AFRICAN UNION		UNION AFRICAINE
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

JACKSON GODWIN

V.

THE UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 037/2016

JUDGMENT

5 SEPTEMBER 2023

TABLE OF CONTENTS

The Court composed of: Modibo SACKO, Vice President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA**,** Stella I. ANUKAM, Dumisa B. NTSEBEZA, 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:

Jackson GODWIN

Self-represented

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 Africa Cooperation;
iv. Ms. Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers; and

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

v. Ms. Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East Africa Cooperation

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Mr Jackson Godwin (hereinafter referred to as "the Applicant") is a Tanzanian national who, at the time of filing this Application, was serving two concurrent thirty (30)-year sentences of imprisonment at Butimba Central Prison, in Mwanza after he was convicted of armed robbery and rape. The Applicant alleges the violation of his rights before domestic courts.

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, on 29 March 2010, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications from Individuals and Non-Governmental Organisations (hereinafter referred to as "NGOs"). On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one year after its deposit.[2]

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, § 38.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that, on 21 April 2013, the Applicant accompanied by other perpetrators, who are not part of this application, broke into the house of a woman and stole money and property. The Applicant and his accomplices also raped the woman and fled the scene of the crime.

4. Subsequently, the Applicant was arrested and charged alone with one count of armed robbery contrary to section 287A of the Penal Code and one count of rape contrary to section 130 and 131 of the Penal Code.

5. On 8 April 2014, in Criminal Case No. 44 of 2013, the District Court convicted the Applicant and sentenced him to serve a thirty (30)-year term of imprisonment for each of the offences and ordered the sentences to run concurrently.

6. Aggrieved by his conviction, the Applicant appealed to the High Court of Tanzania at Bukoba in Criminal Appeal No.45 of 2014. On 7 May 2015 the High Court dismissed the appeal and upheld the conviction and sentence.

7. The Applicant then appealed to the Court of Appeal of Tanzania at Bukoba in Criminal Appeal No. 278 of 2015. The Appeal was dismissed in its entirety on 16 February 2016.

8. Thereafter, the Applicant filed the present Application on 29 June 2016.

B. Alleged violations

9. The Applicant alleges that:

    i. He was not informed of the ground of arrest before being arrested by the

police, in violation of his fundamental rights under section 23 of the Criminal Procedure Act Cap 20 RE 2002 (hereinafter referred to as "CPA") and supported by Article 15(1)(2) of the Constitution of the Respondent State (1977) (hereinafter referred to as "the Constitution");

ii. That the Court of Appeal of Tanzania failed to properly determine matters of law and facts, thus violating Articles 2, 3 and 7(1) of the Charter and Article 107A(B) of the Constitution; and

iii. The justice of appeal erred in law and facts by failing to observe that the defence witnesses were not called as required by Section 231 of the CPA, Cap 20 RE 2002 and Article 13(6)(a) of the Constitution.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

10. The Registry received the Application on 29 June 2016, and served it on the Respondent State on 24 August 2016.

11. The Parties filed their pleadings within the time stipulated by the Court after several extensions.

12. Pleadings were closed on 5 November 2020 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

13. The Applicant prays the Court to:

i. Restore justice by quashing both his conviction and sentence, and set him at liberty;

ii. Grant him reparations pursuant to Article 27(1) of the Protocol to the Charter; and

iii. Make any other order that it deems appropriate in the circumstances of his case.

14. The Respondent State prays the Court to:

iv. Declare that it is not vested with jurisdiction to adjudicate the Application;
v. Declare that the Application has not met the admissibility requirement provided by Rule 40(5) of the Rules of Court;
vi. Declare that the application has not met the admissibility requirement provided by Rule 40(6) of the Rules of Court; and
vii. Declare that the application is inadmissible and duly dismiss it.

