IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Fakihi Jundu, J; & Audace Ngiye, J)

REFERENCE NO. 10 OF 2014

BETWEEN

DR. MPOZAYO CHRISTOPHE.....1ST APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF RWANDA.....RESPONDENT

28TH SEPTEMBER, 2018

JUDGMENT OF THE COURT

A. INTRODUCTION

1. The Applicant, one Dr. Mpozayo Christophe, a citizen of the Republic of Rwanda and currently serving a sentence of ten (10) years imprisonment at Gicumbi (Miyove) prison in Rwanda, lodged this Reference in this Court on 7th July, 2014 against the Attorney General of the Republic of Rwanda, the Respondent. However, on 13th April, 2017, the Applicant filed an Amended Statement of the Reference ("the Reference"). It is premised on the provisions of Articles 6(d), 7(2), 8(1), 27(1), 29(1), 30(1), 30(2), 73 and 138(3) of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 8, 17(1), 50(5), 67, 69, 74(2), 111 and 112 of the East African Court of Justice Rules of Procedure, 2013 ("the Rules").

2. In this Reference, the Applicant seeks to challenge the process of his arrest, detention, prosecution, conviction and sentencing for the offence of inciting insurrection or trouble amongst the population vide Penal Case No.RP0017/14/HC/KIG allegedly based on the same facts as Penal Case No.RP1184/13/TB/KCY in which he was arrested, detained, prosecuted, acquitted and released for *inter alia* the offence of being in illegal possession of ammunition (a grenade). Pursuant to the said challenge, the Applicant, therefore, seeks for the following reliefs from this Court:

    i. ***A declaration be made that his arrest, detention, trial and imprisonment was unlawful as it was done against universally accepted principles of law;***

ii. ***A declaration that the Republic of Rwanda violated [the] East African Treaty and principles of good governance and the rule of law;***

iii. ***An order that the sentence imposed on the Applicant in Criminal Case No.RP0017/14/HC/KIG be and hereby set aside;***

iv. ***A declaration be made that the Applicant's conviction was unlawful;***

v. ***An order that the Applicant's conviction be hereby set aside;***

vi. ***General damages be awarded;***

vii. ***Aggravated and/exemplary damages be awarded;***

viii. ***Costs of the litigation be awarded; and***

ix. ***Further and or any other relief this Honourable Court be deemed fit and or apt to grant be made.***

3. Before proceeding further with this Judgment, we noted from outset that the Respondent in his written response to the Reference filed on 25th May, 2017 as well as in his written submissions filed on 1st March, 2018 had raised and labored on a Preliminary Objection, that the Reference is time barred and lacks cause of action. However, this Court had already dealt with the said Preliminary Objection in its Ruling delivered on 28th September, 2016. In the said Ruling, *we "…..over-ruled the Preliminary Objection raised ...."* by the Respondent and held that "*the Reference was filed within the stipulated time limit*" and has

lawful causes(s) of action to be determined at the hearing of the Reference. The said Ruling remains valid and intact to date as it has never been challenged or reversed by way of an appeal or otherwise. Therefore, we do not find it necessary to dwell again on the said matter in this Judgment.

B. REPRESENTATION

4. Mr. Joel Kimutai Bosek, Learned Counsel assisted by Ms. Amy Kyerure and Ms. Maureen Awuor Okoth, represented the Applicant. On the other hand, Mr. Nicholas Ntarugera, Learned Senior State Attorney assisted by Ms. Specioza Kibibi, Learned Senior State Attorney represented the Respondent.

C. THE APPLICANT'S CASE

5. The Applicant, in this Reference seeks to challenge his arrest, detention, prosecution, conviction and imprisonment aforesaid by the Respondent's agents as being unlawful. The Reference is supported by an Affidavit deponed by Mr. Joel Kimutai Bosek on 13th April, 2017 and another Affidavit by Ms. Maureen Awuor Okoth deponed on 2nd October, 2017 together with her additional Affidavit of 21st November, 2017. Further, elaboration of the Applicant's case was made at the Scheduling Conference held on 12th September, 2017, in his Written Submissions filed on 21st November, 2017 and at the oral highlights thereof held on 19th March, 2018.

6. The Applicant alleged that on 8th November, 2013, he was unlawfully arrested at his hotel room at Imanzi village, Bibare Cell, Kimironko Sector, Gasabo District. He was held and imprisoned without charge until 11th November, 2017 when he

was taken to the Prosecutor at Kacyiru Primary Court and charged with defamation, insulting a person in a private area, conspiracy against the Government of the Republic of Rwanda and being in illegal possession of ammunition (a grenade) vide Penal Case No. RP1184/13/TB/KCY. On 16th November, 2013, the said Court vide its Decision No.394/13/TB/KCY discharged the Applicant of the offence of conspiracy against the Government of Rwanda while the offences of defamation and being in illegal possession of a grenade remained. Through the said decision, the Applicant was put under provisional detention at the Gasabo Prison.

