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

SIJAONA CHACHA MACHERA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 035/2017

JUDGMENT

22 SEPTEMBER 2022

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

In the Matter of:

Sijaona Chacha MACHERA
Self-represented

Versus

UNITED REPUBLIC OF TANZANIA
Represented by:

i. Mr Gabriel P. MALATA, Solicitor General, Office of the Solicitor General;
ii. Mr Ally POSSI, Deputy Solicitor General, Office of the Solicitor General;
iii. Mr Stanley KALOKOLA, State Attorney, Office of the Solicitor General; and
iv. Ms Pauline F. MDENDEMI, State Attorney, Office of the Solicitor General.

after deliberation,

renders the following Judgment:

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

I. THE PARTIES

1. Sijaona Chacha Machera (hereinafter "the Applicant") is a national of Tanzania and a schoolteacher, who, at the time of filing the Application, was serving a thirty (30) year prison sentence at Butimba Central Prison, Mwanza Region, having been convicted for committing an unnatural offence against his twelve (12) year old student. He alleges the violation of his right to a fair trial in the domestic courts.

2. The Application is filed against the United Republic of Tanzania (hereinafter "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter "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 provided for under Article 34(6) of the Protocol (hereinafter "the Declaration"), by virtue of 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, one year after its deposit, which is on 22 November 2020.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the records, that on 8 August 2007, the Applicant allegedly asked one of his students, a boy aged twelve (12) years, to his home. The Applicant was supposedly going to inflict a punishment on the student by

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

whipping him with a cane for getting a number of exercises wrong. However, the Applicant then allegedly proceeded to undress himself and the student and had carnal knowledge of him against the order of nature.

4. The Applicant was charged on 13 August 2007 for having committed an offence against the order of nature, contrary to Section 154(a) of the Respondent State's Penal Code.

5. The Applicant was arraigned before the District Court of Musoma at Mwanza on 4 October 2007, in Criminal Case No. 276/2007 and was convicted and sentenced to thirty (30) years in prison on 21 May 2008.

6. The Applicant filed on 17 February 2009 an appeal before the High Court sitting at Mwanza, being Criminal Appeal No. 31/2009, and on 5 August 2011 this appeal was dismissed.

7. The Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Mwanza, being Criminal Appeal No. 223/2011.[3] In its judgment of 30 July 2013, the Court of Appeal dismissed this appeal in its entirety.

8. The Applicant filed on 23 September 2013 an Application for Review of the Court of Appeal's decision, under Criminal Application No. 17/2013. On 22 August 2017, the Court of Appeal dismissed the Application for Review for lack of merit.

B. Alleged violations

9. In the Application, in addition to alleging that the Respondent State has violated its obligations under Article 1 of the Charter, the Applicant alleges that the Respondent State violated his rights, namely:

    i. The right to non-discrimination, protected by Article 2 of the Charter;

[3] The record does not show on what date the Applicant filed his appeal to the Court of Appeal.

ii. The right to equality before the law and equal protection of the law, protected by Article 3 of the Charter;
iii. The right to life, protected under Article 4 of the Charter;
iv. The right to the respect of the dignity inherent in a human being and prohibition of slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, protected under Article 5 of the Charter;
v. The right to liberty and security, protected by Article 6 of the Charter;
vi. The right to have his cause heard, protected by Article 7(1) of the Charter;
vii. The right to receive information, guaranteed under Article 9(1) of the Charter.

10. The Applicant also alleges that his rights protected in Article 12 (equality of human beings), Article 13 (equality before the law), Article 15 (right to personal freedom), Article 23 (right to just renumeration), Article 24 (right to own property) and Article 107B (independence of the judiciary) of the Constitution of the Respondent State were violated.

11. In the submissions on reparations, the Applicant further alleges the violation by the Respondent State of Article 3 (right to equality before the law and equal protection of the law), Article 5 (respect of dignity), Article 7 (right to a fair trial), Article 8 (right to freedom of conscience and religion), Article 9 (right to information and freedom of expression), Article 14 (right to property), Article 15 (right to work), Article 16 (right to health), Article 17 (right to education), Article 18 (protection of the family and vulnerable groups), Article 19 (right of all peoples to equality and rights) and Article 26 (state duty to guarantee independence of the courts and establish national human rights institutions) of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

12. The Application was filed on 8 November 2017.

13. On 22 February 2018, the Registry sent a notification to the Applicant requesting him to file a detailed claim for reparations.

