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

HAMISI MASHISHANGA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 024/2017

RULING

1 DECEMBER 2022

TABLE OF CONTENTS

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, 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:

HAMISI MASHISHANGA

Self-Represented.

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr. Boniphace Nalija LUHENDE, Solicitor General;
ii. Ms. Sarah Duncan MWAIPOPO, Deputy Solicitor General;
iii. Ms. Caroline K. CHIPETA, Ambassador, Head of Legal Unit, Ministry of Foreign Affairs, East Africa Cooperation;
iv. Ms. Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers;
v. Mr. Abubakar MRISHA, Senior State Attorney, Attorney General's Chambers; and

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

vi. Ms. Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs, East African Cooperation.

after deliberation,

renders the following Judgment:

I. THE PARTIES

1. Hamisi Mashishanga (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Uyui Central Prison, Tabora, where he is serving a sentence for the offences of burglary and armed robbery. He alleges a violation of his fair trial rights during the domestic proceedings.

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"), 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 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] which is one year after its deposit.

[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 that the Applicant and two others not before this Court, on 1 April 2004, at about 2.00 am in Ilagaja Village, Nzega District in Tabora Region, attacked and assaulted Mr. Masesa Charles, a fellow villager, robbed him and thereafter fled the crime scene.

4. After the robbers had fled, Mr. Masesa raised an alarm and the neighbours, including the area Chairman, came to his rescue. A search was conducted and property including, a medical report belonging to the victim were found in the Applicant's house. Thereafter the Applicant was apprehended by the police, charged and convicted on 14 July 2004, and sentenced to five (5) years and thirty (30) years imprisonment for the offence of burglary and armed robbery respectively. He was also ordered to pay compensation to the victim for the items which were stolen but not recovered and for injuries sustained by the victim.

5. The Applicant appealed to the High Court of Tanzania at Tabora in Criminal Appeal No. 134 of 2004 against the conviction and sentence of the District Court of Nzega, which appeal was dismissed by the High Court on 17 July 2006.

6. The Applicant then appealed to the Court of Appeal of Tanzania at Tabora in Criminal Appeal No. 332 of 2007, against the conviction and sentence of the High Court of Tanzania at Tabora. The appeal was dismissed by the Court of Appeal in a Judgment delivered on 1 June 2010.

B. Alleged Violations

7. The Applicant alleges the violation of the following rights:

    a. The right to non-discrimination guaranteed under Article 2 of the Charter;
    b. The right to equality before the law and equal protection of the law guaranteed under Article 3(1)(2) of the Charter;
    c. The right to fair trial guaranteed under Article 7(1)(c) of the Charter; and
    d. The right to obtain justice within a reasonable time guaranteed under Article 107A (2)(b) of the Constitution of the United Republic of Tanzania, 1977.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. The Application was filed with the Court on 31 August 2017 and served on the Respondent State on 6 September 2017.

9. The Parties filed their pleadings on the merits and reparations after several reminders and extensions of time granted by the Court.

10. Pleadings were closed on 15 November 2021 and the parties were duly notified.

IV. PRAYERS OF THE PARTIES

11. The Applicant prays the Court to:

    a. Re-store justice where it was overlooked;
    b. Quash both the conviction and sentence of thirty (30) years in jail against him;
    c. Release him from prison custody;

d. Order the Respondent State to compensate him to the tune of Tsh 65,800,000/= which he would have earned out of his agricultural produce; and
e. Order the Respondent State to compensate him for special damages in an amount that the Court deems fair in the circumstances.

12. In its response on jurisdiction and admissibility, the Respondent State prays the Court to:

a. Declare that it is not vested with jurisdiction to adjudicate this Application;
b. Declare that the Application has not met the admissibility requirements under Rule 40(5) and (6) of the Rules of the Court;
c. Declare that the Application is inadmissible; and
d. Dismiss the Application.

