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

JOSEPH MUKWANO

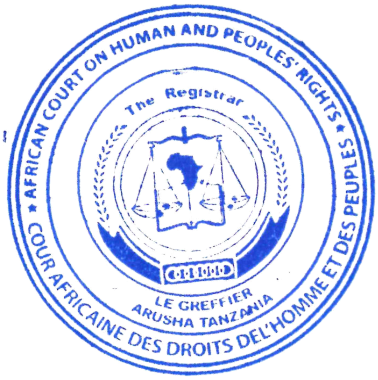
V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 021/2016

JUDGMENT

24 MARCH 2022



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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 and 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:

Joseph MUKWANO
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, Attorney General's Chambers
iii. Ambassador Baraka LUVANDA, Director, Legal Affairs, Ministry of Foreign Affairs, East Africa and International Cooperation
iv. Ms Nkasori SARAKIKYA, Principal State Attorney, Attorney General's Chambers
v. Mr Richard KILANGA, Senior State Attorney; Attorney General's Chambers
vi. Mr Elisha E. SUKU, First Secretary and Legal Officer; Ministry of Foreign Affairs, East Africa and International Cooperation

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

after deliberation,

renders the following Judgment:

I. THE PARTIES

1. Joseph Mukwano (hereinafter referred to as "the Applicant) is a Tanzanian national, who at the time of filing this Application was incarcerated at Butimba Central Prison in Mwanza after being convicted and sentenced to death for murder. The Applicant challenges, among others, the violation of his rights to a fair trial during the proceedings that led to his sentencing.

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. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications 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 has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.[2]

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record before this Court that, on 11 August 2003 the Applicant and two others, stole items from the house of Professor Israel Katote where they worked and in the course of which they murdered him. On 15 July 2010, the Applicant was sentenced to death by the High Court of Tanzania at Bukoba for the said murder.

4. On 7 March 2013, the Court of Appeal confirmed the death sentence. The Applicant then, on 30 April 2013, filed an application to the Court of Appeal for review of its judgment. On 28 February 2014, the Court of Appeal struck out the application for review for being lodged out of time. A subsequent request for extension of time was denied on 13 March 2015 on the ground that the Applicant had failed to meet the legal threshold set out by the prevailing case-law.

B. Alleged violations

5. The Applicant alleges that:

   i. The Court of Appeal failed to consider some vital points of evidence and prejudiced to make its judgment review.
   ii. The conviction was based on the alleged doctrine of recent possession of alleged stolen articles and the retracted confession/extra-judicial statement.
   iii. The Court of appeal violated his right to non-discrimination.
   iv. The Court of Appeal violated his right to equal protection of the law.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Application was filed on 5 April 2016 and served on the Respondent State on 10 May 2016.

7. The Parties filed their pleadings within the time stipulated by the Court. The said pleadings were filed first on the merits and subsequently on reparations after several extensions were granted to the Parties to do so.

8. Pleadings were closed on 23 August 2017 and 11 October 2021 for the merits and reparations proceedings, respectively and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

9. The Applicant prays the Court to:

   i. Quash both conviction and sentence imposed upon him and set him at liberty;
   ii. Grant any other relief that it may deem fit in the circumstances.

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

   i. The Court does not have jurisdiction to hear the matter and the Application is inadmissible;
   ii. The Respondent State has not violated any of the provisions of the Charter as alleged by the Applicant; and
   iii. The Application is dismissed and the costs be borne by the Applicant.

V. JURISDICTION

11. 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.

12. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[3]

13. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

14. In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction.

A. Objection to material jurisdiction

15. The Respondent State alleges that this Court does not have jurisdiction to hear the present Application given that the Applicant is seeking the Court to exercise appellate jurisdiction by reviewing matters which the Court of Appeal had already examined to their finality. According to the Respondent State, the jurisdiction of this Court is limited to interpreting and applying the Charter and other relevant human rights instruments. The Respondent State also avers that the Applicant is requesting this Court to act as a court of instance as it is being asked to consider issues that were raised before domestic courts.

16. The Applicant rebuts the Respondent State's allegation and asserts that the Application is only seeking that this Court examines whether the proceedings in national courts were in abidance with the Charter.