7. The Applicant allegedly underwent full trial on the remaining offences and on 31st March, 2014, he was found innocent and was accordingly acquitted vide Judgment No.RP1184/13/TB/KCY. He was released on 2nd April, 2014 but the police promptly re-arrested him and detained him at Remera Police Station for allegedly having committed a new offence of inciting insurrection or trouble amongst the population, which offence was purportedly premised on the same material facts that had been used as evidence for the criminal defamation charges for which the Applicant had been acquitted by a competent. The said material evidence was the Skype chat between him (the Applicant) and a friend, one Munyampeta Jean Damascene. On the 16th April, 2014, the Intermediate Court of Nyarugenge ordered the Applicant's provisional detention at the Central Prison of Nyarugenge for a case not registered. The Applicant appealed against his provisional detention to the High Court but the said appeal was dismissed on 6th May 2014 vide decision

No.RPA0305/14/HC/KIG, prompting him to lodge this Reference in this Court on 7th July, 2014.

8. The Applicant further averred that, having seen that he was being tried twice for offences based on the same material evidence or the same conduct. On 11th February, 2015, he raised the issue of double jeopardy at the High Court of Rwanda vide Penal Case No.RP0017/14/HC/KIG moving the said court to strike out the second criminal case against him. However, his application was dismissed on 18th February, 2015.

9. When the second trial commenced on 27th February, 2015, the prosecution neither called witnesses nor adduced documentary evidence in support of the charges. The Applicant was thus deprived of his right of cross examination and denied a fair trial as, in his view, no due process of law was adhered to or followed. He also raised the issue of the authenticity of the Skype chat *"documents"* produced by the Prosecutor as evidence as well as the identity of the Skype account, both pertinent issues at the trial, but the same were overruled by the trial court.

10. The Applicant further contended that on 8th April, 2015, the trial court delivered its Judgment for the second criminal case against him. It found him guilty of the offence he was charged with, and convicted him and sentenced him to ten (10) years imprisonment. Challenging the said decision of the trial court, the Applicant averred that, the charges against him were whimsical and lacked clarity, neither was the said case against him proved beyond reasonable doubt. He was allegedly subjected to two series of criminal trials based on similar conduct and the second trial was

but a re-characterization of material facts of the first trial. He further averred that even if the facts were different, in the two cases, the trials should have been merged into one for providing an expeditious trial to the Applicant. He contended further that the Respondent in the process breached the universally accepted principles of criminal justice "*non bis in idem.*"

11. The Applicant contended *inter alia* that the Respondent in the two sets of criminal trials against him did not abide with due process, rule of law and good governance, thereby resulting into miscarriage of justice and violation of among others the Treaty, the African Charter on Human and Peoples' Rights, the Vienna Convention and the Universal Declaration of Human Rights. He therefore prayed to this Court to grant the reliefs sought by him in the Reference.

D. THE RESPONDENT'S CASE

12. The Respondent in his Response to the Reference filed on 25th May, 2017, together with the supporting Affidavit in Reply deponed by one Mr. Nicholas Ntarugera and elaborations made in the Written Submissions, as well as at the oral highlights made on 19th March, 2018 denied and disputed all the Applicant's allegations. He categorically denied the Applicant's contention that he was subjected to two trials for the same facts. He asserted that the Applicant underwent two different cases for two different charges or offences. In the first trial, he was arrested, detained, prosecuted, found innocent, acquitted and was accordingly released, while in the second trial he was arrested, detained, prosecuted, found guilty, convicted and sentenced to

ten (10) years imprisonment. The Respondent denied violating the laws of Rwanda and the provisions of the Treaty as far as the Applicant's arrest, detention, prosecution, conviction and sentencing are concerned. He further denied that the Applicant was subjected to "double jeopardy" or that the *non bis in idem* principle was violated.

13. The Respondent further contended that in the first criminal case, the Applicant was arrested on 8th November, 2013, detained and charged with the offences of defamation, insulting a person in a private area, conspiracy against the Government of Rwanda and being in illegal possession of arms (a grenade). He was acquitted of the charges on 31st March, 2014 and released on 2nd April, 2014. In the second criminal case, the Respondent contended that the Applicant was arrested on 2nd April, 2014, detained and charged with a different offence to *wit* inciting insurrection or trouble amongst the population. The Applicant was tried on the said offence and on 8th April, 2015 was found guilty, convicted and sentenced to ten (10) years imprisonment.

14. The Respondent further contended that the fact that the Applicant was acquitted of the charges initially brought against him meant that he received a fair trial and due process of law was followed including the rule of law. The Respondent denied any violation of Articles 21, 22, 23 and 34 of the Law N.30/2013 of 24/05/2013 relating to the Criminal Procedure Code in the Republic of Rwanda, or of the Constitution of Rwanda, or the Organic Law No.01/2012 of 02/05/2012 instituting the Penal Code or the Treaty during the Applicant's trial.