14. On 7 May 2018, the Applicant filed his claims for reparations.

15. The Application together with the Applicant's submissions on Reparations were served on the Respondent State on 6 September 2018.

16. The Parties filed their pleadings on merits and reparations within the time stipulated by the Court.

17. Pleadings were closed on 19 July 2022 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

18. In the Application, the Applicant prays for the following:

    i. That the Court restores justice where it was overlooked by quashing his charge and sentence and release him from prison.
    ii. That the Court grants other orders and reliefs that it may deem fit and just in the circumstances of the Applicant.

19. In his submissions on reparations, the Applicant prays for the Court to order as follows:

    i. That the Respondent State pays the Applicant his salary and annual salary increments for the period between 24 May 2008 and the end of his contract;
    ii. That the Respondent State pays the Applicant his unpaid basic wages together with a 25% interest.
    iii. That the Respondent State compensates the Applicant with a total of 900.000.000 TZS for physical pain, psychological trauma, loss of earnings and his family's hardship for his loss of income.

20. The Applicant further prays the Court to order the Respondent State to supply him with his employment documents, including his contract of service, the letter terminating his employment, minutes of the meeting in which the decision to terminate his employment was made, his pay slip and any other document relating to his employment.

21. In its Response, with regard to jurisdiction and admissibility of the Application, the Respondent State prays the Court to order the following measures:

    i. That the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate this Application.
    ii. That the Application be declared inadmissible.
    iii. That the Application be dismissed.

22. With regard to the merits of the Application, the Respondent State prays the Court to order the following measures:

    i. That the Respondent State has not violated the Applicant's rights provided under Articles 1, 2, 3, 4, 5, 6, 7(1) and 9(1) of the Charter;
    ii. That the Respondent State has not violated any of the Applicant's rights under the Charter or the Constitution of the United Republic of Tanzania.

23. In Response to the Applicant's submissions on reparations, the Respondent State prays for declarations and orders of the Court as follows:

    i. A declaration that the Applicant is not amenable to reparations;
    ii. A declaration that the Applicant's trial by the national courts of the Government of Tanzania leading to the conviction and sentencing of the Applicant was lawful and in accordance with the national laws, the Charter and other relevant international instruments;
    iii. A declaration that the Applicant's Application for reparation is unfounded and devoid of merit for failure to meet the tests enshrined in the principles and prerequisites of reparations;
    iv. An order for dismissal of the Application for reparations with costs;

v. Any other order or relief that the Court deems fit and just to grant.

V. JURISDICTION

24. 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.

25. 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."[4]

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

27. In the present Application, the Court notes that the Respondent State has prayed, without providing further details, that the Court grants the order that it is not vested with the jurisdiction to adjudicate on this matter.

28. Having conducted an examination of its jurisdiction, and noting that nothing on the record indicates otherwise, the Court holds that:
    i. It has material jurisdiction because the Application alleges violations of Article 1, 2, 3, 4, 5, 6, 7(1) and 9(1) of the Charter which the Respondent State has ratified, and the Court has the power to interpret and apply the Charter in accordance with Article 3(1) of the Protocol.

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

ii. It has personal jurisdiction, given that the Respondent State is a party to the Protocol and had deposited the Declaration under Article 34(6) thereof, which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol. In reference to paragraph 2 of this judgment, the Court recalls that it has held that the withdrawal of the 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 on new cases filed before the withdrawal takes effect.[5] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.

iii. It has temporal jurisdiction given that the alleged violations took place after ratification of the Charter, the Protocol and depositing of the Declaration by the Respondent State. Furthermore, the alleged violations are continuing since the Applicant remains convicted on the basis of what he considers an unfair process.[6]

iv. It has territorial jurisdiction given that the facts on which the alleged violations are based occurred on the territory of the Respondent State.

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

[5] *Andrew Ambrose Cheusi v United Republic of Tanzania,* §§ 35-39.
[6] *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.

VI. ADMISSIBILITY

30. 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".

31. In line with Rule 50(1) of the Rules,[7] "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."

32. 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 seised 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.

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

33. The Respondent State has, without providing further details, prayed that the Court finds the Application inadmissible. Nonetheless, in accordance with Rule 49(1) of the Rules, the Court shall still ascertain the admissibility of the Application in accordance with the Charter, the Protocol and the Rules.

34. 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.

35. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed by the Charter. It also notes that one of the objectives of the Constitutive Act of the African Union as stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court, therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter and thus meets the requirements of Rule 50(2)(b) of the Rules.

36. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

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

38. With regard to the exhaustion of local remedies, the Court notes that the Applicant has had his case determined by three domestic courts, namely, the District Court of Musoma at Mwanza in Criminal Case No. 276/2007, the High Court sitting at Mwanza in Criminal Appeal No. 31/2009 and the Court of Appeal of Tanzania, the highest judicial authority in the Respondent State, in Criminal Appeal No. 223/2011 and Criminal Application No. 17/2013 wherein an Application for Review of the decision of the Court of Appeal was dismissed. The Court therefore finds that the

Applicant has exhausted local remedies in compliance with Rule 50(2)(e) of the Rules.

39. The Court observes that the final decision of the Court of Appeal of Tanzania, that is Criminal Application No. 17/2013 to review the Court of Appeal's decision, was delivered on 22 August 2017 and the Applicant filed his Application before this Court on 8 November 2017. The Court finds a period of 2 months and 17 days that was taken before submitting his Application before this Court was reasonable and therefore the requirement in Rule 50(2)(f) of the Rules has been met.

40. Further, 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, in compliance with Rule 50(2)(g).

41. The Court, therefore, dismisses the Respondent State's objection to the admissibility of the Application and finds that all the admissibility conditions have been met and that this Application is admissible.

VII. MERITS

42. The Court notes that the Applicant alleges the violation of Articles 12, 13, 15, 23, 24 and 107B of the Constitution of the Respondent State. Nonetheless, the Court has previously held that in determining whether the State has complied with the Charter or any other human rights instrument it has ratified, it does not apply the domestic law in making this assessment.[8] The Court will therefore not apply the provisions of the Respondent State's Constitution cited by the Applicant.

[8] *Mohamed Abubakari v Tanzania* (merits) § 28; *Kennedy Owino Onyachi and another v Tanzania* (merits) § 39.

43. The Court further notes that the Applicant alleges that the manner in which the Respondent State's domestic courts determined his case was in error of both the law and facts and as a result, his rights as guaranteed in Articles 1, 2, 3, 4, 5, 6, 7(1) and 9(1) of the Charter were violated.

44. The Court considers, however, that although the Applicant alleges violations of various rights under the Charter, at the core of his Application is the alleged violation of the right to have his cause heard, protected under Article 7(1) of the Charter. The Court will, therefore, first, consider the alleged violation of Article 7(1) of the Charter, before addressing the other human rights that were allegedly violated.

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

45. The Court observes that from the details of the Application, the Applicant essentially has four grievances against the domestic courts whose actions or omissions he claims violated his right to be heard as protected under Article 7(1) of the Charter. These grievances are:

    i. That the Court of Appeal erred by its failure to find fault in the actions of the trial court which the Applicant alleges sentenced him before convicting him.
    ii. That the Court of Appeal erred by its failure to take note that the trial court erroneously admitted the evidence of PW1 who testified without taking an oath.
    iii. That the Court of Appeal erred in law and in fact by failure to find fault in what he alleges is the trial court's illegal admission of Exhibit P1 and P2 as evidence as well as the testimony of PW6.
    iv. That the Court of Appeal misdirected itself by failing to consider his allegation that the trial court did not facilitate the attendance of defence witnesses.

46. The Court will proceed to examine these four (4) grievances in light of Article 7(1) of the Charter.

i. Allegation relating to his sentencing without conviction

47. The Applicant claims that the Court of Appeal erred in law and in fact by its failure to find that entering of the judgment and sentencing by the trial court before convicting him first had occasioned him an injustice and was contrary to Rule 66(1) (a) of the Court of Appeal Rules.

48. He further claims that in the absence of the said conviction, the subsequent decisions of the High Court and the Court of Appeal "had no legs to stand on" and were prepared illegally, contrary to Rule 66(1)(e) of the Court of Appeal Rules.

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49. The Respondent State submits that Criminal Appeal No. 31 of 2009, Criminal Appeal No. 223 of 2011 and Criminal Application No. 17 of 2013 were dismissed for want of merit. Further, that the Court of Appeal was correct in holding that the Applicant was lawfully convicted by the trial court and that the conviction followed establishment of proof beyond reasonable doubt that the Applicant committed the offence with which he was charged.

