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

MATOKE MWITA AND MASERO MKAMI

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 007/2016

JUDGMENT

13 JUNE 2023

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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, 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 (hereinafter referred to as "the Rules"),[1] Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the matter of

Matoke MWITA and Masero MKAMI

Represented by:

Advocate Daniel Walyemera,
Walyemera & Co. Advocates

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General;
ii. Ms Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General;
iii. Mr Baraka LUVANDA, Ambassador, Head of Legal Unit, Ministry of Foreign Affairs and East African Cooperation;

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

iv. Ms Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers;
v. Ms Aidah KISUMO, Senior State Attorney, Attorney General's Chambers; and
vi. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East Africa Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Matoke Mwita and Masero Mkami (hereinafter referred to as "the Applicants") are Tanzanian nationals who, at the time of filing this Application, were serving a life sentence at Butimba Central Prison, Mwanza Region, having been convicted of the offences of gang rape and robbery with violence. The Applicants allege the violation of their rights in relation to 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 has previously held that this withdrawal has no bearing on pending cases and new cases filed before

the withdrawal came into effect one (1) year after its deposit, that is, on 22 November 2020.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the Matter

3. It emerges from the Application that, on 3 December 2000, the Applicants and a third accused came across a woman who was walking home with her two daughters. During the encounter, one of the Applicants raped the woman while his accomplices kept the daughters under watch to prevent them from calling for help.

4. On 31 August 2001, the Applicants were convicted of the offences of gang rape and robbery with violence, and sentenced to life imprisonment in criminal case No. 26 of 2001 by the District Court of Tarime in the Musoma Region.

5. Dissatisfied with the decision of the District Court, the Applicants appealed to the High Court of Tanzania at Mwanza in Criminal Appeal No. 135 of 2001. However, before the appeal was heard, the decision of the lower court was referred to the High Court for confirmation and the High Court substituted the life imprisonment sentence meted by the District Court with a sentence of thirty (30) years imprisonment.[3] The Applicants' appeal before the High Court was subsequently dismissed on 18 February 2002 for want of merit.

6. Aggrieved with the High Court's judgment, the Applicants appealed to the Court of Appeal of Tanzania at Mwanza in Criminal Appeal No. 69 of 2002. On 3 November 2004, the Court of Appeal dismissed the appeal in its

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, §§ 37-39.
[3] United Republic of Tanzania, Criminal Procedure Act 1985, Chapter 20, Section 172.

entirety, set aside the sentence of thirty (30) years imprisonment imposed by the High Court and restored that of life imprisonment meted out by the District Court.

B. Alleged Violations

7. The Applicants allege that:

   i. They are aggrieved by the Court of Appeal's verdict as they had no opportunity to appeal when it dismissed their appeal and substituted the sentence of thirty (30) years with life imprisonment;

   ii. The trial court convicted them based on evidence which had doubts and contradictions wherein there were misdirection and non-directions;

   iii. The trial court erred in accepting evidence of identification for non-direction on silent conditions regarding proper identification;

   iv. The Court of Appeal erred in considering evidence of the prosecution while there was reasonable doubt which could have been resolved in favour of the Applicants; and

   v. The errors condoned by the Court of Appeal were contrary to the law and resulted in a miscarriage of justice. Thus, the verdict of the court violated the Applicants' fundamental rights and Article 3(1) and (2) of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. The Application was received at the Registry of the Court on 1 February 2016 and served on the Respondent State on 23 February 2016.

9. On the Applicants' request, the Court appointed Advocate Daniel Walyemera as counsel to represent them under the Court's legal aid scheme.

10. After several extensions of time, the Parties submitted their pleadings on the merits. However, the Respondent State did not file its Response to the Applicants' submissions on reparations.

11. As provided under Rule 64(1) of the Rules,[4] the Court initiated an amicable settlement procedure to which the Parties did not agree.

12. Pleadings were closed on 20 January 2023 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

13. The Applicants pray the Court to:

    i. Find the Application admissible;
    ii. Find that it has jurisdiction to hear the Application; and
    iii. Find that the Respondent State has violated Article 3(1) and (2) of the Charter.

14. The Applicants further pray the Court to:

    i. Restore justice where it was denied and quash their conviction;
    ii. Set aside the sentence and set them at liberty;
    iii. Grant them damages for the wrong suffered;
    iv. Grant them legal costs; and
    v. Grant them any other orders or reliefs that it may deem fit.

[4] Rule 57 of the Rules of Court, 2010.