15. The Respondent State further prays the Court to grant the following orders:

i. That the Respondent State did not violate the Applicant's rights provided under Articles 2, 3 and 7(1) of the Charter;
ii. That the application is dismissed in its entirety for lack of merit;
iii. That the Applicant's prayers are dismissed;
iv. That the Applicant should continue to serve his sentence; and
v. That the Applicant should not be awarded reparations.

V. JURISDICTION

16. 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.

17. 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]

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

18. On the basis of the above-cited provisions, the Court must, in every application, preliminarily ascertain its jurisdiction and rule on the objections thereto, if any.

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

A. Objection to material jurisdiction

20. The Respondent State contends that the Court lacks material jurisdiction to adjudicate the application given that Article 3 of the Protocol does not provide it with the mandate to sit as a court of first instance or an appellate court and adjudicate points of law and evidence already determined by the highest domestic court.

21. In support of this contention, the Respondent State refers to the decision in *Ernest Francis Mtingwi v. Malawi* where this Court held that it does not have appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and/or regional courts.

22. The Applicant rebuts the Respondent State's objection and contends that the Court has jurisdiction in all cases submitted before it under Article 3(1) and (2) of the Charter, and Article 27 of the Protocol.

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23. The Court recalls that pursuant to 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.[4]

[4] *Kalebi Elisamehe v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 265, § 18 and *Peter Joseph Chacha v. United Republic of Tanzania* (admissibility) (2014) 1 AfCLR 398, § 114.

24. 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.[5] However, the Court retains the power to examine the procedures of national courts in order to determine whether they are in conformity with the standards set out in the Charter or in any other human rights instrument ratified by the State concerned.[6]

25. In the instant case, the Court notes that the Applicant alleges the violations of rights guaranteed under Articles 2, 3, and 7(1) of the Charter, which it is empowered to interpret and apply pursuant to Article 3(1) of the Protocol.[7]

26. 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

27. The Court observes that there is no contention with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,[8] it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding to consider the matter.

28. Having noted that there is nothing on the record to indicate otherwise, the Court concludes that:

    i. It has personal jurisdiction, in so far as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration

[5] *Marthine Christian Msuguri v. United Republic of Tanzania,* ACtHPR, Application No. 052/2016, Judgment of 1 December 2022 (merits and reparations), § 25; *Werema Wangoko Werema and Waisiri Wangoko Werema v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29 and *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.
[6] *Cheusi v. Tanzania* (judgment), *supra*, § 32; *Werema and Werema v. Tanzania*, *ibid,* § 29 and *Alex Thomas v. United Republic of Tanzania,* (merits) (20 November 2015) 1 AfCLR 465, § 130.
[7] *Chananja Luchagula v. United Republic of Tanzania* (admissibility) (25 September 2020) 4 AfCLR 561, §§ 25-28; and *Actions pour la Protection des Droits de l'Homme (APDH) v. Republic of Côte d'Ivoire* (merits and reparations) (18 November 2016) 1 AfCLR 668, §§ 47-65.
[8] Rule 39(1) of Rules of Court, 2 June 2010.

which allows individuals and NGOs to bring cases directly before the Court. In this vein, the Court recalls its earlier position that the Respondent State's withdrawal of its Declaration on 25 March 2020 does not have any effect on the instant Application, as the withdrawal was made subsequent to filing of the application.[9]

ii. It has temporal jurisdiction given that the violations alleged by the Applicant occurred after the Respondent State became a party to the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[10]

iii. It has territorial jurisdiction considering that the alleged violations occurred within the territory of the Respondent State.

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

VI. ADMISSIBILITY

30. Pursuant to Article 6(2) of the Protocol, "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

31. In line with Rule 50(1) of the Rules, "the Court shall ascertain the admissibility of an application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these […]Rules."

32. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

[9] *Cheusi v. Tanzania* (judgment), *supra*, § 38.
[10] *Msuguri v. Tanzania* (merits and reparations), *supra*, § 30 and *Jebra Kambole v. United Republic of Tanzania* (judgment) (15 July 2020) 4 AfCLR 460, §§ 23-24.

