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

LEONARD MOSES

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 033/2017

RULING

5 SEPTEMBER 2023

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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

Leonard MOSES

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. Ms Nkasori SARAKIKYA, Director of Human Rights, Ministry of Constitution and Legal Affairs;
iv. Ms Caroline Kitana CHIPETA, Acting Director, Legal Unit, Ministry of Foreign Affairs and East African Cooperation.

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

v. Mr Hangi M. CHANG'A, Assistant Director, Constitution, Human Rights and Election petitions; Office of the Solicitor General;
vi. Ms Sylvia MATIKU, Principal State Attorney, Attorney General's Chambers; and
vii. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

After deliberation,

Renders this Ruling:

I. THE PARTIES

1. Leonard Moses (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Uyui Central Prison in the Tabora region, having been convicted of the offence of rape and sentenced to a term of thirty (30) years in prison and twelve (12) strokes of the cane. He alleges the violation of his right to a fair trial before the national 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, the Respondent State, on 29 March 2010, 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. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending and new cases filed before 22 November 2020, which

is the day on which the withdrawal took effect, being a period of one (1) year after its deposit.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that on 28 December 2000, the Applicant lured a thirteen (13) year old girl to his house and raped her. The girl reported the incident to her grandmother who further reported it to the Village Executive Officer. The Village Executive Office reported the matter to the police who arrested and then arraigned the Applicant in the District Court of Nzega. On 17 April 2001, the Applicant was convicted and sentenced to thirty (30) years in prison and twelve (12) strokes of the cane as well as a fine of Tanzanian Shillings twenty thousand (TZS 20,000) as compensation to the victim.

4. The Applicant appealed against his conviction and sentence at the High Court of Tanzania sitting at Tabora, which dismissed the appeal on 25 March 2002. He further appealed to the Court of Appeal which dismissed his appeal for lack of merit on 7 March 2005.

5. On 30 October 2015, the Applicant filed an application seeking for extension of time to file for review of the Court of Appeal's decision which was dismissed on 22 September 2017.

B. Alleged violations

6. The Applicant alleges that:

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, §§ 37-39.

i. He was charged and convicted on the basis of a defective charge sheet;
ii. His sentence to corporal punishment is a violation of Article 13 of the Tanzanian Constitution; and
iii. He was not provided with free legal assistance.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was filed on 20 October 2017 and served on the Respondent State on 23 February 2018.

8. The Parties filed the other pleadings on the merits and reparations of the Application after several extensions of time by the Court.

9. Pleadings were closed on 17 April 2023 and the Parties were notified thereof.

IV. PRAYERS OF THE PARTIES

10. The Applicant prays the Court to:

i. Grant and allow the application and order the release of the Applicant from Prison Custody; and
ii. Grant any other legal remedy that the Court may think fit and just to grant in the circumstances of the complaint.

11. With respect to jurisdiction and admissibility, the Respondent State prays the Court to find that:

i. It lacks jurisdiction to determine the case;
ii. The admissibility requirements under Rule 50(2)(e) and (f) of the Rules have not been met; and

iii. The Application should be declared inadmissible.

12. With respect to the merits of the Application, the Respondent State prays the Court to find that it did not violate Articles 2, 3(1) and (2), 5 and 7(1) of the Charter.

13. The Respondent State also prays the Application to be dismissed with costs.

V. JURISDICTION

14. The Court notes that Article 3 of the Protocol provides as follows:

> 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

15. The Court underscores the provision of Rule 49(1) of the Rules which is to the effect that, "[t]he Court shall conduct preliminarily examination of its jurisdiction…in accordance with the Charter, the Protocol and these Rules."

16. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

17. The Court observes that the Respondent State raises objections to its material and temporal jurisdiction. The Court will, therefore, consider the said objections before examining other aspects of its jurisdiction, if necessary.

A. Objection to the material jurisdiction of the Court

18. The Respondent State argues that the Court does not have jurisdiction to hear this Application as it raises issues of law and fact, which fall within the exclusive jurisdiction of its national courts. The Respondent State also contends that the Court does not have the power to quash the conviction and sentence of the Applicant which were lawfully rendered by its Court of Appeal.