50. The Respondent State further states that the Court of Appeal was correct in holding that the Applicant was convicted by the trial court and that the conviction was consequent upon proof beyond doubt. It is the Respondent State's position that there was therefore no miscarriage of justice as alleged by the Applicant.

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51. The Court observes from the Applicant's submissions that he was aggrieved by the alleged fact that the trial court did not "convict" him before passing the sentence against him and this omission made his judgment incomplete and occasioned him an injustice. However, from the record before this Court, the Court of Appeal in its judgment in Criminal Application No. 17 of 2013, which is the decision that according to the Applicant violated

his rights under Article 7(1) of the Charter for failure to take note of the omission to convict him before his sentencing, held as follows:

> The Court's decision [which is] the subject matter of this review at its introductory part clearly indicates that the applicant was convicted by the District Court of Musoma […] It is thus apparent that the applicant was convicted by the trial court and such conviction was consequent upon proof beyond doubts of the offence with which the applicant was charged.[9]

52. Furthermore, this Court notes from the record of proceedings in the trial court that the said record indicates that on 21 March 2008, the trial magistrate held as follows:

> In the instant case, prosecution has proved the case beyond reasonable doubt and I hereby hold that the accused is guilty of the offence he stands charged unnatural offence [sic] c/s154(1)(a) of the Penal Code, Cap 16 (R.E 2002).[10]

53. Further to the above, this Court notes from the record that the Applicant was on the same day that he was convicted, allowed to address the trial court on mitigating circumstances before his subsequent sentencing which took place on 21 May 2008. In view of this, the Court finds that the Applicant's assertion that he was not convicted before he was sentenced is unfounded.

54. Therefore, his allegation that his right to be heard, guaranteed under Article 7(1) of the Charter, was violated, is dismissed.

ii. Allegation that evidence was given without taking oath

55. The Applicant faults the Court of Appeal's Review decision as having erred in law and in fact for its failure to note that the trial court erroneously

[9] At page 11-12 of the judgment in Criminal Application No. 17/2013.
[10] At page 12 of the of the Record of Appeal in Criminal Appeal No. 223/2011.

admitted the evidence of PW1 who testified without taking an oath. As a result, this violated his rights under Article 7(1) of the Charter

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56. The Respondent State disputes the allegation by the Applicant and claims that the Court of Appeal was correct by not entertaining the second ground of the application for review raised by the Applicant, because by doing so the Court would have to re-evaluate the evidence adduced by PW1. This, according to the Respondent State, would have been unlawful because in review, the Court of Appeal does not sit to re-evaluate the evidence all over again. Further, the Respondent State "states that, PW1 being a child of 12 years, his evidence was taken after a *voire dire* test, conducted on him as per section 127(2) of the Evidence Act, Cap 6 of the laws of Tanzania".

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57. The Court notes that the Applicant asserts that the Court of Appeal, in Criminal Application No. 17 of 2013, failed to note that the trial court erroneously admitted the evidence of PW1 who testified without taking an oath as required under Section 127(2) of the Evidence Act.

58. The Court further notes that the said Section 127(2) of the Evidence Act provides as follows:

> Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth.

59. From the above provision, the Court observes that a trial court is permitted to receive evidence from a child of tender years without the child taking an

oath or being affirmed where the court forms the opinion that the child has sufficient intelligence to justify reception of the child's evidence and the child understands the duty to speak the truth.

60. From the record before this Court, it is evident that, as noted by the High Court in Criminal Appeal No. 31/2009, the District Court assessed the credibility of PW1, a child aged twelve (12) years. The trial court held as follows:

> I have assessed the victim (PW1) in terms of intelligence and duty of speaking the truth, his veracity, knowledge of the facts, trustworthiness and came to the conclusion that he is a reliable witness. He has testified while shedding tears the truth that the said offence was committed against him by the accused.

61. This Court also notes that the High Court further observed that "the evidence of PW1 was well assessed by the trial magistrate who correctly found the same was corroborated by the evidence of PW2 to PW6 and that of DW2". In addition, the Court of Appeal in Criminal Appeal No. 223/2011 observed that even though the evidence of PW1 was recorded without an oath, his testimony was corroborated by other witnesses. The Court of Appeal thus concluded: "Surely, in the midst of all the above evidence there is nothing for us in this second appeal to fault the courts below."