13. On the merits, the Respondent State prays the Court to:

a. Declare that the Government of the United Republic of Tanzania did not violate the Applicant's rights provided by Article 2 of the African Charter on Human and Peoples' rights;
b. Declare that Tanzania did not violate the Applicant's rights under Article 3(1)(2) of the African Charter on Human and Peoples' rights;
c. Declare that Tanzania did not violate the Applicant's rights under Article 7(1) of the African Charter on Human and Peoples' rights;
d. Declare that Tanzania did not violate the Applicant's rights under Article 7(1)(c) of the African Charter on Human and Peoples' rights;
e. Declare that Tanzania did not violate the Applicant's rights under Article 7(1)(d) of the African Charter on Human and Peoples' rights;
f. Declare that Tanzania did not violate the Applicant's rights under Article 107A (2)(b) of the Constitution of the United Republic of Tanzania, 1977;
g. Dismiss the Application in its entirety for lack of merit;
h. Dismiss the Applicant's prayers in entirety;
i. Dismiss the Applicant's prayer for reparations; and
j. Order the Applicant to pay the costs of this Application.

V. JURISDICTION

14. 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.

15. 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]

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

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

A. Objection to material jurisdiction

18. The Respondent State contends that the jurisdiction of this Court is provided for under Article 3 of the Protocol and Rule 26 of the Rules.

19. It contests the material jurisdiction of this Court with regard to the Applicant's prayers and contends that, this Court is not afforded unlimited jurisdiction to quash the lawful conviction and sentence of the Applicant and to order his release. Doing so would in effect mean overturning the decision of the Court of Appeal of Tanzania, the highest court of the land, which sustained such

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

conviction and sentence. It further avers that the conviction and sentence were based on the Respondent State's Penal Code, Article 285 and 286 for the offence of burglary and armed robbery. Citing the Courts jurisprudence,[4] the Respondent State contends that the Applicant has not demonstrated specific or compelling circumstances to warrant an order for release by this Court.

20. The Respondent State, further citing the Courts jurisprudence,[5] submits that this Court has held that it does not have any appellate jurisdiction to reverse and consider appeals in respect of cases already decided upon by the domestic or regional courts. Furthermore, the Respondent State submits that to quash the conviction and sentence would require a re-appraisal of matters of evidence and procedure already concluded by the Court of Appeal, which is beyond the jurisdiction of this Court, which has also held in a number of decisions[6] that its mandate is to examine compliance with international human rights standards.

21. The Respondent State avers that this Court would be deliberating on matters of evidence such as the doctrine of recent possession and visual identification, which were already finalised by the Court of Appeal of Tanzania on page 6 of the Judgment. Moreover, it avers that this Court has already ruled,[7] at paragraph 89 of the Judgment that matters of identification are best left to domestic courts.

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22. The Applicant avers that this Court is clothed with jurisdiction to adjudicate this matter because the violation alleged against the Respondent State concern rights protected by the African Charter on Human and Peoples' Rights and the Protocol.

[4] Application No. 005/2013, *Alex Thomas v. United Republic of Tanzania*, § 157.
[5] Application No. 001/2013, *Ernest Francis Mtingwi v. Republic of Malawi.*
[6] Application No. 003/2015, *Kennedy Owino and Others v. The United Republic of Tanzania*, §§ 37-38.
[7] Application No. 005/2013, *Alex Thomas v. United Republic of Tanzania*, § 89.

23. The Applicant cites the Court's jurisprudence[8], that as long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter. He avers that the alleged violations are provided for under Articles 2, 3(1) and (2) and 7(1)(c) of the Charter as well as Article 107A (2)(b) of the Constitution of the United Republic of Tanzania.

24. The Applicant affirms that he has demonstrated the compelling circumstances that support his prayer for release and cites the Court's jurisprudence,[9] that an order for an Applicants release from prison can be made only under very specific and/or compelling circumstances.

25. The Applicant further submits that the Court can draw inspiration from the decision of the Inter-American Court of Human Rights in the case of "*Loayza Tamayo v. Peru*, merits judgment of 17 August 1997, series C NO 33, Resolutory paragraph 5 and 84". He submits that in this case, **"**the court ordered the Applicant's release since not doing so would have resulted in double jeopardy which is prohibited by the American Convention on Human Rights".