15. The Respondent also averred that the Applicant was aggrieved by the provisional detention order issued by the Intermediate Court of Nyarugenge on 16th April, 2014 and had appealed to the High Court of Rwanda but the same was dismissed vide Decision No.RPA0305/14/HC/KIG, thereby confirming Decision No.RONPJ05361/53/14/RN/NR of the Nyarugenge Intermediate Court ordering the said provisional detention. He further averred that the Applicant had appealed to the Supreme Court of Rwanda vide Appeal No.(RPA0059/14/CS PR0019YRPA0440/14/HC/KIG), but on 2nd January, 2015 the said Court declared the appeal inadmissible.

16. The Respondent further contended that the Applicant was lawfully arrested on 8th November, 2013 with a search warrant signed by Prosecutor Nkeshimana Janvier and on 9th November, 2013, a grenade was seized in his hotel room hence the Statement of Seizure No.1 and 2 in proof thereof signed by Supt. Mbabazi Modest, a judicial police officer. Thus, the Respondent averred that the Applicant was legally arrested by competent judicial organs of the Public Prosecution Authority, who later transmitted the same to the trial court within the prescribed time under Article 1 of Law No.20/20/12 of 24/5/2013.

17. As regards the Skype Chat documents, the Respondent averred that the WhatsApp conversation between the Applicant and one Munyampeta Jean Damascene was discovered in his seized laptop and produced before the trial court as evidence in the case against him of inciting insurrection or trouble amongst the population and the same were discovered after issuance of the decision to intercept the relevance communication and

correspondence by the National Prosecutor, one Ruberwa Bonaventure on 25th October 2013. This was pursuant to Articles 72, 73, 74 and 75 of law No.30/2013 of 24th May 2013 relating to the Code of Criminal Procedure and Articles 463, 462 of law No. 01/2012/01 of 2nd May 2012 instituting the Penal Code of Rwanda and warrant of search signed by the Prosecutor, Nkeshimana Janvier on 08th November 2013 and a statement of seizure No.1 and No.2 were signed on 9th November by Supt. Mbabazi Modest.

18. The Respondent in his pleadings, prayed for the dismissal of the Reference with costs.

E. SCHEDULING CONFERENCE

19. At a Scheduling Conference held on 12th September, 2017, the following issues were framed by the Parties for determination by this Court:

    i. ***Whether the Respondent's acts of arresting, detaining, prosecution, conviction and imprisonment of the Applicant is an infringement of the Rwanda laws and the principles of good governance and rule of law as enshrined in Articles 6(d), 7(2) and 8(1) of the EAC Treaty;***

    ii. ***Whether Respondent violated the principle of non bis in idem by subjecting the Applicant to trial twice based on similar facts;***

    iii. ***Whether the Respondent violated the Applicant's rights to fair trial and due process of law; and***

    iv. ***Whether the Applicant is entitled to the reliefs sought.***

F. COURT'S DETERMINATION

20. Given their similarity, we propose to address issues No.(i) and (iii) together.

Issue No.(i): Whether the Respondent's acts of arresting, detaining, prosecution, conviction and imprisonment of the Applicant is an infringement of the Rwanda laws and the principles of good governance and rule of law as enshrined in Articles 6(d), 7(2) and 8(1) of the EAC Treaty

Issue No.(iii): *Whether the Respondent violated the Applicant's rights to fair trial and due process of law*

21. With regard to Issue No.(i), the Applicant contended that his arrest, detention, prosecution, conviction and imprisonment by the Respondent's agents were unlawful as they breached several provisions of the Constitution of Rwanda, the Penal Code of Rwanda, the Criminal Procedure Code of Rwanda as well as the rule of law enshrined in Articles 6(d), 7(2) and 8(1) of the Treaty.

22. The Applicant submitted that the Respondent violated his right to due process of law as enshrined in Article 29 of the Constitution of the Republic of Rwanda[1] given that in the second trial, having been arrested on 2nd April 2014 and taken to Court on 8th April 2014 for hearing of his provisional detention, he had been held illegally for six (6) days without being informed of the reasons for his arrest contrary to the aforesaid provisions. He contended that his right to due process of law was further violated as he was arrested, detained, prosecuted and imprisoned for an act that did

[1] The Applicant has initially referred to Article 18 of the Constitution of Rwanda 2003, but it was revised in 2015.

not constitute a crime or an offence under the laws of Rwanda, specifically Articles 2 (Definition of an offence), 3 (No punishment without law) and 463 (Offence of inciting insurrection or trouble amongst the population) of the Organic Law No. 01/2012 instituting the Penal Code. It was also the Application's submission that the Respondent violated his right to defence as provided in the Constitution and Articles 50 and 150 of the Rwandan Code of Criminal Procedure since in the second trial, there were no witness(es) called by the Prosecutor to testify against him nor did the Prosecutor present any exhibit to the trial court, thus depriving him of his right of cross-examination.

23. The Applicant also contended that the Respondent violated his constitutional right to be presumed innocent until proved guilty by a competent Court as enshrined in Article 29 of the Constitution, alleging that the Police Officers never adhered to any law or procedure during his arrest, detention and trial and that there was no moment he was presumed innocent.