19. The Respondent State submits that the quashing of a sentence and ordering of release requires the re-examination of evidence in a matter already concluded by the Court of Appeal. Citing the Court's decision in the matter of *Kennedy Owino and Others v. Tanzania*, the Respondent State argues that the Court itself has held that its role is limited to examination of the state's compliance with procedures in international instruments ratified by the State and not to re-examine issues of evidence already concluded by national courts.

20. The Applicant avers that the Court is vested with jurisdiction to hear this Application under Articles 3 and 27 of the Protocol.

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21. The Court recalls, as it has consistently held in accordance with Article 3(1) of the Protocol, that it has jurisdiction to consider any Application filed before it provided that the Applicant alleges the violation of rights guaranteed in the Charter, the Protocol or any other human rights instruments ratified by the Respondent State.[3]

[3] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45; *Kennedy Owino Onyachi and Charles John Mwanini Njoka v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, §§ 34-36; *Jibu Amir alias Mussa and Saidi Ally Mang'aya v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 629, § 18; *Abdallah Sospeter Mabomba v. United Republic of Tanzania,* ACtHPR, Application No. 017/2017, Judgment of 22 September 2022 (jurisdiction and admissibility), § 21.

22. The Court further reiterates that, while national courts are empowered to consider evidentiary issues, as recalled by the Respondent State, the Court's role is to ensure that domestic proceedings are in compliance with international standards set out in the Charter and any other human rights instruments ratified by the Respondent State.[4] Therefore, if the procedure leading to the conviction and sentencing is found to be in violation of the international standards provided for in the Charter, then, the Court is empowered to order the release of an Applicant as one of the remedies under Article 27(1) of the Protocol.

23. In the instant case, the Court notes that the Applicant alleges the violation of the right to defence and the right to a fair trial protected under the Charter to which the Respondent State is a party. Consequently, the application fulfils the material jurisdiction of the Court.

24. From the foregoing, the Court dismisses the objection and finds that it has material jurisdiction in this application.

B. Objection to temporal jurisdiction

25. The Respondent State contends that the Court lacks temporal jurisdiction in this application because the alleged violations occurred before the Respondent State ratified the Protocol and they are not continuing.

26. The Applicant avers that the Court is vested with jurisdiction to hear this application under Articles 3 and 27 of the Protocol.

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[4] *Kennedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

27. The Court underscores, in accordance with the principle of non-retroactivity, that it cannot consider allegations of human rights violations that occurred before the Respondent State's obligations were triggered unless the violations are continuing in nature.[5]

28. The Court notes that, in the present case, the alleged violations are based on the alleged denial of the right to a fair trial in the national courts, which occurred between 2000 and 2005. In this regard, the alleged violations occurred after the Respondent State had ratified the Charter but prior to the ratification of the Protocol. However, the alleged violations continued thereafter since the Applicant is still serving a sentence based on a conviction from procedures in the national courts that he considers to be unfair.[6]

29. Consequently, the Court dismisses the objection to its temporal jurisdiction and holds that it has temporal jurisdiction.

C. Other aspects of jurisdiction

30. The Court notes that there is no contention regarding its personal, or territorial jurisdiction. Nevertheless, it must satisfy itself that these aspects have been met.

31. The Court notes, with respect to its personal jurisdiction that, as earlier stated in paragraph 2 of this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited with the African Union Commission, the Declaration made under Article 34(6) of the Protocol. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.

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[5] *Igola Iguna v. United Republic of Tanzania,* ACtHPR*,* Application No. 020/2017, Judgment of 1 December 2022 (merits and reparations), § 18.

[6] *Jebra Kambole v. United Republic of Tanzania* (merits and reparations) (15 July 2020) 4 AfCLR 460, § 24; *Dismas Bunyerere v. United Republic of Tanzania*, (merits and reparations) (28 November 2019) 3 AfCLR 702, § 28(ii); *Norbert Zongo and Others v. Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 71-77.

32. The Court recalls its jurisprudence that the withdrawal of a Declaration does not apply retroactively and only takes effect one (1) year after the date of deposit of the notice of such withdrawal, in this case, on 22 November 2020. This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court finds that it has personal jurisdiction.