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26. 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.[10]

27. In the present Application, the Court notes that the Applicant has alleged violations of provisions of the Charter, specifically, Article 2 on the right to non-discrimination; Article 3(1)(2) on the right to equality before the law and

[8] Application No. 003/2012, *Peter Joseph Chacha v. Tanzania*, § 114.
[9] Application No. 005/2013, *Alex Thomas v. United Republic of Tanzania.*
[10] See, for instance, *Kalebi Elisamehe v. United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations), § 18; *Gozbert Henrico v. United Republic of Tanzania*, ACtHPR, Application No. 056/2016, Judgment of 10 January 2022 (merits and reparations), §§ 38-40.

equal protection of the law; Article 7(1)(c) on the right to fair trial; and Article 107A (2)(b) of the Constitution of the United Republic of Tanzania, 1977 on the dispensation of justice within a reasonable time. The Court notes that these rights are protected by an international instrument to which the Respondent State is a Party.

28. The Court recalls its established jurisprudence that, "it is not an appellate body with respect to decisions of national courts".[11] However "…this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[12] In this regard, therefore, it would not be sitting as an appellate court, if it were to examine the allegations by the Applicant. Consequently, the claim that the Court would be sitting as an appellate court in considering the Applicant's allegations is dismissed**.**

29. As a consequence of the foregoing, the Court finds that it has material jurisdiction to consider the present Application and dismisses the Respondent State's objection.

B. Objection to temporal jurisdiction

30. The Respondent State contests the temporal jurisdiction of this Court on the basis that the allegations raised by the Applicant are not ongoing, since the Applicant is serving a lawful sentence for the offence committed as provided by its Penal Code.

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31. The Applicant avers that this Court has temporal jurisdiction to hear this Application because the rights violated by the Respondent State are

[11] *Ernest Francis Mtingwi v. Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14.
[12] *Ernest Francis Mtingwi v. Malawi*, *ibid.*; *Kenedy Ivan v. United Republic of Tanzania*, ACtHPR (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Armand Guehi v. Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

protected under the Charter. Additionally, he avers that at the time this offence was committed, the Respondent State had already ratified the Charter on 9 March 1984 and was therefore bound by it.

32. The Applicant submits that the "violations are still ongoing and that he was tried, convicted and sentenced on a flawed charge." He avers that when a charge upon which the accused person is charged is flawed in form or substance, then, the accused person is considered not to have been accorded a fair trial. Therefore, he is serving an unlawful sentence.

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33. In respect of its temporal jurisdiction, the Court notes that the relevant dates, in relation to the Respondent State, are those of entry into force of the Charter and the Protocol as well as the date of depositing the Declaration under Article 34(6) of the Protocol.

34. In the instant case, the Court notes that the violations alleged by the Applicant are based on the judgments of the District Court, High Court and Court of Appeal rendered on 14 July 2004, 17 July 2006 and 1 June 2010, respectively, that is, after the Respondent State had ratified the Charter and the Protocol, and deposited the Declaration on 21 October 1986, 10 February 2006 and 29 March 2010 respectively. Furthermore, the alleged effects of the violations are continuing, as the Applicant remains convicted and is serving a five (5) year imprisonment sentence for the offence of burglary and thirty (30) years for the offence of armed robbery imposed upon him by the District Court of Nzega in Criminal Case No. 69 of 2004, on 14 July 2004, on the basis of what he considers an unfair trial.[13]

[13] *Hussein Ally Fundumu v. United Republic of Tanzania*, ACtHPR, Application No. 016/2018, Judgment of 22 September 2022 (jurisdiction and admissibility), §§ 29-30*; Tanganyika Law Society and Legal and Human Rights Center v. United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 84; *African Commission on Human and Peoples' Rights v. Kenya* (merits) (26 May 2017) 2 AfCLR 9, § 65.

35. Consequently, the Court holds that it has temporal jurisdiction to examine this Application and dismisses the Respondent State's objection accordingly.