24. The Applicant contended that given the foregoing violations of the laws of Rwanda, the Respondent had flouted the principles of good governance and the rule of law under Article 6(d) and 7(2) of the Treaty.

25. Conversely, the Respondent vigorously denied the Applicant's allegations. He insisted that there was no violation of the Constitution of Rwanda and its laws or Articles 6(d), 7(2) and 8(1) of the Treaty as the Applicant had alleged. He contended that the arrest, detention, prosecution, conviction and imprisonment of the Applicant were lawful under the laws of Rwanda and due process

was continuously observed. In this regard, he asserted that the Applicant was legally arrested under warrants signed by competent Police Officers who duly complied with the pertinent provisions of the Code of Criminal Procedure as regards the timeframe within which bring the Applicant before the Court. With respect to the allegations that the Applicant's right to a fair trial was violated considering the way evidence was adduced, the Respondent contended that in the second trial, proceedings were conducted in accordance with the relevant provisions of the law relating to the Code of Conduct Procedure on production of evidence during trial in Court and the law relating to the Code of Criminal Procedure. It was the Respondent submission on this issue that due process of law had been observed at all stages of the Applicant's trial and that therefore, no violation of the rule of law did occur, contrary to the Applicant's allegations.

26. With regard to Issue No.(iii), the Applicant argued *inter alia* that the right to a fair trial is guaranteed under the Constitution of Rwanda, as well as the Treaty and the African Charter on Human and Peoples' Rights. He submitted that by trying him twice for the same act he had already been tried and acquitted of, the Respondent violated his right to due process of the law. He asserted that in the second trial, he was illegally held in detention for six (6) days without being informed of the alleged offence he was being charged with, was eventually charged with an act that did not constitute an offence under the Rwanda, denied an opportunity to defend himself by the Prosecution's failure to call witnesses, thus denying him the right of cross-examination, all of which amounted to infringement of the

principle of rule of law, good governance, the right to fair trial and due process.

27. On the other hand, the Respondent in his pleadings and submissions argued that the Applicant had enjoyed all his rights of fair trial with regard to the second criminal case. He submitted that all provisions of the Penal Code as well as those of the Code of Criminal Procedure were respected and observed. He further submitted that there was no violation of the principles of the rule of law, fair trial and due process of law as enshrined under the Treaty and the African Charter on Human and Peoples' Rights. He argued that the evidence produced at the Applicant's second trial was lawfully tendered including the electronic messages in Word format produced.

Determination on Issue No.(i) and Issue No.(iii)

28. We have carefully considered the pleadings and submissions of the Parties on the above issues. With regard to Issue No. (i), we noted first of all that the Applicant had complained about being subjected to unlawful arrest and illegal detention for the period from 8th November 2013 to 2nd April 2014 and unsuccessfully challenged those alleged illegalities up to Appellate Court levels in Rwanda. The Applicant also challenged the legality of court proceedings in his second trial alleging that they violated his right to due process of law as enshrined in the Constitution of the Republic of Rwanda and its Code of Criminal Procedure. The Applicant therefore requested the Court to find that those acts attributable to the Respondent violated the cited laws of Rwanda

and therefore, infringe the Respondent's obligations under Articles 6(d) and 7(2) of the Treaty.

29. We must point out forthwith that in the matter before us the question of the Respondent's responsibility for the impugned acts of a court within its jurisdiction was neither canvassed nor disputed. Indeed, we are cognizant of a well-established rule of international law that the conduct of an organ of a State, including the conduct of an organ otherwise independent of a State must be regarded as an act of that State.[2]

30. We are also mindful of the principle advanced in the case **of B. E. Chattin (USA) Vs. United Mexican States, 1927, UNRIAA, vol. IV, p. 282 at 288**, where state responsibility for wrongful judicial acts was limited to "judicial acts showing outrage, bad faith, willful neglect of duty, or manifestly insufficient governmental action." Similarly in the case of **Ida Robinson Smith Putnam (USA) Vs. United Mexican States, 1927, UNRIAA, vol. IV, p. 151 at 153,** it was held:

> ***"The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.[3] A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere***

[2] See Advisory Opinion of the International Court of Justice in **Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, p.62 at pp. 87-88, paras. 62, 63 and Salvador Commercial Company, 1902, UNRIAA, vo. XV, p. 455 at p. 477.**

[3] See case of Margaret Roper, Docket No. 183, paragraph 8.

glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law." (Our emphasis)

31. In the matter before us, no attempt was made by either party to address us on whether or not the acts complained of by the Applicant were, in fact, judicial acts showing outrage, bad faith, willful neglect of duty, acts of clear and notorious injustice, visible at mere glance so as to make them acts attributable to the Respondent Sate. The Applicant simply sought to invoke the Court's mandate to review the acts of the Respondent's domestic courts in so far as they allegedly violated designated Treaty provisions.