15. The Respondent State prays the Court to:

    i. Find that it is not vested with jurisdiction to adjudicate this matter;
    ii. Dismiss the Application as it does not meet the admissibility requirements stipulated under Rule 40(5) of the Rules;
    iii. Dismiss the Application as it does not meet the admissibility requirements stipulated under Rule 40(6) of the Rules; and
    iv. Order that the cost of this Application be borne by the Applicants.

16. The Respondent State further prays the Court to:

    i. Find that the Respondent State did not violate Articles 3(1) and (2) of the Charter;
    ii. Dismiss the Application in accordance with Rule 38 of the Rules;
    iii. Dismiss the Applicants' prayers;
    iv. Dismiss the Application in its entirety for lack of merit; and
    v. Order the Applicants to bear the cost of this.

V. JURISDICTION

17. 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.

18. 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."[5]

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

19. In view of the foregoing, the Court must conduct a preliminary assessment of its jurisdiction and dispose of objections thereto, if any.

20. In the present Application, the Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will thus first consider the said objection before examining other aspects of its jurisdiction, if necessary.

A. Objection to material jurisdiction

21. The Respondent State avers that this Court does not have appellate jurisdiction to determine matters of fact and law which have been determined with finality by its Court of Appeal. It is the Respondent State's submission that the jurisdiction of this Court cannot extend to the issue of identification of the Applicants in the original criminal case.

22. The Respondent State further contends that this Court cannot entertain the Applicants' prayers that their conviction should be quashed, their sentencing be set aside, and that they should be released.

23. The Applicants rebut the Respondent State's submissions and pray that the objection be dismissed given that the Application concerns rights protected in the Charter, which is an instrument that the Court has jurisdiction to interpret and apply. It is also the contention of the Applicants that this Court has jurisdiction to consider issues relating to alleged errors in the domestic proceedings in order to assess whether they were in abidance with provisions of the Charter and other instruments to which the Respondent State is a party.

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24. 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.[6]

25. The Court further recalls that, as is now firmly established in its case-law, it does not exercise appellate jurisdiction with respect to claims already examined by domestic courts.[7] However, the Court reiterates its position that it retains the power to assess the propriety of domestic proceedings as against standards set out in international human rights instruments ratified by the State concerned.[8]

26. In the present matter, the Applicants request this Court to determine whether the proceedings before the domestic courts were conducted in line with the Respondent State's obligations under the Charter. The Court is empowered by provisions of Article 3(1) of the Protocol to ensure compliance with these obligations and, where it deems it fit, to grant any remedy as appropriate.

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

B. Other aspects of jurisdiction

28. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,[9] it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

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[6] *Marthine Christian Msuguri v. United Republic of Tanzania*, ACtHPR, Application No. 052/2016, Judgment of 1 December 2022 (merits and reparations), §§ 23-27; *Kalebi Elisamehe v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 265, § 18.
[7] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.
[8] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Werema Wangoko Werema and Another v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29; and *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.
[9] Rule 39(1) of Rules of Court, 2 June 2010.

29. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration deposited under Article 34(6) of the Protocol. The Court further recalls that, as it has previously held, the withdrawal of a Declaration does not have any retroactive effect and also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect as is the case of the present Application.[10] Given that this Application was filed before the withdrawal of the Declaration, it is not affected by the said withdrawal. In light of the foregoing, the Court finds that it has personal jurisdiction to examine this Application.

30. In respect of its temporal jurisdiction, the Court notes that the violations alleged by the Applicants occurred after the Respondent State became a Party to the Charter but before it ratified the Protocol. However, the alleged violations are continuing since the Applicants remain convicted on the basis of what he considers an unfair process.[11] Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

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

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

[10] *Cheusi v. Tanzania*, *supra*, §§ 35-39; *Ingabire Victoire Umuhoza v. United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.
[11] See *Msuguri v. Tanzania*, *supra*, § 30; *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 64-65; *Norbert Zongo and Others v. Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 71-77, 83.

VI. ADMISSIBILITY

33. 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”.

34. 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.”

35. 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.

36. The Court notes that the Respondent State raises an objection to admissibility on the ground that the Application was not filed within a reasonable time after local remedies were exhausted. The Court will, therefore, first consider the said objection (A) before examining other admissibility requirements (B), if necessary.

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

37. The Respondent State argues that the Application is time-barred and therefore does not meet the requirement set out under Article 56(6) of the Charter and Rule 50(2)(f) of the Rules[12] which states that an Application must be filed within a reasonable time from when local remedies are exhausted.