C. Other aspects of jurisdiction

36. The Court notes that the Respondent State does not contest its personal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,[14] it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

37. In relation to its personal jurisdiction, the Court recalls as indicated in paragraph 2 of the judgment, that the Respondent State is a party to the Protocol and deposited the Declaration under Article 34(6) of the Protocol with the Chairperson of the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.

38. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect one year after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.[15] This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court holds that it has personal jurisdiction.

39. As for territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred within the territory of the Respondent State. In the circumstances, the Court holds that its territorial jurisdiction is established.

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

[14] Rule 39(1) of Rules of Court, 2 June 2010.
[15] *Andrew Ambrose Cheusi v. United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

VI. ADMISSIBILITY

41. 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.”

42. In line with Rule 50(1) of the Rules, “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.

43. 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.

44. The Respondent State raises objections to the admissibility of the Application, based on non-exhaustion of local remedies and failure to file the Application within a reasonable time.

A. Objection based on non-exhaustion of local remedies

45. On the objection based on non-exhaustion of local remedies, the Respondent State avers that the Applicant raised five (5) new violations which were not considered by the domestic courts, namely that:

    i. the Applicant's conviction on the basis of the doctrine of recent possession;
    ii. the Court of Appeal of Tanzania, did not observe the proceedings from the District Court and the High Court;
    iii. the Applicant's right to be heard was violated;
    iv. the Court of Appeal of Tanzania procured its judgments against the Applicant by error by convicting him on the basis of evidence and identification by moonlight; and finally
    v. there was a delay in the dispensation of justice.

46. The Respondent State submits that it recognises the importance and significance of the principle of the exhaustion of local remedies, which is reiterated in the Court's jurisprudence in *Urban Mkandawire v. The Republic of Malawi*[16] and *Peter Joseph Chacha v. Tanzania*. Further, the African Commission on Human and Peoples' Rights held in the matter of *Article 19 v. Eritrea* that one should at least attempt to exhaust the available remedy. Simply casting doubt as to the futility of exhausting local remedies does not suffice.

47. It further maintains that the Applicant has not exhausted domestic remedies in respect of the five (5) new claims mentioned above, and accordingly,

[16] Application No. 003/2011, *Urban Mkandawire v. Republic of Malawi.*

prays the Court to declare the Application inadmissible.[17] As to the conviction of the Applicant on the basis of the doctrine of recent possession, the Respondent State alleges that the Applicant had the legal remedy of filing a review of the decision of the Court of Appeal, which he did not pursue.

48. Furthermore, the Respondent State submits that the Applicant failed to pursue the available local remedies before the national Courts: by not raising the issue of the Court of Appeal not pronouncing itself on the inconsistent referencing by District Court and High Court of the Criminal Case numbers; not being accorded free legal representation during the trial; the Court of Appeal's reliance on evidence used for identification; and the delay in the dispensation of justice.

49. Finally, the Respondent State submits that the remedy to institute a review of the decision of the Court of Appeal was made known to the Applicant by the prison authorities. However, the Applicant sought the court's leave to file an application for review," ten (10) years after the Court of Appeal delivered its decision on 1 June 2010". Therefore, any so-called delay was caused by the Applicant himself. On these submissions, the Respondent State asserts that the admissibility requirement under Rule 40(5) of the Rules of Court have not been met and the Application should therefore be declared inadmissible and dismissed.

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50. The Applicant contends that he has exhausted local remedies available in the Respondent State's judicial system. Moreover, he appealed to the Court of Appeal of Tanzania, being the highest court in the Respondent State, in Criminal Appeal No. 322 of 2007. Furthermore, he contends that the Court

[17] *Urban Mkandawire v. Republic of Malawi,* ACtHPR, Application No. 003/2011, Judgment of 13 March 2011 (jurisdiction & admissibility), § 38.1-38.2; *Peter Joseph Chacha v. United Republic of Tanzania*, ACtHPR, Application No. 003/2012, Judgment of 28 March 2014 (jurisdiction & admissibility), § 142-145 and *African Commission on Human and Peoples' Rights'* decision in *Article 19 versus Eritrea*.

of Appeal dismissed his appeal in its entirety on 1 June 2010, thereby bringing his case to its finality. The Applicant cites the Court's jurisprudence in *Alex Thomas v. United Republic of Tanzania*, where it held that, "…The Court is persuaded by the reasoning of the African Commission in Southern Africa Human Rights NGO Network v. Tanzania, Communication 333/2008, Activity Report Nov 2009-May 2010, that the remedies to be exhausted are ordinary remedies."