32. The duty of this Court in this regard was amply summed up in the case of **Manariyo Désiré Vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 8 of 2015** as follows:

> ***"Where a domestic adjudication process is alleged by any of the parties thereto to have been unsatisfactory, an international adjudication process would be required to interrogate whether indeed there has been a violation of a State's international obligation."***

33. Indeed, the considerations to be taken into account in such an interrogation were espoused by the Appellate Division of this Court in **Henry Kyalimpa Vs. The Attorney General of the Republic of Uganda, EACJ Appeal No. 6 of 2014** as follows:

"Where the complaint is that the action was inconsistent with internal law, and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the rule of law, it is the Court's inescapable duty to consider the internal law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty."

34. In **Manariyo Désiré Vs. The Attorney General of the Republic of Burundi** (supra), the Court did cite with approval the following exposition in the matter of **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina Vs. Serbia & Montenegro), Judgment, ICJ Reports 2007, p. 43, para 203** on the burden of proof applicable to international claims:

"On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of Military and para-military Activities in and against Nicaragua (Nicaragua Vs. United States of America,[4] "it is the litigant seeking to establish a fact who bears the burden of proving it."

35. In the same vein, in **Henry Kyalimpa** (supra), the following preposition in **Shabtai Rosenne, 'The Law and Practice of the International Court,' 1920 – 2005, Vol. III, Procedure, p. 1040** had been cited with approval:

[4] Judgment, ICJ Reports 1984, p. 437, para. 1010

"Generally... the court will formally require the Party putting forward a claim or particular contention to establish the elements of fact and of law on which the decision in its favour is given."

36. In the instant case as stated above, the Applicant's complaint is that he has been subjected to illegal court proceedings that led to his condemnation and requests this Court to declare that that adjudication process violated the laws of Rwanda as well as the principles of good governance and rule of law as enshrined in Articles 6(d) and 7(2) of the Treaty. We reproduce Articles 6(d) and 7(2) of Treaty for ease of reference.

Article 6(d) provides that:

"The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(.....)

(d) good governance including adherence to the principle of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter of Human and Peoples' Rights."

Article 7(2) provides that:

"(...)

2. The Partner States undertake to the principles of good governance, including adherence to the principles of

democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights."

37. Considering the issue at hand, we take the view that this Court is required to interrogate the impugned court proceedings and decisions so as to ascertain whether the Courts of Rwanda, in their handling of the two cases complained of by the Applicant, made wrongful acts or decisions that can be attributed to Rwanda's failure to comply with its international obligations thus infringing the provisions of Articles 6(d), 7(2) and 8(1) of the Treaty, the African Charter on Human and Peoples' Rights and the Vienna Convention. This is a question of evidence. It seems quite clear to us that both the Judgments of the courts and their record of proceedings are extremely relevant. The Applicant in filing the Reference, availed a translated copy of the Judgment RP0017/14/HC/KIG) from Kinyarwanda to English to aid the Court in appreciating those judgments. In the Affidavit deponed on 2nd October, 2017 by Ms.Maureen Awuor Okoth (para.30) she promised to avail copies of the proceedings translated from Kinyarwanda to English. In a further Affidavit of Maureen Awuor Okoth deponed on 21st November, 2017, the said deponent purported to annex a bundle of documents that were allegedly records of the court proceedings having been translated from Kinyarwanda to English.

38. First, looking at this bundle of documents, it is not easy to make out which particular document in Kinyarwanda has been translated into English. It appears to be a fishing expedition. Secondly, the certification thereof made by one Habarurema

Aloys, that he translated the proceedings from Kinyarwanda to English is of a general nature. It is not applied to a particular document in the bundle. It is omnibus. Thirdly, under Rule 39(1) of the Rules annexed documents are to be "certified copies". In the annexed bundle, there are several documents but there is no evidence to show that each one is a certified copy of the original. We are therefore of the view that the mandatory requirements of Rule 39(1) have not been complied with. In the circumstances, we conclude that no proper translated records of the court proceedings from Kinyarwanda to English have been furnished to this Court in respect of the two aforementioned criminal cases.

39. In Manariyo Desiré (supra), the importance of the record of court proceedings was emphatically mentioned. It was stated as follows:

> ***"Even more specifically, the record of proceedings would have informed this court's findings as to whether the Supreme Court administered Burundian law in an outrageous way, in bad faith, with willful neglect of their duties or conducted the proceedings in blatant violation of the substance of natural justice, such as would engender international liability. Whereas the abuse of the Applicant's rights to be heard and be availed an opportunity for cross-examination of witnesses was indeed raised in pleadings, we find that insufficient evidence was adduced in proof thereof ----"***

40. The Court further stated:

"In the absence of the record of proceedings, we are unable to determine the extent of the Supreme Court's alleged non-compliance with Burundi's legal regime so as to make a justifiable finding on whether or not the resultant decision was iniquitous and thus engendered the Respondent legal liability. We do therefore find that the Applicant has not satisfactorily proved the violation of the principle of the rule of law enshrined in Article 6(d) and 7(2) of the Treaty. We so hold."