33. The Court also holds that it has territorial jurisdiction given that the alleged violations occurred in the Respondent State's territory.

34. In light of the foregoing, the Court holds that it has jurisdiction to hear this application.

VI. ADMISSIBILITY

35. Article 6(2) of the Protocol provides: "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter."

36. Pursuant to Rule 50(1) of the Rules, "[t]he 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."

37. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all of the following conditions:
>
> a. Indicate their authors even if the latter request anonymity;
> b. Are compatible with the Constitutive Act of the African Union and with the Charter;

c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
d. Are not based exclusively on news disseminated through the mass media;
e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union, or the provisions of the Charter.

38. In the present Application, the Respondent State raises two objections to the admissibility of the Application, that is, in relation to non-exhaustion of local remedies and the failure to file the Application within a reasonable time. The Court will, therefore, consider the said objections before examining other conditions of admissibility, if necessary.

A. Objection based on non-exhaustion of local remedies

39. The Respondent State contends that the Applicant did not raise the specific allegations that he raises before this Court at the national courts. The Respondent State argues that the Applicant should have raised the alleged violation in relation to the "the omission in the charge sheet" and to the lack of free legal assistance before the national courts. Having failed to do so, the Respondent State argues that the Applicant did not exhaust local remedies.

40. The Applicant avers that the Application is admissible in accordance with Articles 6(1), (2) and 10 of the Protocol.

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41. The Court notes pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, that, any application filed before it has to fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing states the opportunity to resolve cases of alleged human rights violations within their jurisdiction before an international human rights body is called upon to determine the state's responsibility for the same.[7]

42. In the instant case, the Court notes from the record that the Applicant having been convicted at the District Court of Nzega filed an appeal against his conviction and sentence to the High Court, which dismissed his appeal on 25 March 2002. He then appealed to the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, which on 7 March 2005, upheld the judgment of the High Court. The Court further notes that the claims raised by the Applicant herein were also raised in substance in the national courts, given that he had also challenged the procedure leading to his conviction. The Respondent State thus had the opportunity to redress the alleged violations. Consequently, the Applicant exhausted all the available domestic remedies.

43. For this reason, the Court dismisses the objection relating to the non-exhaustion of local remedies.

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

44. The Respondent State contends that the Court of Appeal delivered its judgment on 7 March 2005, while the Applicant seised the Court on 20 October 2017. In addition, the Respondent State alludes to the fact that it deposited its Declaration under Article 34(6) of the Protocol on 29 March

[7] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

2010 and therefore, the Applicant filed his case, “seven (7) years and seven (7) months” later.

45. According to the Respondent State even though the Charter does not set a time limit for seizure of the Court by Applicants, the Court has held that it would determine what is reasonable on a case-by-case basis. The Respondent State argues that the Court should not consider the present Application to have been filed within a reasonable time as the lapse of “seven (7) years and four (7) months” is unreasonable.

46. The Applicant did not reply specifically to the objection but he avers that the Application is admissible in accordance with Articles 6(1), (2) and 10 of the Protocol.

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47. The Court notes that Rule 50(2)(f) of the Rules which in substance restates the contents of Article 56(6) of the Charter, requires an application to 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 seised with the matter.”

48. The Court recalls its jurisprudence, that: “… the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis.”[8] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[9] indigence,

[8] *Norbert Zongo and Others v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92. See also *Thomas v. Tanzania* (merits), *supra*, § 73.
[9] *Thomas v. Tanzania* (merits), *supra*, § 73; *Christopher Jonas v. Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisals[10] and the use of extraordinary remedies.[11]

49. The Court observes that the reckoning of time within which to assess reasonableness in filing the Application should, ordinarily, begin from the date when the Court of Appeal rendered its judgment that is on 7 March 2005. However, in the instant case, the actual starting date for computing the time is 29 March 2010 when the Respondent State filed its Declaration because that is when individuals could seize the Court with cases against the Respondent State. Given that the application was filed on 20 October 2017, the time to be assessed is seven (7) years, six (6) months and twenty-two (22) days. The issue for determination, therefore, is whether such time is reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

50. In this respect, the Court has held that failure to file an application within a reasonable time due to indigence and incarceration must be proved and cannot be justified by blanket assertions or assumptions.[12]