51. Citing the same case, the Applicant argues that this Court had previously held that an application for review of the decision of the Court of Appeal is neither necessary nor mandatory and that the final appeal in criminal trials lies with the Court of Appeal, which he has already accessed. The Applicant, therefore, prays this Court to find his application admissible, since he has fully exhausted all local remedies.

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52. This Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies, unless the same are unavailable, ineffective and insufficient or the proceedings in respect of the local remedies are unduly prolonged.[18]

53. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined by the said court when it rendered its judgment on 1 June 2010.

54. The Court reiterates its jurisprudence where it has held that:

> (…) where an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby

[18] *Peter Joseph Chacha v. United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 142-144; *Almas Mohamed Muwinda and Others v. United Republic of Tanzania*, ACtHPR, Application No. 030/2017, Judgment of 24 March 2022 (merits and reparations), § 43.

> afforded an opportunity to pronounce themselves on possible human rights breaches. This is because the alleged human rights violations form part of the bundle of rights and guarantees that were related to or were the basis of the proceedings before domestic courts. In such a situation it would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for such claims.[19]

55. The Court observes that the claim of the right to a fair trial impacts on the realisation of various rights alleged by the Applicant under the bundle of fair trial rights.

56. In light of this, the Court observes that the Respondent State had the opportunity to address the possible human rights breaches before the domestic courts.

57. Regarding the filing of an application for review at the Court of Appeal, the Court has already held that within the Respondent State's judicial system, this is an extraordinary remedy which applicants are not required to exhaust before filing their applications before this Court.[20]

58. Consequently, the Court holds that the Applicant has exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and therefore, it dismisses the Respondent State's objection.

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[19] *Jibu Amir alias Mussa and Another v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 629, § 37; *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 60-65, *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Ernest Karatta, Walafried Millinga, Ahmed Kabunga and Others v. United Republic of Tanzania* (merits and reparations) (30 September 2021) 1 AfCLR 356, § 57.

[20] *Alex Thomas v. Tanzania*, *op. cit.*, §§ 63-65; *Mohamed Abubakari v. Tanzania* (merits) *op cit.*, §§ 66-70; *Christopher Jonas v. Tanzania* (merits), § 44.

B. Objection based on the failure to file the Application within a reasonable period of time

59. The Respondent State submits that in the event that the Court finds that the Applicant has exhausted local remedies, it should then find that the Applicant has not filed this Application within a reasonable period, because the decision of the Court of Appeal was delivered on 1 June 2010, whereas this Application was filed before this Court on 31 August 2017. Moreover, the Respondent State deposited its instrument accepting the jurisdiction of the Court under Article 5(3) of the Protocol on 29 March 2010, therefore, **"**a period of seven (7) years and four (4) months elapsed**"** from the date the Respondent State accepted the competence of the Court to the time the Applicant filed his Application at the Court.

60. The Respondent State submits that even though, the Rules of the Court do not quantify or define reasonable time, this Court has held that it shall consider what amounts to reasonable time on a case-by-case basis.[21]

61. It contends that the general maxim holds that all admissibility requirements provided by Rule 40(1-7) of the Rules[22] have to be met for an application to be deemed admissible as was in the case of *Mariam Kouma and Ousmane Diabate v. Mali,*[23] where the Court held that "… the conditions of admissibility are cumulative and, as such, when one of them is not fulfilled, the Application cannot be admissible". The Respondent State submits that this is the case in the instant matter, therefore the Application should be declared inadmissible and dismissed.