41. Similarly, in the present case, a little demonstration would suffice to show the importance and relevance of the record of the court proceedings in the present case. The Applicant's allegation that the same material evidence (Skype chat) used in the first criminal case was used in the second criminal case; that no witnesses were called and that he was denied an opportunity to cross-examine them did require verification by the perusal of the record of the proceedings of the cases in issue. We are of the firm view that the record of the court proceedings was crucial to our interrogation of the said court's decisions in respect of the Applicant's complaints of unlawful arrest, detention, prosecution, conviction and imprisonment.

42. We have also considered our jurisdiction in relation to the complaints before us. With regard to the issue as to whether the acts with which the Applicant was charged in the second criminal case did or did not constitute an offence under Rwandan law, we are of the view that the determination of this issue is appropriate for an appellate review before competent Rwandan Courts which may examine elements of the offence in relation to the relevant

provisions of the Rwandan law. The responsibility of this Court in respect to court decisions from Partner States, as reaffirmed in this judgment herein above, is to carry out an international judicial review of the said domestic court decisions so as to ascertain whether the impugned acts cause an injury and whether the acts which caused it violate any rule of international law, in the present case, Articles 6(d), 7(2) and 8(1) of the Treaty.

43. In the present case, in the absence of records of proceedings, we do not find sufficient material before us as would support a determination as to whether those impugned acts of the Respondent were an infringement of the Rwandan laws and the principles of good governance and rule of law as enshrined in Articles 6(d) and 7(2) of the Treaty. For these reasons, Issue No. (i) is resolved in the negative.

44. Turning to Issue No. (iii), in the case of **Baranzira Raphael & Another Vs. The Attorney general of the Republic of Burundi, EACJ Reference No. 15 of 2014,** this Court did cite with approval the following definition of due process from Black's Law Dictionary:[5]

> ***"The notion of due process advances the conduct of legal proceedings according to established rules and principles for the protection and promotion of private rights."***

45. In the same dictionary, the notion of fair trial is defined as follows:

[5] Black's Law Dictionary (8th Ed.), pp. 538-539.

"A trial by an impartial and disinterested tribunal in accordance with regular procedures; especially a criminal trial in which the defendant's constitutional and legal rights are respected."

46. On the other hand, Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR) does recognize the right to a fair trial, delineating the basic tenets thereof to include persons' equality before the courts; hearings in open court before a competent, independent and impartial tribunal, and judgments or rulings arising from such hearings being made public.[6] It reads:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law... any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

47. Article 14.3. of the same Covenant does provide minimum standards for criminal trials in the following terms:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[6] Closed hearings are only permitted for reasons of privacy, justice or national security; and judgments may only be suppressed in divorce cases or to protect the interests of children.

(a)....

(b)....

(c)....

(d)....

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f)....

(g)....

48. The Applicant argued that his right to a fair trial was violated by the Respondent's omission to call witnesses in his second trial in so far as this course of action by the Prosecution violated his right of cross-examination. However, as clearly depicted in Article 14.3 of the ICCPR, an accused person would only have the right to cross-examine such witnesses as have been called by the Prosecution, but the Prosecution is not obliged to call any witnesses. Consequently, the decision by the Prosecution in the Applicant's trial not to call witnesses cannot be deemed to be a violation of the Applicant's right to fair trial. We so hold.

49. In light of the foregoing, we are of the considered view that the Applicant has not sufficiently established that either the trials in issue in the present Reference were not conducted in accordance with the Respondent's national laws, or that the Applicant's constitutional and legal rights were violated in the course of the said criminal trials. It seems abundantly clear to us that both principles as invoked by the Applicant would require the interrogation of the court record of the proceedings to ascertain

the Rwandan courts' compliance with domestic laws and procedures (or the lack thereof). As we did find in Issue No.(i), such record of proceedings were not availed to the Court.

50. In Bosnia & Herzegovina Vs. Serbia & Montenegro (supra), the onerous duty on an Applicant before an international court or tribunal was appositely stated by the ICJ as follows:

> ***"The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.[7]... The same standard applies to the proof of attribution for such acts."***

51. We are persuaded by that elucidation of the standard of proof. In the absence of such conclusive evidence, therefore, we are constrained to find, as we did in Issue No. (i) that the Applicant's allegations with regard to violation of Articles 6(d) and 7(2) of the Treaty do remain unproven with regard to the principles of rules of law, fair trial and due process. We so hold.

Issue No.(ii): Whether the Respondent violated the principle of *non bis in idem* by subjecting the Applicant to trial twice based on similar facts:

52. The Applicant in his submission argued that there was only one act that constituted two sets of offences upon which the prosecution relied in the two trials. The Applicant asserted that the prosecution failed to prove his guilt on the first trial hence reframing facts and instituting the second trial. He further argued that the second trial was based on similar facts to the first trial, to

[7] See Corfu Channel (United Kingdom Vs. Albania), Judgment, ICJ Reports 1949, p. 17.

wit the Skype Chat conversation between him and one Munyampeta Jean Damascene. The Applicant submitted that in the second trial, he did raise the said issue but the Prosecution insisted on taking the position that the facts did not matter, only the offence did. He strongly argued that the said position was contrary to the principle of *"non bis in idem"* because the same is emphatic that a man may not be put twice in jeopardy for a conduct in which he has been tried and acquitted and/or convicted. He further invoked the *maxim* of *"autrefois acquit"*, that is, if an accused person has been tried of an offence and not found guilty of that offence by a competent court, and is instead acquitted, the acquittal is a bar to a second charge. He submitted that the prosecution having lost in the first trial ought to have appealed against the acquittal instead of instituting a second trial.