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[3] Rule 39(1), Rules of Court, 2 June 2010.

17. The Court recalls that, as it has previously held, 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]

18. In the instant matter, the first issue arising is whether, by examining the present Application, this Court exercises appellate jurisdiction vis-à-vis domestic courts. The second issue arising is whether, by examining the Application, the Court would be acting as a court of first instance.

19. Regarding the first issue, the Court recalls that, as is now firmly established in its case-law, it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[5] However, the Court reiterates its position that 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.[6]

20. In the present matter, the Applicant is asking this Court to determine whether the proceedings before domestic courts were conducted in line with the Respondent State's obligations under the Charter. Furthermore, the allegations made by the Applicant relate to fair trial rights guaranteed under Article 7(1) of the Charter. It cannot therefore be said that this Court is exercising appellate jurisdiction.

21. With regard to the second issue, that this Court is being requested to act as a court of first instance, the Court notes that, as mentioned in the earlier stated submissions of the Respondent State, the Applicant is raising issues which were never raised before domestic courts.

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[4] *Kalebi Elisamehe v. United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 18.
[5] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.
[6] *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.

22. The Court recalls that, as it has previously held, its material jurisdiction is established as long as the Application brought before it raises allegations of violation of human rights; and it suffices that the subject of the Application relates to the rights guaranteed by the Charter or any other human rights instruments to which the Respondent State is a party.[7] The Court notes that, in the present matter, the Applicant alleges the violation of rights guaranteed in the Charter. As such, the Application cannot be said to invoke a first instance jurisdiction of this Court.

23. In light of the above, the Respondent State's objection is dismissed; and the Court consequently holds that it has material jurisdiction to hear this Application.

B. Other aspects of jurisdiction

24. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

25. 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 deposited with the Chairperson of the African Union Commission, an instrument withdrawing 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 filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect.[8] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the

[7] See *Kenedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 20; *Shukrani Masegenya Mango and Others v. United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 439, § 29.
[8] *Andrew Ambrose Cheusi v. Tanzania,* §§ 35-39.

Respondent State's withdrawal was 22 November 2020.[9] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.

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

27. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicant arose 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 convicted on the basis of what he considers an unfair process.[10]

28. Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

29. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred within the territory of the Respondent State, which is a state party to the Protocol. In the circumstances, the Court holds that it has territorial jurisdiction.

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

VI. ADMISSIBILITY

31. 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".

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[9] *Ingabire Victoire Umuhoza v. United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

[10] *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.

32. In line with Rule 50(1) of the Rules,[11] "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."

33. The Court notes that 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 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;
> f) Are submitted 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) 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, or the Constitutive Act of African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

34. The Respondent State raises two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies while the second one relates to whether the Application was filed within a reasonable time.

[11] Rule 40 of the Rules of Court, 2 June 2010.

i. Objection based on non-exhaustion of local remedies

35. The Respondent State argues that the Application does not meet the requirement of exhaustion of local remedies as the Applicant should have raised some of the allegations as grounds of review before the Court of Appeal, which he failed to do although he was duly directed by the said Court. According to the Respondent State, these issues include the failure of the Court of Appeal to address vital points of evidence and review its judgment, as well as allegations that the same Court violated the Applicant's rights under Articles 2, and 3(2) of the Charter in the course of appeal proceedings.

36. It is also the Respondent State's objection that local remedies have not been exhausted because the Applicant should have raised the claim that his conviction was based on the doctrine of recent possession, and consideration of his extra-judicial statement, as grounds of appeal before the Court of Appeal.

37. The Applicant refutes the Respondent State's objection and argues that the Application meets the requirement of exhaustion of local remedies. It is the Applicant's submission that his application for review was struck out by the Court of Appeal for being filed out of time. The Applicant further submits that his request to file a new application for review out of time was dismissed for failing to cross the legal threshold set by the prevailing jurisprudence.