38. The Applicants on their part refute the Respondent State's objection and assert that the Charter does not define what is to be considered as reasonable time. According to the Applicants, in assessing whether the time was reasonable in this Application, the Court should consider the fact that the Applicants are incarcerated.

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

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

40. The Court notes that the issue for determination is whether the time it took the Applicants to file the present Application after exhausting local remedies is reasonable. The Court further notes that, in this case, local remedies were exhausted on 3 November 2004 when the Court of Appeal dismissed the Applicants' appeal. However, the starting date for time computation should be 29 March 2010 when the Respondent State deposited the Declaration as that is when individuals could seise this Court with claims against the Respondent State.

41. Having said that, the Court observes that the period between 2007 and 2013 were its formative years when members of the general public, let alone persons in particular situations such as incarceration, could not be presumed to have had sufficient awareness of the existence of the Court.[13] In the present Application, the Applicants are lay persons and were incarcerated during the above-mentioned initial years of this Court's operation. Consequently, the period to be assessed in the instant case is that from 2014 to the filing of the Application, that is, 1 February 2016, which is a period of two (2) years and one (1) month. The issue for consideration is whether such a period of time is reasonable within the meaning of Article 56(6) of the Charter.

42. The Court recalls that in assessing reasonableness, consideration should be given to the situation of the Applicant, namely whether he was incarcerated, lay and indigent without the benefit of legal assistance[14] or had limited knowledge of the operation of this Court.[15]

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[13] *Igola Iguna v. United Republic of Tanzania*, ACtHPR, Application No. 020/2017, Judgment of 1 December 2022, § 34; *Sadick Marwa Kisase v. United Republic of Tanzania*, ACtHPR, Application No. 005/2016, Judgment of 2 December 2021, § 52; *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 91-93; *Zongo and Others v. Burkina Faso* (preliminary objections), *supra*, § 122.

[14] *Iguna v. Tanzania*, *supra*, § 35; *Thomas v. Tanzania*, *supra*, § 73; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

[15] *Iguna v. Tanzania*, *ibid*; *Mohamed Selemani Marwa v. United Republic of Tanzania*, ACtHPR, Application No. 014/2016, Judgment of 2 December 2021, § 61; *Amiri Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

43. In the instant case, the Court notes that the Applicants are lay. It also emerges from the records that at the time of filing the Application, the Applicants were incarcerated and therefore limited in movement as well as to flow of information, which the Court has previously held as legitimate justification for delays in lodging applications.[16]

44. The Court considers that the above stated circumstances constitute valid justification for the time it took the Applicants to file this Application subsequent to the judgment of the Court of Appeal. The Court, therefore, finds that such time is reasonable within the meaning of Article 56(6) of the Charter.

45. In light of the foregoing, the Court dismisses the Respondent State's objection to the admissibility of the Application based on the alleged failure to file the same within reasonable time.

B. Other admissibility requirements

46. The Court notes that, from the records, the fact that the Application complies with the requirements in Article 56 sub-articles (1), (2), (3), (4), (5) and (7) of the Charter, which are reiterated in sub-rules 50(2)(a), (b), (c), (d), (e) and (g) of the Rules, is not in contention between the Parties. Nevertheless, the Court must ascertain that these requirements have been fulfilled.

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

48. The Court also notes that the claims made by the Applicants seek to protect their rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. The Application also does not contain any claim or prayer that is

[16] *Iguna v. Tanzania*, *supra*, § 37; *Thomas v. Tanzania*, *supra*, § 73; *Jonas v. Tanzania*, *supra*, § 54.

incompatible with the said provision of the Constitutive Act. Therefore, the Court considers that the Application meets the requirement of Rule 50(2)(b) of the Rules.

49. The Court further observes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, its institutions or the African Union, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.

50. Regarding the requirement stated in Rule 50(2)(d) of the Rules, the Court notes that the Application contains submissions by the Applicants supported with official documents from the judicial authorities of the Respondent State. The Application therefore fulfils this requirement as it is not based exclusively on news disseminated through the mass media.

51. The Court also notes that the requirement of exhaustion of local remedies under Rule 50(2)(e) of the Rules is met given that, prior to the filing present Application, the Court of Appeal, which is the highest judicial organ of the Respondent State had adjudicated the issues raised by the Applicants by a judgment rendered on 3 November 2004.

52. Finally, with respect to the requirement laid down in Rule 50(2)(g) of the Rules, the Court finds that the present 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, or the provisions of the Charter. The Application, therefore, fulfils this condition.