53. Conversely, the Respondent denied any violation of the principle of *"non bis in idem"* or subjecting the Applicant to trial twice based on similar facts. He asserted that the Applicant was tried twice on different charges. In the first trial, in case No.RP1184/13/TB/KCY, the Applicant was charged of being in possession of ammunition (a grenade) contrary to Article 670 and 671 of laws No.01/2012 of 02/05/0012 instituting the Penal Code for which he was found innocent, acquitted in Judgment No.RP1184/13/TB/KCY and was released on 2nd April, 2014. In the second trial, the Applicant was charged with inciting insurrection or trouble amongst the population contrary to Article 463 of the said Penal Code, he was convicted and imprisoned for ten (10) years. It was the Respondent's contention that both trials

were therefore not conducted in violation of either the principle of *autrefois acquit* or *non bis in idem.*

Determination on Issue No.(ii)

54. From the outset, we deem it appropriate to define the concept *non bis in idem* as relied upon. *Non bis in idem* which literally translates to "not twice for the same thing," is a legal doctrine to the end that no legal action can be instituted twice for the same cause of action. It is essentially the equivalent of the double jeopardy (*autrefois* acquit) doctrine found in Common law jurisdictions. Indeed, Article 14.7 of the International Covenant on Civil and Political Rights forbids double jeopardy in the following terms:

> ***"No one shall be liable to be tried or punished again for an offence for which he has already been finally convinced or acquitted in accordance with the law and penal procedure of each country."***

This rule finds expression in Article 6 of the Penal Code of Rwanda which provides that:

> ***"A person shall not be punished twice for the same offence."***

55. The application of the doctrine *non bis in idem* entails thus several ingredients. These include (a) an initial proceeding in which jurisdiction was properly exercised; (b) a determination on the merits was properly made in the initial proceedings with respect to the particular acts constituting the crime; and (c) the

crimes or acts that are the subject of the successive trial are substantially similar.

56. In the instant case, it is our considered view that whether similar material evidence or "similar conduct" was used in the two cases is a matter that necessitates the perusal of the two impugned Judgments of the Courts of Rwanda as well as the record of the proceedings in respect thereof so as to verify the Applicant's allegations. In the purported translated record of the court proceedings on record, we did not find the court proceedings for the first criminal case No. RP1184/13/TB/KCY nor did we see the Skype chat documents that were allegedly used as material evidence in that case. We did not see the alleged Skype documents in the translated proceedings of the second criminal case RP0017/14/HC/KIG either. Therefore, we were unable to verify the alleged similarity of material or conduct as alleged by the Applicant in the absence of the record of proceedings of the two cases.

57. In the absence of the record of proceedings to ascertain the actual evidence used in the two cases, a plain reading of Articles 670 and 671 of the Penal Code of Rwanda in relation to the first criminal case RP1184/13/TB/KCY and Article 463 in relation to the second criminal case RP0017/14/HC/KIG clearly shows that the two offences were framed differently and *prima facie,* in the absence of material to the contrary, we cannot conclude that the Applicant was subjected to "Double Jeopardy" or was tried twice for an offence which he had already been acquitted of. We do therefore resolve Issue No.(ii) in the negative.

Issue No.(iv): Whether the Applicant is entitled to the relief sought:

58. The Applicant in his submission prayed to this Court to grant him reliefs as reproduced earlier in Para.2 above. In addition, the Applicant asserted that he was the Head of ICT at the East African Legislative Assembly (EALA) with a salary of USD 6000 a month, and thus prayed to the Court to apply the said figure in computation of his compensation from the date he was arrested, that is 8th November, 2013 to the date of his release from prison. The Applicant further asserted that the Court should hold that the Respondent violated the principles of the established law of Rwanda, the provisions of Articles 6(d) and 7(2) of the Treaty and the African Charter on Human and Peoples' rights.

59. In his submission, the Respondent on the other hand submitted that the Applicant is not entitled to the reliefs sought in the Reference. He argued that the Applicant had been accorded fair trial in both trials and in the circumstances, prayed to this Court to:

    i. ***Find that the Applicant is not entitled to the reliefs sought;***

    ii. ***Find that the Respondent never violated any provision of the domestic and international laws and the Treaty of the EAC as far as the principles of good governance and rule of law are concerned;***

    iii. ***Order that the sentence being served by the Applicant in Criminal Case No.RP0017/14/HC/KIG is a legal one and cannot be set aside by this Honorable Court;***

iv. ***Find that the Applicant's conviction respected the rule of law and is considered valid and legal;***

v. ***Find that no damages sought should be awarded to the Applicant since the whole procedure of conviction and sentencing the Applicant was legal;***

vi. ***Order that the Applicant's prayer in paragraph 50 concerning the compensation of the Applicant's salary of USD 6000 from 8th of November, 2013 up to date not be granted; and***

vii. ***Dismiss the Reference with costs.***

Determination on Issue No.(iv)