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[21] Application No. 013/2011, *Beneficiaries of the late Norbert Zongo and Others v. Burkina Faso*, § 121; Application No. 007/2013, *Mohamed Abubakar v. The United Republic of Tanzania*, § 91.
[22] Rule 50(2) Rules of Court, 2020.
[23] Application No. 040/2016, *Mariam Kouma and Ousmame Diabate v. Mali*, § 63.

62. The Applicant refutes the Respondent State's submissions and asserts that there is no fixed period to seize the Court, and each case is decided based on its facts and circumstances. He cites the Courts jurisprudence,[24] where the Court upheld the same position.

63. The Applicant alleges that, the existence of this Court, the Charter, the Protocol to the Charter, its Rules and Practice Direction were unknown at Uyui Central Prison at Tabora before "May 2017", where he is serving his custodial sentence. He states that there has never been an application lodged before this Court from this prison earlier than "13.06. 2017" and the same can be verified from the Registry records. He further **notes t**hat Application No. 017/2017 *Abdallah Sospeter Mabomba and Others v. United Republic of Tanzania* was the first such application and it was filed on "13.06. 2017".

64. The Applicant argues that in the circumstances, his Application was filed within a reasonable time since he only became aware of the existence of this Court in May 2017. Subsequently, he filed his application before this Court on 31 August 2017, therefore the Court should find that the Application is admissible and complies with Rule 40(6) of the Rules.

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65. The Court notes that neither the Charter nor the Rules specify the time frame 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 simply 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".

[24] Application No. 009/2011, *Tanganyika Law Society and Legal and Human Rights Centre v. United Republic of Tanzania* and Application No. 011/2011, *Reverend Christopher Mtikila v. United Republic of Tanzania.*

66. The Court recalls its jurisprudence that: "…the reasonableness of the time frame for seizure depends on the specific circumstances of the case…".[25] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, the recent establishment of the Court and lack of awareness of the existence of the Court.

67. This Court has previously held that it is not enough for Applicants to simply plead, for example, that they were incarcerated, are lay or indigent, to justify their failure to file an application within a reasonable period of time.[26] As the Court has previously pointed out, even for lay, incarcerated or indigent applicants are duty-bound to demonstrate how their personal situation prevented them from filing their applications before this Court in a timely manner.

68. In the instant Application, the Court observes that the judgment of the Court of Appeal in *Criminal Appeal No. 322 of 2007* was delivered on 1 June 2010, while the Applicant filed his Application before this Court on 31 August 2017. The Court notes that a period of seven (7) years, two (2) months and thirty (30) days elapsed between 1 June 2010 and 31 August 2017 when the Applicant filed the Application before this Court. The issue for determination, therefore, is whether the period that the Applicant took to file the Application before the Court is reasonable.

69. Additionally, in the instant case, the Court takes note of the Applicant's submissions that he only came to know about the Court's existence in May 2017, after an application by another inmate from the same prison where he was incarcerated was filed before this Court on 13 June 2017 and subsequently, he also filed his own Application on 31 August 2017. A

[25] *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v. Republic of Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.
[26] *Layford Makene v. United Republic of Tanzania,* ACtHPR, Application No. 028/2017 Ruling of 2 December 2021 (admissibility), § 48; *Rajabu Yusuph v. United Republic of Tanzania*, ACtHPR, Application No. 036/2017, Ruling of 24 March 2022 (admissibility), § 65.

perusal of the Court records reveals that indeed the first Application, No. 017/2017 *Abdallah Sospeter Mabomba and Others v. United Republic of Tanzania* from Uyuyi Central Prison, where the Applicant is incarcerated, was registered at the Court on 13 June 2017. Therefore, a period of two (2) months and eighteen (18) days elapsed between the time the Applicant filed his application before this Court and when the first Application was filed from Uyui Central Prison.

70. In this regard, the Court has previously considered as relevant factors, the fact that an applicant is incarcerated,[27] their indigence,[28] lack of free assistance of a lawyer,[29] and the recent establishment of the Court,[30] are all circumstances that justify some flexibility in assessing the reasonableness of the timeline for seizure of the Court.