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

VII. MERITS

54. The Applicants allege that the Respondent State violated their rights to equality before the law and equal protection of the law protected under Article 3 of the Charter when domestic courts convicted and sentenced them based on evidence that did not meet the required standards.

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55. Article 3 of the Charter provides that "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."

56. The Court recalls that, in line with its case-law, equal protection of the law presupposes that the law protects everyone without discrimination.[17] Particularly in respect of the right protected under Article 3 of the Charter, the Court has held that a violation would be established when there is evidence showing that the Applicant was treated differently as compared to other persons who were in a situation similar to his.[18]

57. In the context of an alleged violation of the right to a fair trial, the burden lies on the Applicant to prove that the manner in which the competent domestic court assessed the evidence reveals apparent or manifest error that occasioned a miscarriage of justice to the detriment of the Applicant as opposed to other litigants in the same situation.[19]

58. The Court notes that the Applicants' allegation centres on two main issues, namely, the Court of Appeal firstly, based the conviction on wrong evidence;

[17] *Harold Mbalanda Munthali v. Republic of Malawi*, ACtHPR, Application No. 022/2017, Judgment of 23 June 2022 (merits and reparations), § 81; *Action pour la Protection des Droits de l'Homme v. Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668, § 146.
[18] *Oscar Josiah v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 83, 73; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 69.
[19] *Josiah v. Tanzania*, *supra*, § 60.

and, secondly, it dismissed their appeal and reinstated the sentence of life imprisonment meted out by the trial court.

A. Allegation that the burden of proof was shifted and the conviction was based on improper evidence

59. The Applicants allege that the Court of Appeal erred by requiring them to raise reasonable doubt to the prosecution evidence by proving that they were not at the crime scene, while the burden of proof as per law lies on the prosecution and not the defence.

60. The Applicants also submit that the Court of Appeal based their conviction on improper visual identification thus leaving doubts, which, if they had been resolved, could have inured to their benefit. According to the Applicants, the Court of Appeal should not have considered the identification made through the headlights of the passing motor vehicle without any evidence of its speed. The Applicants also aver that the Court of Appeal did not consider the contradictory witnesses' statements regarding the source of light, i.e., whether it was the headlights of the passing motor vehicle or moonlight.

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61. The Respondent State refutes these allegations and contends that the prosecution proved the case against the Applicants beyond reasonable doubt.

62. The Respondent State submits that the Court of Appeal acknowledged the issue of contradiction raised by the Applicants and thus disregarded all evidence related to that issue.

63. The Respondent State further avers that allegations regarding improper identification lack merit because the Court of Appeal thoroughly assessed the evidence tendered in court regarding the identification of the Applicants

and ultimately held that the applicants were properly identified at the crime scene.

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64. The Court notes that while the issue raised by the Applicants is in relation to evidence used in domestic courts, their allegation is that the manner in which issues of evidence were examined led to a violation of their rights to equality before the law and equal protection of the law.

65. With respect to the right to equal protection of the law, the Court notes that Articles 12 and 13 of the Respondent State's Constitution provide for the said right in terms that are similar to those of the Charter. It is worth noting that the Applicants have not provided evidence that any other law or statute applied in the proceedings involving them runs counter to the right to equal protection of the law. The Court also notes, from the record of the present Application, that there is no evidence to the effect that domestic proceedings were conducted based on any law or statute, which includes different provisions in respect of the Applicants as opposed to other litigants in terms of both the burden of proof and evidentiary issues.

66. As far as the right to equality before the law is concerned, this Court notes that, as it emerges from the records, the Court of Appeal examined all evidence submitted by the prosecution but eventually discarded such evidence, which appeared to be contradictory. The Court of Appeal also assessed all evidence tendered in the case against the Applicants and reached the conclusion that the prosecution had proven the case beyond reasonable doubt as required by the standards applicable in such circumstances. Consequently, it cannot be said that the right to equality before the law was breached simply because the Court of Appeal ultimately discarded contradictory evidence which the Applicants claim could have been in their favour.

67. In view of the foregoing, the Court dismisses the Applicants' allegation that the Respondent State violated Article 3 of the Charter in respect of the manner in which the Court of Appeal handled the issues of burden of proof and evidence.

B. Allegation that the decision to substitute the sentences could not be appealed

68. The Applicants allege that the decision of the Court of Appeal to dismiss their appeal, set aside the sentence of thirty (30) years imprisonment and substitute it with life imprisonment left them aggrieved and without any opportunity to appeal.