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38. The Court notes that pursuant to Article 56(5) of the Charter, whose provision is restated in Rule 50(2)(e) of the Rules, any application filed before it shall 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.[12]

39. The issues arising for determination in the present case regarding compliance with this requirement are, firstly, whether the Applicant did not exhaust local remedies by failing to raise some of the issues as grounds for review; and secondly, whether the Applicant ought to have raised claims related to some of the alleged violations during the proceedings before the Court of Appeal.

40. On the first issue, the Court restates its consistent position that, when it comes to the judicial system of the Respondent State, the review procedure at the Court of Appeal is an extraordinary remedy, which the Applicant is not required to exhaust prior to filing an application before this Court.[13] The Respondent State's objection on this point is therefore dismissed.

41. On the second issue, the Respondent State avers that for this Application to fulfil the condition of exhaustion of local remedies, the Applicant should have specifically raised some issues before the Court of Appeal. These issues are, the failure of the Court of Appeal to address vital points of evidence namely in relation to the Applicant's conviction based on the doctrine of recent possession and admission of his retracted confession without taking into account his complaint therefore leading to a breach of his rights to equality and equal protection of the law. The critical determination therefore consists in assessing whether domestic remedies have been exhausted in respect of these allegations.

42. As a preliminary observation, it is paramount to note that the Applicant raised a single ground of appeal before the Court of Appeal, which is that

[12] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.
[13] *Andrew Ambrose Cheusi v. United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020, § 53; *Kenedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 42; *Shukrani Masegenya Mango and others v. United Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 439, § 57; *Alex Thomas v. Tanzania* (merits), § 65.

"his extra-judicial statement was not voluntary and therefore wrongly admitted and acted upon by the trial court to convict him."[14] It is in respect of this ground that the Applicant avers in his Reply, that, he was subjected to torture for six (6) days prior to giving the statement.[15]

43. This Court notes that the issue at hand was considered by the Court of Appeal, which dismissed the Applicant's appeal upon concluding that the statement was rightly admitted.[16] It is evident that domestic remedies have been exhausted in respect of this issue, and the Respondent State's objection is consequently dismissed.

44. Conversely, it is beyond dispute that the Applicant did not raise as a ground of appeal the issue of his conviction based on the doctrine of recent possession. The issue was not brought to the knowledge and assessment of the Court of Appeal, being the highest court of the Respondent State. As such, it cannot be considered that domestic remedies have been exhausted in respect thereof. This Court therefore upholds the Respondent State's objection on this point.

45. As a consequence of the above, the Court finds that domestic remedies have been exhausted in this Application only in respect of the alleged failure of the Court of Appeal to consider the Applicant's views while assessing the propriety of his statement.

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

46. The Respondent State claims that the Application was not filed within a reasonable time as three (3) years elapsed between the date of the Court of Appeal's judgment and that of the filing of the present Applicant. According to the Respondent State, the Applicant should have filed the

[14] *Deogratias Nicholaus and Joseph Mukwano v The Republic*, Court of Appeal of Tanzania at Mwanza, Criminal Appeal No. 211 of 2010, Judgment of 7 March 2012, page 14.
[15] Applicant's Reply to the Respondent State's Response, 19 June 2017, § 8.
[16] *Ibid.*, pages 14-18.

Application within six (6) months after the date of the Court of Appeal's judgment and did not face any difficulty which justified doing so later.

47. The Applicant on his part refutes the Respondent State's objection and argues that the Rules do not provide for any timeframe to file an Application and such time should be determined on a case-by-case basis. According to the Applicant, assessing reasonable time in this case should take into account the time spent to exhaust all possible remedies.

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48. The issue arising for determination is whether the time observed by the Applicant before bringing his Application before this Court is reasonable within the meaning of Article 56(6) of the Charter.

49. The Respondent State contends that it took the Applicant three (3) years to file the present Application considering that the judgment of the Court of Appeal was delivered on 7 March 2013 while the application for extension of time to file a review was dismissed on 13 February 2015. The Applicant does not dispute these dates.