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.

33. The Court notes that the Respondent State raises an objection to admissibility of the application on the ground of non-exhaustion of local remedies. The Court will, therefore, consider the said objection before examining other conditions of admissibility, if necessary.

A. Objection based on non-exhaustion of local remedies

34. The Respondent State contends that the application does not meet the requirement of exhaustion of local remedies given that the Applicant did not attempt to exercise other existing remedies such as the filing of a constitutional petition before the High Court.

35. The Applicant, on his part, prays the Court to declare that the application is admissible in accordance with Articles 5(3) 6(1) and 7 of the Protocol.

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36. The Court recalls that, as it has consistently held, the requirement of exhaustion of local remedies is an internationally recognised and accepted rule restated in Article 56(5) of the Charter, and Rule 50(2)(e) of the Rules.[11] As established in the Court's jurisprudence, the remedies to be exhausted must be those that are ordinary and judicial in nature.[12]

37. The Court has also held that the constitutional petition procedure as it applies in the Respondent State's judicial system is not a remedy that an Applicant is required to exhaust.[13] Consequently, in instances where the Applicant has gone through the judicial system up to the Court of Appeal, which is the highest court in the Respondent State, it should be considered that local remedies have been exhausted.[14]

38. The Court notes that in the present application, the Applicant's appeal was determined through a judgment rendered on 16 February 2016 by the Court of Appeal sitting at Bukoba, which is the highest judicial authority of the Respondent State. Given that the constitutional petition is not a remedy that the Applicant ought to have used, the Court holds that domestic remedies were exhausted in the present matter.

39. The Court is cognisant of the Respondent State's contention that the Applicant's allegation that he was prevented from calling witnesses is being raised for the first time and, therefore, domestic remedies were not exhausted in that respect.

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[11] *Sébastien Germain Ajavon v. Republic of Benin* (judgment) (4 December 2020) 4 AfCLR 133, § 85 and *Diakité Couple v. Republic of Mali* (jurisdiction and admissibility) (28 September 2017) 2 AfCLR 118, § 41.

[12] *Laurent Munyandilikirwa v. Republic of Rwanda*, ACtHPR, Application No. 023/2015, Ruling of 2 December 2021, § 74 and *Thomas v. Tanzania* (merits), *supra,* § 64.

[13] *Gozbert Henerico v. United Republic of Tanzania,* ACtHPR, Application No. 056/2016, Judgment of 10 January 2022, § 61; *Elisamehe v. Tanzania* (judgment), *supra*, §§ 35-36; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 46 and *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

[14] *Hamis Shaban alias Hamis Ustadh v. United Republic of Tanzania*, ACtHPR, Application No. 026/2015, Judgment of 2 December 2021, § 51 and *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

40. The Court observes in this regard that, in the present application, it is evident from the record that the issue of summoning of witnesses arose during the proceedings before the High Court during the hearing of the Applicant's appeal from the District Court.[15] In the said proceedings, the High Court dismissed the allegation highlighting that during the proceedings at the District Court on 27 January 2014, the Applicant informed the court that he would give his testimony under oath and that he had neither a witness to call nor an exhibit to tender.

41. It follows from the foregoing that the issue of calling of witnesses was considered as an appeal issue by the High Court and cannot, therefore, be said to arise for the first time before this Court. Domestic remedies should, therefore, be considered to have been exhausted in respect of the said issue.

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

B. Other conditions of admissibility

43. The Court notes that, in the present case, the parties are not challenging the application's compliance with the requirements in Article 56 sub-articles (1), (2), (3), (4), (6) and (7) of the Charter, which are reiterated in sub-rules 50(2)(a), (b), (c), (d), (f) and (g) of the Rules. However, the Court must examine whether these conditions have been met.

44. It is apparent from the record that the condition set out in Rule 50(2)(a) of the Rules has been satisfied, as the Applicant has clearly indicated his identity.