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69. The Respondent State refutes this allegation and contends that the Court of Appeal merely addressed the anomaly in the sentencing of the accused and handed out the appropriate sentence as provided by law for the offence of gang rape which attracts life imprisonment as stipulated under Section 131A(2) of the Penal Code.

70. The Respondent State further argues that although the Court of Appeal is the highest court of the land, the Applicants still had the opportunity to file an application for review of its decision.

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71. The Court notes that while the issue raised by the Applicants is in relation to the lack of a remedy against the substitution of the sentences, their allegation is that the manner in which this issue was examined led to a violation of their rights to equality before the law and an equal protection of the law.

72. The Court observes that while the alleged violation is that of the right to equal protection of the law, preliminary clarifications are required in respect

of the right to appeal. In this regard, the Court recalls that as it has previously held, the right to appeal entails that States should establish competent mechanisms but also facilitate access thereto.[20] The Court has further held that the requirement of two-tier adjudication is absolute in criminal matters.[21]

73. The issue arising in the present Application is whether the rights to equality before the law and equal protection of the law were breached when the Applicants could not appeal the Court of Appeal's judgment which substituted the sentence of thirty (30) years imprisonment meted out by the High Court with that of life imprisonment.

74. The Court observes that, as prescribed in the Respondent State's judicial system, criminal matters such as the one involving the Applicants are first adjudicated by the District Court with appeal to the High Court. Contestations of the High Court's pronouncement are then taken to the Court of Appeal.

75. In the instant Application, the High Court reversed the sentence of life imprisonment meted by the District Court and substituted it with that of thirty (30) years imprisonment. When the matter was appealed to the Court of Appeal, the latter then found that the sentence as varied by the High Court was not appropriate as per law; and restored the one imposed by the trial court as the one provided for by law.

76. This Court notes that pursuant to Section 131A (1) and (2) of the Respondent State's Penal Code, the sentence of life imprisonment is mandatory for the offence of gang rape. It is in observance of the said provision that the Court of Appeal restored the sentence of life imprisonment initially meted out by the District Court.

[20] *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 57; *Benedicto Daniel Mallya v. United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 482, § 43.
[21] *Sébastien Germain Ajavon v. Republic of Benin* (merits) (29 March 2019) 3 AfCLR 130, § 212.

77. It is paramount to stress that the Court of Appeal did not hear the matter on sentencing for the first time and did not mete out the sentence of life imprisonment in an initial pronouncement. Furthermore, the Applicants have not shown that any provision of the relevant law targeted them personally or that the Court of Appeal adjudicated their appeal differently as compared to other litigants in the same or similar situation.

78. In light of the foregoing, this Court dismisses the Applicants' claim and finds that the Respondent State did not violate the rights guaranteed under Article 3 of the Charter.

VIII. REPARATIONS

79. The Applicants pray the Court to grant them reparations for the violations that they suffered including quashing the judgment of the Court of Appeal and setting them at liberty.

80. The Respondent State prays the Court to dismiss the Applicants' request for reparations.

***

81. 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.

82. In the instant case, since no violation has been established, the prayer for reparation is not justified. The Court, therefore, dismisses the Applicants' prayer for reparation.

IX. COSTS

83. The Applicants pray the Court to order that the Respondent State should bear the costs of this Application.

84. The Respondent State on its part prays the Court to order that the Applicants should bear the costs of the Application.

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85. 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, if any.”

86. In the present Application, the Court does not find any reason to order either Party to bear the costs of the Application. Consequently, the Court decides that each Party shall bear its own costs.

X. OPERATIVE PART

87. For these reasons,

THE COURT,

On jurisdiction

Unanimously

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

On admissibility

By a majority of seven (7) for, and three (3) against, Justices Ben KIOKO,

Tujilane R. CHIZUMILA and Dennis D. ADJEI dissenting,

iii. *Dismisses* the objection to the admissibility of the Application;

iv. *Declares* the Application admissible.

On merits

By a majority of seven (7), Justices Ben KIOKO, Tujilane R. CHIZUMILA and Dennis D. ADJEI having dissented on admissibility,

v. *Finds* that the Respondent State did not violate the Applicants' rights to equality before the law and equal protection of the law guaranteed under Article 3 of the Charter.

Unanimously

On reparations

vi. *Dismisses* the prayer 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.

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the Joint Dissenting Opinion of Justice Ben KIOKO, Justice Tujilane R. CHIZUMILA and Justice Dennis ADJEI is appended to this Judgment.

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