50. The Court recalls that in assessing reasonable time under Article 56(6) of the Charter, the determinative date for reckoning of time should be the decision rendered following the last ordinary remedy which the Applicant attempted to exhaust. In the instant case, the relevant remedy is, the appeal the Applicant filed at the Court of Appeal which delivered its judgment on 7 March 2013. Given that the present Application was filed on 5 April 2016, the time to be considered is three (3) years and twenty-eight (28) days. The arising issue is whether such a time is reasonable in the meaning of the Article 56(6) of the Charter.

51. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules

merely provide that applications must be filed "… within 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". As such, the Respondent State's reference to the period of six (6) months cannot be justified.

52. In its previous decisions, the Court has held that "…[the] reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[17] Factors taken into consideration by the Court include the facts that the Applicant is incarcerated and self-represented. Furthermore, in instances where the judicial system of the Respondent State provides for a review procedure, such as is the case in the present Application, attempts made by the Applicant to use the said procedure should be considered as a factor in assessing reasonableness.[18]

53. The Court notes that in the present case, after filing an application for review of the Court of Appeal's judgment, which was dismissed on 28 February 2014 for being filed out of time, the Applicant was directed to request for an extension of time to make a fresh application.[19] The Applicant then, on 6 March 2014, filed the application for extension of time but the latter was dismissed on 13 February 2015 for being baseless. The present Application was subsequently filed before this Court on 5 April 2016.

54. This chronology serves to establish that the bulk of the time used by the Applicant before filing the present Application was exhausted in attempting to pursue the review procedure. Furthermore, the Applicant then required some time to prepare his Application before this Court.

[17] *Norbert Zongo and Others v. Burkina Faso* (preliminary objection) (25 June 2013) 1 AfCLR 197, § 121.
[18] *Andrew Ambrose Cheusi v. Tanzania, op.cit.*, § 68; *Majid Goa alias Vedastus v. United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 498, § 41; *Werema Wangoko Werema and Another v. Tanzania* (merits), §§ 29, 56; *Armand Guehi v. Tanzania* (merits and reparations), § 56.
[19] See *Joseph Mukwano and Another v. The Republic*, Criminal Application No. 6 of 2013. Ruling of 28 February 2014, page 2.

Peculiarities of this case also include the facts that the Applicant is incarcerated and self-represented.[20] In the circumstances, this Court considers that the period of time of three (3) years and twenty-eight (28) days that it took the Applicant to file the present Application should be deemed reasonable.

55. In light of the foregoing, the Court dismisses the Respondent State's objection and finds that the Application has been filed within a reasonable time.

B. Other conditions of admissibility

56. 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 are reiterated in sub-rules 50(2)(a), (b), (c), (d), and (g) of the Rules, are not in contention between the Parties. Nevertheless, the Court must ascertain that these requirements have been fulfilled.

57. In particular, the Court notes that the requirement laid down in Rule 50(2)(a) of the Rules is met since the Applicant's identity is known.

58. The Court also notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. Furthermore, 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. Besides, the Application does not contain any claim or prayer that is incompatible with a provision of the Act. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

[20] *Christopher Jonas v. Tanzania* (merits) § 54; *Amiri Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83; *Armand Guehi v. Tanzania* (merits and reparations) § 56; *Werema Wangoko v. Tanzania* (merits and reparations) § 49*; Kijiji Isiaga v. Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 55.

59. The Court further 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.

60. Regarding the condition stated in Rule 50(2)(d) of the Rules, the Court notes that the Application fulfils the said condition as it is not based exclusively on news disseminated through the mass media.

61. 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. The Application therefore meets this condition.

62. As a consequence of the foregoing, the Court finds the Application partially admissible in respect of the alleged failure of the Court of Appeal to consider the Applicant's views while assessing the propriety of his statement.

VII. MERITS

63. The Applicant alleges the violation of his rights to non-discrimination, to equal protection of the law and to a fair trial guaranteed under Articles 2, 3(2), and Article 7(1) of the Charter respectively. In light of its earlier finding on the admissibility of the present Application, this Court will consider only allegations made in respect of the failure of the Court of Appeal of the Respondent State to consider the Applicant's views on his conviction based on a retracted confession.

64. This Court will first consider the alleged violation of the Applicant's right to have his cause heard under Article 7(1) before examining allegations in respect of Articles 2 and 3(2) of the Charter.