[15] *Jackson Godwin v. The Republic*, Criminal Appeal No.45 of 2014, Judgment of the High Court of Tanzania, 7 May 2015, pages 7-8.

45. The Court also notes that the claims made by the Applicant seek to protect his 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 incompatible with the said provision of the Act. Therefore, the Court considers that it meets the requirement of Rule 50(2)(b) of the Rules.

46. The Application does not contain any abusive or insulting language directed at the State concerned and its institutions and is thus consistent with Rule 50(2)(c) of the Rules.

47. As regards the condition laid down in Rule 50(2)(d) of the same Rule, it has not been established that the arguments of fact and law developed in the application are based exclusively on information disseminated through the mass media. The condition is therefore met.

48. Regarding the requirement of exhaustion of local remedies in accordance with Rule 50(2)(f) of the Rules, the Court notes that the appeal lodged by the Applicant was dismissed by the Court of Appeal's judgment of 16 February 2016. Given that the present application was filed on 29 June 2016, a time of four (4) months and thirteen (13) days had elapsed between the two events. In light of its case-law,[16] the Court considers that such time is manifestly reasonable and therefore finds that the requirement set out under Rule 50(2)(f) of the Rules is met.

49. 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, meets this condition.

[16] *Niyonzima Augustine v. United Republic of Tanzania*, ACtHPR, Application No. 058/2016, Judgment of 13 June 2023 (merits and reparations), §§ 56-58; and *Ajavon v. Benin* (judgment), *supra,* §§ 89-91.

50. In light of the foregoing, the Court concludes that the application meets all the conditions of admissibility set out in Article 56 of the Charter as restated in Rule 50(2) of the Rules, and accordingly declares it admissible.

VII. MERITS

51. The Applicant alleges the following violations:

    i. That he was not informed of the ground of arrest before being arrested by the police;
    ii. That the Court of Appeal of Tanzania failed to properly determine matters of law and facts in violation of Articles 2, 3 and 7(1) of the Charter and Article 107A(B) of the Constitution of the Respondent State (1977); and
    iii. That the justice of appeal had erred in law and facts by failing to observe that the defence witnesses was/were not summoned/called as required by Section 231 of the CPA, Cap 20 RE 2002 and Article 13(6)(a) of the Constitution of the Respondent State.

52. The Court observes that the Applicant's averments as stated above revolve around the alleged violations of the right to be notified of the charges against him (A), the right to have one's cause heard jointly read with the right to equality before the law (B), and the right to defence (C). The Court will examine these allegations in turn.

A. Alleged violation of the right to be notified of the charges

53. The Applicant alleges that he was not informed of the grounds of arrest before being arrested which amounts to a violation of his fundamental rights under section 23 of the CPA, Cap 20 RE 2002 supported by Article 15(2) of the Constitution of the Respondent State.

54. The Respondent State refutes the allegation and submits that if the Applicant felt his rights had been violated, he had the remedy of instituting

a constitutional petition under the Basic Rights and Duties Enforcement Act [Cap 3 RE 2002] while the proceedings were ongoing before the District Court.

55. The Respondent State further avers that the Applicant never raised this allegation before the trial court or as a ground of appeal before the High Court or the Court of Appeal and therefore lacks merit and should be duly dismissed.

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56. Article 7(1)(c) of the Charter provides that every individual shall have "the right to defence, including the right to be defended by counsel of his choice".

57. The Court observes that while Article 7(1)(c) of the Charter does not explicitly provide for the right to be notified of charges, the said right is expressly guaranteed in Article 14(3)(a) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR".[17]

58. This Court recalls that, as it held in the matter of *Sébastien Germain Ajavon v. Republic of Benin*, the right to be notified of charges is an important aspect of the right to defence protected under Article 7(1)(c) of the Charter.[18] Particularly in criminal cases, the purpose of the accused being notified of the charges is to enable them to duly prepare their defence.[19]

59. The same purpose is inherent in the CPA Cap 20 RE 2002 of the Respondent State. Section 23(1) of the said Act provides that "a person who arrests another person shall, at the time of the arrest, inform that other person of the offence for which he is arrested".