51. The Court recalls that it held, in *Godfred Anthony and Another v. United Republic of Tanzania,* that a period of five (5) years and four (4) months was an unreasonable lapse of time before the filing of an application. The Court reasoned that while the applicants were incarcerated and, therefore, restricted in their movements, they had not asserted or provided any proof that they were illiterate, lay, or had no knowledge of the existence of the Court.[13]

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[10] *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v. Republic of Mali* (merits) (11 May 2018) 2 AfCLR 380, § 54.
[11] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 56; *Werema Wangoko v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 49 *Alfred Agbes Woyome v. Republic of Ghana,* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 83-86.
[12] *Abdallah Sospeter Mabomba v. United Republic of Tanzania,* ACtHPR, Application No. 017/2017, Ruling of 22 September 2022 (ruling) § 51.
[13] *Godfred Anthony and Ifunda Kisite v. United Republic of Tanzania* (26 September 2019) (admissibility) 3 AfCLR 470, § 48.

52. In the instant case, the Applicant did not make any submissions as regards his filing of the application within a reasonable time. Conversely, the Respondent State submits that the Applicant did not seize the Court within a reasonable time.

53. The Court observes that while it emerges from the record that the Applicant was incarcerated, there is no proof that his incarceration constituted an impediment to the timely filing of the Application. As such, the Applicant has not justified as to why it took him seven (7) years, six (6) months and twenty-two (22) days to file the Application.

54. Furthermore, the Court notes, from the record, that the Court of Appeal decided the Applicant's appeal on 7 March 2005 and he filed an application for extension of time to file his application for review on 7 September 2015, which is ten (10) years after his appeal had been dismissed by the same court. The Court notes that the Applicant has not given any reasons as to why he could not have seised the Court between 2010 and September 2015, before he filed an application for review. This period of time has not been accounted for.

55. While the Court should not penalise Applicants for attempting to use the review procedure, such an attempt should be done in accordance with the requirements of domestic law to justify the delay in seising of the Court. In this regard, the Rules of the Court of Appeal provide that an application for review of its judgment should be filed within sixty (60) days of the order sought to be reviewed.[14] The Court notes that the Court of Appeal found that the Applicant had not adduced any cogent reasons as to why it took him ten (10) years to file an application for extension of time to file for review of its judgment. Consequently, the Applicant cannot rely on his own inordinate delay in the national courts to justify the delay in seizing this Court.

[14] Rule 66(3) of the Tanzania Court of Appeal Rules 2009.

56. In light of the foregoing, the Court finds that the Applicant has not justified why it took him seven (7) years, six (6) months and twenty-two (22) days to file the application. Therefore, the Court finds that the application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

C. Other conditions of admissibility

57. The Court having found that the application does not satisfy Rule 50(2)(f) of the Rules, does not need to rule on the admissibility requirements set out in Article 56(1), (2), (3), (4) and (7) of the Charter reflected in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules,[15] as the admissibility requirements are cumulative.[16]

58. In view of the foregoing, the Court declares the Application inadmissible and dismisses it.

VII. COSTS

59. The Respondent State prays the Court to order the Applicant to bear the costs of the application. The Applicant did not make any submissions on costs.

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60. 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.”

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

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[15] *Ibid*.

[16] *Mariam Kouma and Ousmane Diabaté v. Republic of Mali* (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 237, § 63; *Rutabingwa Chrysanthe v. Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 361, § 48; *Collectif des Anciens Travailleurs du Laboratoire ALS v. Republic of Mali* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 73, § 39.

VIII. OPERATIVE PART

62. For these reasons,

THE COURT,

On jurisdiction

Unanimously,

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

On admissibility

Unanimously,

iii. *Dismisses* the objection based on non-exhaustion of local remedies;

By a majority of nine (9) for, and one (1) against, Justice Chafika BENSOULA having issued a declaration,

iv. *Upholds* the objection that the application was not filed within a reasonable time;
v. *Declares* that the application is inadmissible.

On costs

vi. *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.

Pursuant to Article 28(7) of the Protocol and Rule 70(1) of the Rules, the Declaration of Justice Chafika BENSAOULA is appended to this Judgment.

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.