A. Alleged violation of the right to have one's cause heard

65. The Applicant avers that the Court of Appeal did not undertake a thorough examination of evidence that he adduced in respect of his retracted statement. According to the Applicant, his right to have his cause heard was breached when the Court of Appeal did not consider the allegation that he was subjected to torture for six (6) days prior to be taken to the justice of peace who even recorded in the statement that the Applicant had some fresh bruises.

66. The Respondent State rebuts these allegations and submits that domestic law allows conviction based on extra-judicial statements and in any event, the Applicant made the statement voluntarily as proved by a statement given by one witness in the case. The Respondent State further submits that the Applicant's conviction was not based solely on the retracted statement but also on the doctrine of recent possession and common intention and the trial court was satisfied of the same as proved by prosecution. According to the Respondent State, the fact that the Applicant's objection to the admissibility of the extra judicial statement was dismissed cannot be said to constitute a breach of his right to have his cause heard.

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67. The Court notes that Article 7(1) of the Charter provides that "every individual shall have the right to have his cause heard …". In its case law, this Court has held that such right imposes an obligation on the judicial authorities to undertake a proper assessment of arguments and evidence submitted by the Applicant.[21]

[21] See *Sadick Marwa Kisase v. United Republic of Tanzania*, ACtHPR, Application No. 005/2015, Judgment of 2 December 2021, § 65; *Armand Guehi v. United Republic of Tanzania* (merits and

68. The question arising in the present Application is whether the Court of Appeal failed to consider the Applicant's submission that his conviction based on his retracted statement allegedly provided after he was subjected to torture; and whether such failure constitutes a breach of his right to have his cause heard.

69. It emerges from the record of the case that, subsequent to an objection by Counsel for the Applicant, the trial court, which was the High Court, conducted a trial within a trial.[22] Those proceedings were aimed at considering the objection raised by the Applicant to the Prosecution's reliance on his extra judicial statement which he avers was obtained under torture.[23] After hearing both parties, and against a thorough examination of their submissions, as well as related facts, the High Court dismissed the Applicant's objection upon finding that the Applicant made the statement freely and voluntarily and what he said it nothing but the truth.[24]

70. This Court further notes that the Court of Appeal equally considered whether the trial court properly admitted the Applicant's extra judicial statement and that the Court of Appeal held that the High Court could not be faulted for deciding as it did.[25] The Court of Appeal therefore dismissed the Applicant's appeal on that single ground.[26]

71. Considering the foregoing, it cannot be said that the domestic courts of the Respondent State ignored the Applicant's objection or failed to consider the propriety of his extra judicial statement in arriving at his conviction. The claim is therefore unfounded.

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reparations) (7 December 2018) 2 AfCLR 477, §§ 97-111; *Mohmed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 559, §§ 174, 193, 194.

[22] See *The Republic v. Deogratias Nicholaus Jeshi, Josephat Mkwano, and Audax Felician*, Criminal Session No. 113/2004, Ruling of 22 June 2010.

[23] *Ibid*, pages 1-2.

[24] *Ibid*, pages 3-8.

[25] See *Deogratias Nicholaus and Joseph Mukwano v. The Republic*, Court of Appeal of Tanzania at Mwanza, Criminal Appeal No. 211 of 2010, Judgment of 7 March 2012, pages 14-17.

[26] *Ibid*, page 18.

72. In the circumstances, this Court dismisses the Applicant's claim and finds that there is no violation of the right to be heard guaranteed under Article 7(1) of the Charter.

B. Alleged violation of the right to equality

73. The Applicant alleges that the Court of Appeal discriminated against him when it "isolated him by its judgment to rely unfairly on the side of the Respondent".

74. The Respondent State on the contrary avers that the allegation is not proved; and the only fact that the Court of Appeal dismissed the Applicant's claims cannot amount to discrimination.

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75. Article 2 of the Charter provides that "Every individual shall be entitled to the enjoyment of the rights […] recognized […] in the present Charter without distinction of any kind […]".

76. In its earlier decisions, this Court has held that non-discrimination entails that the law should provide for everyone and is applicable to everyone in equal measure without any distinction. This implies that persons in a similar or identical situation ought not to be treated differently.[27] The issue to be determined in this case is whether such distinction is established in respect of the Applicant.