62. Further to the above, in the Review decision by the Court of Appeal in Criminal Application 17/2013, the court declined to re-assess the evidence adduced by PW1 and noted that the alleged grounds for review (which include the challenge on the testimony of PW1) did not fall within the grounds for review outlined in Rule 66(1) of the Court of Appeal Rules. Additionally, the Court of Appeal held: "…we are not ready to sit on our own decision for the court's decision is clear that it considered the evidence by all the witnesses…and came to a finding that the witnesses were credible and there was nothing to fault the courts below".[11]

[11] At page 13 of the judgment in Criminal Application 17/2013.

63. From the above, this Court finds that the trial court, the High Court and the Court of Appeal (twice) did take note and addressed the Applicant's challenge of the testimony of PW1.

64. The Court, therefore, dismisses the allegations of the Applicant and finds that his right to be heard, protected under Article 7(1) of the Charter, has not been violated.

iii. Allegation relating to the admission of exhibits and testimony

65. The Applicant claims that the Court of Appeal erred in law and in fact by failure to find fault in what he alleges was the trial court's illegal admission of Exhibit P1 and P2 as evidence as well as the testimony of PW6.

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66. The Respondent State disputes the allegation of the Applicant. It submits that the allegation that Exhibit P1 and P2 as well as the evidence of PW6 were admitted illegally does not fall in any of the grounds for review under Rule 66(1) of the Court of Appeal Rule. Hence, the Court of appeal was correct in dismissing the said allegations.

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67. The Court takes note that the Applicant, without providing any details, alleges that the Court of Appeal in Criminal Application No. 17/2013 failed to take note that the trial court had admitted Exhibit P1 and P2 illegally. Despite this general allegation, from the record, this Court notes that the Court of Appeal, in Criminal Appeal No. 223/2011 noted that the Applicant was challenging the credibility of Exhibit P1 which was a letter from PW1 to his mother.[12]

[12] At page 5 of the judgment in Criminal Appeal No. 223/2011.

68. The Court of Appeal further noted that the Applicant had not challenged the credibility of Exhibit P1 in his first appeal at the High Court and found: "It is too late in the day to take issue with the letter at this stage because in practice we do not deal with matters that were never raised and considered by the courts below".[13]

69. Further to the above, in the Review decision in Criminal Application No. 17/2013, the Court of Appeal held: "…the Court's decision is clear that it considered the evidence by all the witnesses and the letter at pages 3 to 6 of the judgment and came to a finding that the witnesses were credible and there was nothing to fault the courts below. We, for the above reason, do not accept the invitation to re-assess the evidence and admissibility of exhibits at this stage for to do so is tantamount to sitting on appeal on our own decision".[14]

70. In light of all the above, this Court finds that both the High Court and Court of Appeal (twice) sufficiently addressed the issue of admission of exhibits in the Applicant's case as well as the evidence by PW6. Nothing done by the domestic courts in this regard warrants the intervention of this Court. The Court therefore finds the Applicant's assertion that the Court of Appeal did not take note of illegal admission of the said evidence to be without merit and therefore dismisses the Applicant's allegation that his right to be heard, protected under Article 7(1) of the Charter, was violated.

iv. Allegation relating to the attendance of defence witnesses

71. The Applicant alleges that the trial court did not assist with the attendance of defence witnesses. He claims that the Court of Appeal misdirected itself for failure to consider these allegations. This according to him was a violation of Article 7(1) of the Charter.

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[13] At page 5 of the judgment in Criminal Appeal No. 223/2011.
[14] At page 13 of the judgement in Criminal Application No. 17/2013.

72. The Respondent State challenges the allegation of the Applicant. It submits that the allegation that the trial court failed to assist the attendance of the Applicant's witness was an afterthought in the Application for Review since such allegation was never raised by the Applicant in the appeal.

73. Further to the above, the Respondent State claims that although the Applicant had indicated to the trial court that he intended to call five witnesses, after DW2 testified, the Applicant requested to close his case, but the court allowed him more time to call the three witnesses. Further that on 25 April 2008 the Applicant informed the trial court that he had no witnesses and also did not move the court to issue summons to his intended witnesses.

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74. The Court takes note of the Applicant's allegation that the Court of Appeal misdirected itself for failure to consider that the trial court did not assist the attendance of defence witnesses.

75. The Court notes that from the Record of Appeal in Criminal Appeal No. 223/2011,[15] that on 18 March 2008 the Applicant requested to close his defence after two defence witnesses had testified. The prosecution did not object to this, noting that the accused person (the Applicant) had made this prayer willingly.