[17] Ratified by the Respondent State on 11 June 1976.
[18] *Ajavon v. Benin* (judgment), *supra*, § 161. See also, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, §§ 76-82.
[19] *Ajavon v. Benin*, *ibid*.

60. The question arising in this application is whether or not, at the time of arrest, the Applicant was informed of the charges levelled against him. It is recalled that, in making this determination, the applicable general principle of law is that he who alleges a fact shall provide evidence to prove it.[20]

61. As emerges from the judgment of the District Court in proceedings against the Applicant, in his sworn testimony the Applicant submitted that, on 20 April 2013, he was put under arrest while at his home. The Applicant also confirmed that, at the time of arrest, the police informed him that there was an allegation of stealing and rape against him.[21] The preceding demonstrates that the Applicant's assertion that he was not informed of the charges brought against him is without foundation.

62. In view of the foregoing, the Court dismisses the Applicant's allegation that the Respondent State violated his right to be informed of the charges brought against him. The Court, therefore, finds that the Respondent State has not violated Article 7(1)(c) of the Charter as read jointly with Article 14 of the ICCPR.

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

63. The Applicant alleges that the judgment of the Court of Appeal violated Articles 2, 3 and 7(1) of the Charter as it did not properly determine matters of law and fact.

64. The Respondent State disputes this allegation as vague and unspecific. It is the Respondent State's contention that the Court of Appeal duly assessed all matters of law and facts, and found no merit to the Applicant's grounds of appeal, which it dismissed.

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[20] *Viking (Babu Seya) and Nguza (Papi Kocha) v. Tanzania* (merits), *supra*, § 71; *Cheusi v. Tanzania* (judgment), *supra,* § 129.
[21] *Republic v. Jackson S/O Godwin,* Criminal Case No. 44/2013, Judgment of the District Court of Biharamulo, 8 April 2014, page 22.

65. The Court observes, from the Applicant's submissions that he makes a joint allegation of violation of Articles 2, 3, and 7(1) of the Charter. It is indeed the Applicant's contention that the domestic courts did not uphold his rights to non-discrimination, equality before the law, equal protection of the law, and to have his cause heard while examining issues related to identification and evidence. The Court will examine these allegations jointly.

66. Article 2 of the Charter provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

67. 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.

68. Article 7(1) of the Charter provides that:

> Every individual shall have the right to have his cause heard.

69. Regarding the right to non-discrimination as protected under Article 2 of the Charter, the Court recalls that, as it held in *Action pour la Protection des Droits de l'Homme (APDH) v. Republic of Côte d'Ivoire*, discrimination is "a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria."[22]

70. With respect to Article 3, equality before the law, and equal protection of the law presuppose that the law protects everyone without discrimination

[22] *APDH v. Côte d'Ivoire* (merits and reparations), *supra,* §§ 146-147.

whether in its provisions or in its application.[23] Consequently, as this Court has previously held, breach of Article 3 of the Charter is 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.[24]

71. As far as the right to have one's cause heard, this Court has held in *Jebra Kambole v. United Republic of Tanzania* that this right, as enshrined under Article 7(1) of the Charter, bestows upon individuals a wide range of entitlements pertaining to due process of law. These include the right to be given an opportunity to express their views on matters and procedures affecting their rights; properly prepare a defence; present one's arguments and evidence; and to respond to the arguments and evidence presented by the opposing side.[25]

72. The Court notes that in the instant matter, the Applicant's allegation revolves around two main issues:i) whether he was properly identified at the scene of the crime and; ii) whether he was convicted against the weight of the evidence on record. The Court will examine the joint allegation of violation of the right to non-discrimination, equality before the law, and to have one's cause heard in respect of each of these two issues.

i. Allegation that the Applicant was not properly identified

73. The Applicant alleges that he was convicted on fabricated evidence as he was not properly identified by the Prosecution Witness 1 (PW1) at the scene of the crime. According to the Applicant, this failure amounted to a violation of his right to non-discrimination, equality before the law, equal protection of the law and the right to have his cause heard.