71. The Court observes that the Applicant is in a comparable situation, because he is incarcerated; restricted in movement and with limited access to information; he was not accorded free legal representation at the domestic level; and he claims not to have been aware of the existence of this Court and only got to know about it after the first case by another Applicant from the same prison was filed before this Court on 13 June 2017.

72. In a comparable case, where the Applicant claimed not to know about the Courts existence before the first Application from his prison was filed and he took seven (7) years, seven (7) months and ten (10) days to seize the Court after exhaustion of local remedies, this Court held that this argument of the lack of knowledge of the Courts existence, is insufficient to persuade it that the Applicant diligently pursued his case and that he was not in a position to know about the Court prior to the filing of the first case from that

[27] *Beneficiaries of late Norbert Zongo and Others v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92; *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 56; *Alex Thomas v. Tanzania* (merits), § 73.
[28] *Nguza Viking and Johnson Nguza v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 61.
[29] *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599, § 92.
[30] *Beneficiaries of late Norbert Zongo and Others v. Burkina Faso* (preliminary objections), § 122; *Rajabu Yusuph v. United Republic of Tanzania,* ACtHPR, Application No. 036/2017, Ruling of 24 March 2021 (jurisdiction and admissibility), § 69.

prison, where he was incarcerated.[31] Similarly, the Court is of the opinion that this Applicant has not provided compelling arguments and sufficient evidence to demonstrate that his personal situation prevented him from filing the Application in a timelier manner.

73. In view of the foregoing, the Court finds that the filing of the Application seven (7) years, two (2) months and thirty (30) days after exhaustion of local remedies is not a reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

74. The Court recalls that the admissibility requirements under Article 56 of the Charter are cumulative, such that if one requirement is not fulfilled then the Application becomes inadmissible.[32] In the present case, since the Application has failed to fulfil the requirement under Article 56(6) of the Charter which is restated in Rule 50(2)(f) of the Rules, the Court needs not assess the admissibility requirement set out in Article 56(7) restated in Rule 50(2)(g).

C. Other admissibility requirements

75. Having found that the Application does not satisfy the requirement in Rule 50(2)(f) of the Rules, the Court needs not rule on the Application's compliance with the admissibility requirements set out in Article 56(1), (2), (3), (4), and (7) of the Charter as restated in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules, as these requirements are cumulative.[33]

76. In view of the foregoing, the Court declares the Application inadmissible.

[31] *Rajabu Yusuph v. United Republic of Tanzania,* ACtHPR, Application No. 036/2017, Ruling of 24 March 2021 (jurisdiction and admissibility), § 69.
[32] *Dexter Eddie Johnson v. Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 57.
[33] *Jean Claude Roger Gombert v. Republic of Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270, § 61; *Dexter Eddie Johnson v. Republic of Ghana*, ACtHPR, Application No. 016/2017, Ruling of 28 March 2019 (jurisdiction and admissibility), § 57.

VII. COSTS

77. The Applicant did not make any prayers with regards to the costs.

*

78. The Respondent State prayed the Court to order the Applicant to pay the costs of this Application.

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79. The Court notes that Rule 32(2) of its Rules provides that “unless otherwise decided by the Court, each party shall bear its own costs.”

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

VIII. OPERATIVE PART

81. For these reasons:

THE COURT,

Unanimously,

On jurisdiction

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

On admissibility

By a majority of Seven (7) for, and Three (3) against, Justices Rafaâ BEN ACHOUR; Chafika BENSAOULA and Dumisa B. NTSEBEZA dissenting,

iv. *Finds* that the Application was not filed within a reasonable time;
v. *Declares* the Application inadmissible.

On Costs

Unanimously,

vi. *Orders* each party to 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

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the Dissenting Opinions of Judge Rafaâ BEN ACHOUR, Judge Chafika BENSAOULA and Judge Dumisa B. NTSEBEZA are appended to this Ruling.

Done at Arusha, this First day of December, in the Year Two Thousand and Twenty-Two in English and French, the English text being authoritative.