76. It also emerges from the record before this Court that the Applicant did not raise the abovementioned allegation as a ground of appeal at the High Court in Criminal Appeal No. 31/2009 and at the Court of Appeal in Criminal Appeal No. 223/2011. The Applicant raised this issue as a ground of appeal for the first time in his Application for Review of the decision of the Court of Appeal in Criminal Application No. 17/2013.

[15] At page 35 of the Record of Appeal in Criminal Appeal No. 223/2011.

77. The Court of Appeal in the Review decision in Criminal Application 17/2013, noted as follows:

> Parts (ii) and (iii) of ground 8 of review [sic] need not detain us. They concern the trial magistrate's failure to issue summons to compel the applicant's witness (then defence witness) to attend court […] In the first place the court's decision does not show that such grounds were raised before it. They are new issues being raised at this stage which is improper […] The Court's decision in Ghati Mwita vs. The Republic is an authority that a party is not allowed to raise a new matter at this stage. These grounds are without basis. The also fail.[16]

78. In view of the above, this Court finds that the Court of Appeal did indeed consider the Applicant's allegation that the trial court did not facilitate attendance of defence witnesses. It is the Court's position that nothing on the record and in the finding of the Court of Appeal as re-stated above reveals that the Court of Appeal misdirected itself as alleged by the Applicant. To the contrary, the Applicant presented two defence witnesses and voluntarily requested the trial court to allow the defence to close its case. For these reasons, this Court finds that Applicant's allegation is unfounded and therefore finds that the Respondent State has not violated the Applicant's right to be heard guaranteed under Article 7(1) of the Charter.

79. The Court, having found that none of the Applicant's four main allegations in the Application regarding violation of his right to be heard under Article 7(1) of the Charter has been established, finds that the Respondent State has not violated Article 7(1) of the Charter.

B. Allegation relating to the violation of other human rights

80. The Applicant also alleges that the Respondent State's violated his rights as guaranteed in Articles 1, 2, 3, 4, 5, 6, and 9(1) of the Charter.

[16] At page 14 of the judgment in Criminal Application 17/2013.

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81. The Respondent State disputes the Applicant's allegation and submits that the Applicant is put to strict proof thereof. The Respondent State asserts that from its submissions it is evident that is has not violated the Applicant's rights provided under Article 1, 2, 3, 4, 5, 6 and 9(1) of the Charter.

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82. The Court notes that the Applicant has not made specific submissions nor provided evidence that the Respondent State violated its obligations under the Charter (Article 1 of the Charter), that he was discriminated against (Article 2 of the Charter), that he was not treated equally before the law or did not enjoy equal protection of the law (Article 3 of the Charter), that his right to life was infringed (Article 4 of the Charter), that his right to dignity was violated (Article 5 of the Charter), that is his right to liberty and security of the person was violated (Article 6 of the Charter), or that his right to receive information was violated (Article 9(1) of the Charter).

83. In these circumstances, the Court finds that there is no basis to find a violation and therefore holds that the Respondent State did not violate Articles 1, 2, 3, 4, 5, 6 and 9(1) of the Charter.

VIII. REPARATIONS

84. The Applicant's prayers for reparations are reflected in paragraphs 18-20 above while the Respondent State's prayers in response to the Applicant's submissions on reparations are reflected in paragraph 23 above.

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85. 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 fair compensation or reparation."

86. Having found that the Respondent State has not violated any of the Applicant's rights, the Court dismisses the Applicant's prayers for reparations.

IX. COSTS

87. The Applicant did not make any submissions on costs.

88. The Respondent State prayed that costs be borne by the Applicant.

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89. The Court notes that Rule 32(2)[17] of the Rules of Court provides that: "unless otherwise decided by the Court, each party shall bear its own costs, if any".

90. The Court decides that in view of this provision each party shall bear its own costs.

X. OPERATIVE PART

91. For these reasons:

THE COURT,

Unanimously,

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

On Jurisdiction

i. *Dismisses* the objection to its 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 Articles 1, 2, 3, 4, 5, 6, 7(1) and 9(1) of the Charter.

On Reparations

vi. *Dismisses* the prayers for reparations.

On Costs

vii. *Orders* that each Party shall bear its own costs.

Signed:

Blaise TCHIKAYA, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. Ntsebeza, Judge;

Modibo SACKO, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar.

Done at Arusha, this Twenty-Second Day of September, in the Year Two Thousand and Twenty-Two in English and French, the English text being authoritative.