[23] *Harold Mbalanda Munthali v. Republic of Malawi*, ACtHPR, Application No. 022/2017, Judgment of 23 June 2022 (merits and reparations), § 81; and *APDH v. Côte d'Ivoire*, *ibid.*
[24] *Oscar Josiah v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 83, § 73 and *Makungu v. Tanzania* (merits), *supra,* § 69.
[25] *Kambole v. Tanzania* (judgment), *supra,* §§ 96-97; and *Werema and Werema v. Tanzania* (merits), *supra,* §§ 68-69.

74. The Respondent State refutes this allegation and avers that the Court of Appeal considered the identification of the Applicant and held that he was properly identified. The Respondent State further submits that the victim named the Applicant at the earliest possible time to her friend, the Prosecution Witness 2 (PW2) as well as to the police and that this fact carried significant weight given that PW2 was a reliable witness.

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75. The Court notes that while the Applicant raises an issue of proper identification, his allegation is that the manner in which this issue was examined led to a violation of his rights to non-discrimination, equality before the law and an equal protection of the law and the right to have his cause heard. Noting that the alleged violation relates to the right to a fair trial, the Court will first examine whether the proceedings in the instant case were conducted in accordance with Article 7(1) of the Charter before assessing the alleged violations relating to Articles 2 and 3 of the Charter.

76. This Court has previously stated that when visual or voice identification is used as evidence to convict a person, all circumstances of possible mistakes should be ruled out and the identity of the suspect should be established with certitude. Resultantly, the identification should be corroborated by other circumstantial evidence and must be part of a coherent and consistent account of the scene of the crime.[26]

77. In the instant case, the Court notes from the record that the prosecution relied on four (4) witnesses to prove its case. According to the judgments of the District Court, High Court and the Court of Appeal,[27] the victim, PW1 testified that she was invaded by three (3) people and upon entering the room, they put on the solar light. The judgments of the three (3) domestic

[26] *Kenedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 64.
[27] *Republic v. Jackson S/O Godwin*, Criminal Case No. 44/2013, *supra,* pages 25-28; *Jackson Godwin v. The Republic*, Criminal Appeal No.45 of 2014, *supra*, pages 2-3; and *Jackson Godwin v. The Republic,* Criminal Appeal No. 278 of 2015, 16 February 2016*,* pages 3-5.

courts also show that PW1 gave a clear account of what transpired when the Applicant and the other two persons entered the room and testified that she clearly identified the Applicant who was her neighbour and well known to her.[28] Further, according to the record before the Court, PW1 named the Applicant at the earliest possible time to her friend, PW2 and to the police.

78. It follows from the foregoing that the domestic courts assessed the circumstances in which the crime was committed, to eliminate possible mistaken identity and they found that the Applicant was positively identified as having committed the crime.

79. It is worth noting that in the present application, the Applicant has not provided evidence that any law or statute applied in the proceedings involving him runs counter to the right to non-discrimination, equality before the law and equal protection of the law. Further, the Applicant has not shown that he was treated differently as compared to other persons who were in a situation similar to his. The Court also notes, from the record, 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 Applicant as opposed to other litigants regarding the right to have his cause heard.

80. In light of the foregoing, the Court dismisses the Applicant's allegations that he was not properly identified and that he was subjected to discrimination and unequal treatment in the proceedings before domestic courts. The Court, therefore, finds that the Respondent State did not violate Articles 2, 3 and 7(1) of the Charter read jointly in respect of the Applicant's identification.