77. The Court observes that, in attempting to prove discrimination, the Applicant avers that the prosecution was treated in a manner that was comparatively different from how he was treated, resulting in a breach of the principle of equality. The Court notes, however that, the Applicant makes a general statement and fails to demonstrate how the Court of

[27] *Sébastien Germain Ajavon v. Republic of Benin* (merits) (29 March 2019) 3 AfCLR 130, § 221; *Kijiji Isiaga v. Tanzania* (merits), § 85.

Appeal discriminated against him, in comparison to the prosecution during the proceedings before it. Furthermore, as established above in respect of the right to be heard, the Court of Appeal did not discard the Applicant's submissions or lean towards the arguments of the Respondent State. Discrimination cannot be said to have occurred on the sole basis that the Court of Appeal made a finding that did not favour the Applicant.

78. As a consequence of the foregoing, this Court dismisses the Applicant's claim and finds that there has been no violation of the right to equality protected under Article 2 of the Charter.

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

79. The Applicant submits that he "had no any ability neither control on the procedure as he was represented by the counsel who was settled by the Respondent State without his choice", and "the procedure isolated the applicant" therefore violating his right to equal protection of the law.

80. The Respondent State refutes this allegation and prays the Court to disregard the same for being unsubstantiated and baseless.

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

82. The Court notes that the Applicant has not provided any specific argument or evidence that he was treated differently from other persons in similar conditions and circumstances. Furthermore, the Court recalls that, as earlier found, there is no evidence on file suggesting that the manner in which domestic courts conducted the proceedings amounts to a breach of

the Applicant's right to an equal protection of the law. The Applicant's claim is therefore dismissed.

83. In light of the above, the Court finds that the Respondent State did not violate the Applicant's right to equal protection of the law provided under Article 3(2) of the Charter.

VIII. REPARATIONS

84. The Applicant prays the Court to order the Respondent State to set him at liberty. He also requests the Court to grant him reparation the amount of which should be assessed based on the time spent in custody and the national annual ratio per citizen applicable in the Respondent State.

85. The Respondent State prays the Court to find that the Applicant is not entitled to any reparation given that he failed to prove and justify the claims made.

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86. The Court notes that Article 27(1) of the Protocol stipulates that

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

87. The Court notes that since no violation has been established, the issue of reparation does not arise.[28] Consequently, the Applicant's prayers for reparation are dismissed.

[28] *Alfred Agbesi Woyome v. Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, § 142; *Werema Wangoko Werema and Another v. Tanzania* (merits), § 99.

IX. COSTS

88. None of the Parties makes a prayer as to costs.

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89. Pursuant to Rule 32(2) of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs".[29]

90. In the instant Case, the Court decides that each Party will bear its own costs.

X. OPERATIVE PART

91. For these reasons

THE COURT,
Unanimously,

Jurisdiction

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

Admissibility

iii. *Upholds* the objection to the admissibility of the Application for failure to exhaust local remedies in respect of the Applicant's conviction based on the doctrine of recent possession;
iv. *Dismisses* the objections to the admissibility of the Application in other respects;
v. *Declares* the Application partially admissible.

[29] Rule 30(2) of the Rules of Court, 2 June 2010.

Merits

vi. *Finds* that the Respondent State has not violated the Applicant's right to have his cause heard, as guaranteed by Article 7(1) of the Charter as regards the assessment of evidence during the domestic proceedings.

vii. *Finds* that the Respondent State has not violated the Applicant's right to equality protected under Article 2 of the Charter as regards the alleged discrimination in the course of domestic proceedings.

viii. *Finds* that the Respondent State has not violated the Applicant's right to equal protection of the law under Article 3(2) of the Charter as regards the alleged failure to examine evidence tendered and consider submissions of the Applicant.

Reparations

ix. *Dismisses* the Applicant's prayers for reparations.

Costs

x. *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 Arusha, this Twenty Fourth Day of March, in the Year Two Thousand and Twenty Two in English and French, the English text being authoritative.