60. Before considering the prayers for remedies from the Parties, it is worth recalling that in **Appeal No.2 of 2017, Hon. Dr. Margaret Zziwa vs. the Secretary General of the East African Community**,[8] the Appellate Division of this Court considered the question as to whether the remedy of damages is available in this Court and held that Articles 23(1) and 27(1) of the Treaty confer on the Court, being an international judicial body, the authority to grant appropriate remedies to ensure adherence to law and compliance with the Treaty. The Court also held:

> **"The remedies of compensation (usually known as damages in internal law) is very firmly established in international law, and is available for the Community's breach of its Treaty obligations where a claimant establishes that the Act, regulation, directives, decision**

[8] Hon. Dr. Margaret Zziwa case, para 35, p. 19.

or action of the Community complained of has caused such claimant a loss which is financially assessable."[9]

61. We have also perused the International Law Commission (ILC) provisions (Article 31) and considered various international courts' decisions on reparation including the famous case of the **Chorzow Factory Case, Judgment No.13 of P.C.I.J of 13 September, 1928, Series A No.17** where the Court stated as follows:

> ***"The foundation of the international law on remedies is that an international wrong generates an obligation of reparation, and the reparation must so far as possible eradicate the consequences of the illegal act. Every breach of an international obligation carries with it a duty to repair harm and an international tribunal with jurisdiction over dispute has jurisdiction to award reparation upon determining that a breach of international law has occurred.***
>
> ***Full reparation may take the form of restitution, compensation and satisfaction as required by the circumstances. Wiping out all the consequences of the wrongful act may thus require some or all the forms of reparation to be provided depending on the type and extent of the injury that has been caused."***

62. Furthermore, in **Grands Lacs Supplier S.A.R. L. 7 Others Vs. The Attorney General of the Republic of Burundi, EACJ No. 6 of 2016**, this Court held that, as an international Court set up by a

[9] Idem.

Treaty, it is vested with the jurisdiction to determine whether the Applicants were entitled to the damages and interest thereof sought as a remedy to the unlawful seizure of their goods by the Respondent.

63. In light of the foregoing case law on the subject of reparation by an international court's such as the East African Court of Justice, we now proceed to deal with the determination of Issue No.(iv) as stated above.

Prayer (i), (ii) and (iv)

64. Given our holding herein above, we find that the Applicant has not satisfied us that Criminal Case No.RP0017/14/HC/KIG was conducted against universally accepted principles of law, therefore prayer (i) is declined. Further, prayers (ii) and (iv) are also declined for the same reason that the Applicant has not satisfactorily proved violation of the principles of law enshrined in Articles 6(d) and 7(2) in the Treaty.

Prayer (iii) and (v)

65. We are of the considered view that granting prayers (iii) and (v) would be tantamount to exercise an appellate jurisdiction over national courts, which jurisdiction we are not clothed with. The said prayers are therefore hereby declined.

Prayer (vi) and (vii)

66. Generally, as far as prayer (vi) is concerned, the Court may award general damages in an appropriate case as above explained. However, in the present case, we are unable to do so because the Applicant has not proved his claims in the

Reference. Hence, prayer (vi) is declined. Similarly, we find no basis to award aggravated and exemplary damages as sought in prayer (vii), the Applicant having not succeeded in this Reference.

67. The Applicant did in his Written Submissions raise a claim for his unpaid monthly earning. In our view, such a claim is akin to a claim for special damages. It is now well settled law that specific damages must be pleaded and proved. In this case, they were not pleaded. In any event, the Applicant has not even succeeded in the Reference. We do therefore disallow this prayer.

Prayer (viii)

68. With regard to the prayer for costs, as stated in Rule 111(1), costs follow the event unless the Court for good reasons otherwise orders. In the present case, the Applicant having failed to prove his claims under this Reference, he would not be entitled to costs. Ordinarily, he should be subjected to pay costs to the Respondent. However, we are aware that the Applicant could not afford to engage a lawyer to represent him initially and that the ones that represented him subsequently were doing so under a legal aid brief by the East African Law Society. In the circumstance, it is in the interest of justice that each party should bear its own costs.

G. CONCLUSION

69. In the result, the Reference is hereby dismissed. We order each party to bear its own costs.

70. It is so ordered.

Dated, delivered and signed at Arusha this 28th day of September, 2018.

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MONICA K. MUGENYI
PRINCIPAL JUDGE

.....

ISAAC LENAOLA*
DEPUTY PRINCIPAL JUDGE

.....

FAUSTIN NTEZILYAYO
JUDGE

.....

FAKIHI A. JUNDU
JUDGE

.....

AUDACE NGIYE
JUDGE

***Hon. Justice Isaac Lenaola retired from the Court on 29th June, 2018, but has signed the Judgment in terms of Article 23(3) of the Treaty**