[28] *Ibid.*

ii. Allegation that the Applicant's conviction was against the weight of the evidence on record

81. The Applicant alleges that the domestic courts relied upon fabricated, contradictory, inadequate and devoid prosecution evidence to uphold his conviction. He avers that the domestic courts ignored crucial facts including that he was not found with any stolen items; the prosecution failed to bring a witness to give corroborative evidence; PW4 gave hearsay evidence when cross examined; and that evidence of PW4 contradicted evidence of PW3.

82. The Respondent State submits that the Applicant's allegation in this regard has no merit; and avers that the conviction of the Applicant was based on the evidence of identification and that it is clear from the evidence on the record that the Applicant was properly identified. It is also the Respondent State's contention that the Court of Appeal assessed all matters of fact and law and dismissed the Applicant's appeal in its entirety for lack of merit.

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83. The Court notes that while the Applicant raises an issue relating to evidence in the proceedings before domestic courts, the basis of his allegation is that the manner in which issues of evidence were examined led to a violation of his rights to non-discrimination, equality before the law, equal protection of the law and the right to have one's cause heard.

84. The Court reiterates its position as held in *Kijiji Isiaga v. United Republic of Tanzania*[29] that:

> … domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.

[29] *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65.

85. Having noted that, the Court also restates its position in *Kenedy Ivan v. Republic of Tanzania* that while it does not have the power to evaluate matters of evidence that were settled in national courts, it does have the power to determine whether the assessment of the evidence in the national courts complies with relevant provisions of international human rights instruments.[30]

86. In the present Application, the judgments of the domestic courts show that all the three courts, that is, the District Court, the High Court and the Court of Appeal relied on the evidence of four (4) witnesses and fairly evaluated the said evidence.[31]

87. Regarding the evidence presented by PW1, all the three domestic courts held that the victim significantly named the Applicant at the earliest possible time to her friend PW2 as well as to the police and that she was a reliable witness. Regarding the evidence of the other three (3) witnesses, all three courts held that the evidence considered was enough and substantial to make the conviction stand.[32] In any event, while examining the Applicant's claim on identification, this Court has earlier concluded that the Applicant's identification in the proceedings did not lead to any breach of procedural rights.

88. The Court takes note of the other factors that were mentioned by the Applicant which he claims should have been taken into account by domestic courts in the assessment of the evidence before them. In respect to the said issues, the Court notes that both the High Court and Court of Appeal examined the submissions and evidence before them and held that there was no material contradiction in the evidence of the prosecution. Having done so, both the High Court and the Court of Appeal highlighted, in their

[30] *Ivan v. Tanzania* (merits and reparations), *supra,* § 61; and *Abubakari v. Tanzania* (merits), *supra*, §§ 26 and 173.
[31] *Republic v. Jackson S/O Godwin*, Criminal Case No. 44/2013, *supra,* pages 26-34; *Jackson Godwin v. The Republic*, Criminal Appeal No.45 of 2014, *supra*, pages 2-3; and *Jackson Godwin v. The Republic,* Criminal Appeal No. 278 of 2015, *supra,* pages 1-3.
[32] *Ibid.*

judgments, that the case against the Applicant had been proved beyond a reasonable doubt.[33]

89. In the circumstances, the Court finds that the evidence in the Applicant's trial was evaluated in conformity with the requirements of fair trial and the procedures followed by the national courts in dealing with the Applicant's appeals did not violate Article 7(1) of the Charter. The Court also finds that the assessment of the evidence by the domestic courts was not done in a manner discriminatory to the Applicant as opposed to other litigants in similar circumstances. Further, the Applicant has not provided evidence that any other law or statute applied in the proceedings involving him runs counter to the right to non-discrimination, equality before the law and equal protection of the law in violation of Articles 2 and 3 of the Charter.

90. In light of the above, the Court is of the opinion that the manner in which the national courts evaluated the facts and evidence and the weight they gave to them does not disclose any manifest error or miscarriage of justice to the Applicant which requires this Court's intervention.

91. The Court, therefore, dismisses the Applicant's allegation that his conviction was against the weight of the evidence on record. The Court finds that the Respondent State did not violate Articles 2, 3 and 7(1) of the Charter read jointly in respect of the consideration of evidence regarding the Applicant's conviction.

