during his trial before the District Court at Chato as well during his appeals before the High Court and the Court of Appeal.

VIII. REPARATIONS

74. The Court recalls that, in respect of reparations, the Applicant prays that it should order his "acquittal as basic reparation and adding reparation of the payment which shall be considered and assessed by the Court according to the custody per the national ratio of a citizen per country."

75. In its Response, the Respondent State prays that the Court dismiss all the Applicant's prayers.

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76. Article 27(1) of the Protocol provides that:

> If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of the fair compensation or reparation.

77. The Court considers that for reparations to be granted, the Respondent State should, first, be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where granted, reparation should cover the full damage suffered. It is also clear that it is always the Applicant that bears the onus of justifying the claims made.[26] As the Court has stated previously, the

[26] See, *Armand Guehi v. United Republic of Tanzania* (Merits and Reparations) § 157. See also, *Norbert Zongo and Others v. Burkina Faso* (Reparations) (5 June 2015) 1 AfCLR 258 §§ 20-31; *Lohé Issa Konaté v. Burkina Faso* (Reparations) (3 June 2016) 1 AfCLR 346 §§ 52-59 and *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (Reparations) (13 June 2014) 1 AfCLR 72 §§ 27-29.

purpose of reparations is to place the victim in the situation he/she would have been in but for the violation.[27]

78. In relation to material loss, the Court recalls that it is the duty of an applicant to provide evidence to support his/her claims for all alleged material loss. In relation to moral loss, however, the Court restates its position that prejudice is assumed in cases of human rights violations and the assessment of the quantum must be undertaken in fairness looking at the circumstances of the case. [28] As such, the causal link between the wrongful act and moral prejudice "can result from the human rights violation, as a consequence thereof, without a need to establish causality as such".[29] As the Court has previously recognised, the evaluation of the quantum in cases of moral prejudice must be done in fairness taking into account the circumstances of each case.[30] The practice of the Court, in such instances, is to award lump sums for moral loss.[31]

79. The Court acknowledges that although Article 27 empowers it to "make appropriate orders" to remedy the violation of human rights, in line with its jurisprudence, it can only order the release of a convict in exceptional and compelling circumstances. Such exceptional circumstances could exist where the Court finds that the Applicant's conviction was based entirely on arbitrary considerations such that his continued imprisonment would be a miscarriage of justice.[32] In the present case, however, the Applicant has not established the existence of any exceptional circumstances that would necessitate the Court ordering his release. The Applicant's prayer for release is, therefore, dismissed.

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[27] *Lucien Ikili Rashidi v. United Republic of Tanzania*, ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (Merits and Reparations) § 118 and *Norbert Zongo and Others v. Burkina Faso* (Reparations) § 60.

[28] *Armand Guehi v. United Republic of Tanzania* (Merits and Reparations) § 55; and *Lucien Ikili Rashidi v. United Republic of Tanzania* (Merits and Reparations) § 58.

[29] *Norbert Zongo and others v. Burkina Faso* (reparations) § 55; and *Lohé Issa Konaté v. Burkina Faso* (reparations) § 58.

[30] *Armand Guehi v. United Republic of Tanzania (*merits and reparations) § 157 and *Norbert Zongo and others v. Burkina Faso (*reparations*)* § 61.

[31] *Norbert Zongo and Others v. Burkina Faso* (Reparations) §§ 61-62.

[32] *Diocles William v United Republic of Tanzania* (21 September 2018) 2 AfCLR 426 §101-*Mgosi Mwita Makungu v United Republic of Tanzania* (7 December 2018) 2 AfCLR 550 § 84 and African Court on Human and Peoples' Rights *Comparative study on the law and practice of reparations for human rights violations* (2019) 46-50.

80. On a separate note, the Court having found that the Respondent State violated the Applicant's right to free legal assistance, contrary to Article 7(1)(c) of the Charter, there is a presumption that the Applicant suffered moral prejudice.

81. In assessing the quantum of damages for the violation of the Applicant's right to free legal assistance, the Court bears in mind that it has adopted the practice of granting applicants an average amount of Three Hundred Thousand Tanzanian Shillings (TZS 300.000) in instances where legal aid was not availed by the Respondent State especially where the facts reveal no special or exceptional circumstances.[33] In the circumstances, and in the exercise of its discretion, the Court awards the Applicant the amount of Three Hundred Thousand Tanzanian Shillings (TZS 300.000) as fair compensation.

IX. COSTS

82. None of the Parties made any prayers in respect of costs.

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83. The Court notes that Rule 32(2) of the Rules[34] provides that "Unless otherwise decided by the Court, each party shall bear its own costs, if any".

84. In this case, the Court orders that each Party shall bear its own costs.

[33] See *Minani Evarist v. Tanzania* (merits), (21 September 2018) 1 AfCLR 402 § 90; and *Anaclet Paulo v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 111.
[34] Formerly Rule 30(2) of the Rules of 2 June 2010

X. OPERATIVE PART

85. 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 objections to the admissibility of the Application;

iv. *Declares* that the Application is admissible.

On merits

v. *Holds* that the Respondent State has not violated the Applicant's right to a fair trial, as guaranteed by Article 7 of the Charter, due to the manner of assessment of the evidence during the domestic proceedings;

vi. *Holds* that the Respondent State has violated the Applicant's right to a fair trial, provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, by failing to provide him with free legal assistance.

On reparations

Pecuniary reparations

vii. *Orders* the Respondent State to pay the Applicant the sum of Tanzanian Shilling Three Hundred Thousand (TZS 300 000) as reparations for violation of his right to free legal assistance;

viii. *Orders* the Respondent State to pay the amount indicated under (vii) above free from taxes effective six (6) months from the date of notification of this Judgment, failing which it will 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 for release from prison.

On implementation and reporting

x. Orders the Respondent State to submit to this Court, within six (6) months from the date of notification of the present Judgment, a report on the 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:

Sylvain ORÉ, President;

Ben KIOKO, Vice President;

Rafâa 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 Arusha, this Twenty Sixth Day of February in the Year Two Thousand and Twenty One in English and French, the English text being authoritative.