C. Alleged violation of the right to defence

92. The Applicant alleges that the justice of appeal erred in law and facts by failing to observe that the defence witnesses were not summoned in contravention of Section 231 of the CPA, Cap 20 RE 2002 and Article 13(6)(a) of the Constitution of the Respondent State. The Applicant claims

[33] *Jackson Godwin v. The Republic,* Criminal Appeal No.45 of 2014, *supra,* pages 8-9; and *Jackson Godwin v. The Republic, Criminal* Appeal No. 278 of 2015, *supra*, page 7.

that he was not given the right to call his wife whom he identifies as Amina Muhangi, to testify despite naming her as his witness.

93. The Respondent State disputes this allegation and submits that the same argument was dismissed by the Court of Appeal as the appellant was recorded as saying that he would give his testimony under oath and that he had neither a witness to call nor an exhibit to tender. The Respondent State further avers that the issue of denial of a right to have a witness for the defence is an afterthought which contradicts what happened at the trial court.

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94. Article 7(1)(c) of the Charter provides that:

> Every individual shall have the right to have his cause heard. This comprises the right to defence, including the right to be defended by counsel of his choice.

95. This Court has held that the right to defence as set out in Article 7(1)(c) of the Charter is a key component of the right to a fair trial and reflects the potential of a judicial process to offer the parties the opportunity to express their claims and submit their evidence.[34] This Court has further held in *Ingabire Victoire Umuhoza v. Republic of Rwanda*, that an essential aspect of the right to defence includes the right to call witnesses in one's defence.[35]

96. The Court notes, from the record, that there is nothing to show that the Applicant made any request for the summoning of the defence witnesses and that the courts refused to grant it. On the contrary, despite indicating that his wife could verify his alibi, the Applicant never showed any intention to have her in court as a witness. As a matter of fact, the Applicant is on record indicating that he would not call any witness.

[34] *Ajavon v. Benin* (judgment), *supra,* § 141.
[35] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (merits) (24 November 2017) 2 AfCLR 165, § 93.

97. In view of the above, the Court dismisses the Applicant's allegation that the Justices of Appeal violated his right to defence by failing to summon defence witnesses. The Court, therefore, finds that the Respondent has not violated Article 7(1)(c) of the Charter in respect of the summoning of defence witnesses.

VIII. REPARATIONS

98. The Applicant prays the Court to grant him reparations for the violations that he suffered including quashing the judgment of the Court of Appeal, setting him at liberty and any other reliefs that the Court may deem necessary.

99. The Respondent State prays the Court to deny the Applicant's request for reparations.

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100. 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.

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

IX. COSTS

102. In the present application, the Parties did not make any submissions regarding the costs of the application.

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103. 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.”

104. In the instant case, the Court does not find any reason to depart from the provisions of the relevant rule. Consequently, the Court decides that each Party shall bear its own costs.

X. OPERATIVE PART

105. For these reasons,

THE COURT,

Unanimously,

On jurisdiction

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

On admissibility

iii. *Dismisses* the objection to the admissibility of the application;
iv. *Declares* the application admissible.

On merits

v. *Finds* that the Respondent State has not violated Article 7(1)(c) of the Charter in relation to the failure of the domestic courts to inform the Applicant of the charges against him;
vi. *Finds* that the Respondent State has not violated Articles 2, 3 and 7(1) of the Charter in relation to the identification of the Applicant;
vii. *Finds* that the Respondent State has not violated Articles 2, 3 and

7(1) of the Charter in relation to the Applicant's conviction being against the weight of the evidence;

viii. *Finds* that the Respondent State has not violated Article 7(1)(c) of the Charter in relation to the failure to summon defence witnesses.

On reparations

ix. *Dismisses* the prayer for reparations.

On costs

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

Signed:

Modibo SACKO, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar.

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