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

AMOS KABOTA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 032/2017

JUDGMENT

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

Amos KABOTA

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. Mr Hangi M. CHANG'A, Assistant Director, Constitution, Human Rights and Election petitions; Office of the Solicitor General; and
v. Jacqueline KINYASI, State Attorney, Office of the Solicitor General.

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

After deliberation,

Renders the following Judgment:

I. THE PARTIES

1. Amos Kabota (hereinafter referred to as "the Applicant"), is a Tanzanian national, 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 thirty (30) years imprisonment. 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 held that this withdrawal has no bearing on pending and new cases filed before the withdrawal came into effect, that is, one (1) year after its deposit, which is on 22 November 2020.[2]

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

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that on 5 May 2009, the Applicant sent a twelve (12) year old girl to a shop to buy him a match box. Upon her return,he lured her to his room and raped her. The girl reported the incident to her mother who further reported the matter to the police. The Applicant was arrested and charged with rape before the District Court of Nzega. On 26 May 2009, the Applicant was convicted and sentenced to a term of thirty (30) years in prison and one (1) stroke of the cane.

4. On 1 June 2009, the Applicant appealed against his conviction and sentence at the High Court of Tanzania sitting at Tabora, which dismissed the appeal through a judgment dated 9 August 2011. He further appealed to the Court of Appeal, but his appeal was dismissed in its entirety on 10 March 2014.

B. Alleged violations

5. The Applicant alleges the violation of his right to a fair trial, in that:

    i. He was convicted on the basis of a defective charge sheet; and
    ii. He was also convicted on the basis of unreliable evidence

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The application was filed on 2 October 2017. On 8 May 2018, the Applicant filed the record of the proceedings of the national courts after being requested to do so on 22 February 2018.

7. The application was served on the Respondent State on 5 September 2018. The Respondent State filed its response on 21 March 2019 which was served on the Applicant on 25 March 2019.

8. The Parties filed all their other pleadings after several extensions of time was granted by the Court.

9. Pleadings were closed on 18 April 2023 and the parties were notified thereof.

IV. PRAYERS OF THE PARTIES

10. The Applicant prays the Court to:

    i. Find a violation of his rights, quash his conviction and sentence and order his release from prison;
    ii. Grant him reparations to the tune of Tanzanian Shillings two hundred and eighty-eight million (TZS 288,000,000); and
    iii. Grant any other remedy that the Court deems fit.

11. The Respondent State, with respect to jurisdiction and admissibility, prays the following:

    i. That, the African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate the present application;
    ii. That, the application has not met the admissibility requirements provided by Article 56(6) of the Charter, Article 6(2) of the Protocol and Rule 40(6) of the Rules of Court;
    iii. That, the application be declared inadmissible;
    iv. That, the application be dismissed with costs.

12. The Respondent State with respect to the merits of the application, prays the Court to find:

i. That, the Respondent has not violated the Applicant's rights as guaranteed under Article 2 of the Charter;
ii. That, the Respondent has not violated any of the Applicant's rights guaranteed in the Charter.

V. JURISDICTION

13. 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.

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

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

16. The Respondent State raises an objection to the material jurisdiction of the Court. The Court will, therefore, consider the said objection before examining other aspects of its jurisdiction, if necessary.

A. Objection to the material jurisdiction of the Court

17. The Respondent State contends that the Court is not vested with jurisdiction to determine the present application as it is not a criminal appellate court.

18. Citing the matter of *Peter Joseph Chacha v. Tanzania*, the Applicant avers that the Court has jurisdiction to consider this application as it raises alleged violations of the Charter.

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19. 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 latter alleges the violation of rights guaranteed in the Charter, the Protocol or any other human rights instruments ratified by the Respondent State.[3]

20. The Court further reiterates that, while it does not exercise appellate jurisdiction, criminal or otherwise with respect to decisions of domestic courts, it is empowered by the provisions of Article 3(1) of the Protocol to assess whether 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] In the instant case, the Applicant alleges the violation of the right to a fair trial protected under the Charter to which the Respondent State is a party.

21. Given the foregoing, the Court dismisses this objection to its material jurisdiction and holds that it has material jurisdiction to hear the application.

[3] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 45; *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65, § 34-36; *Jibu Amir alias Mussa and Another 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.

[4] *Kenedy Ivan v. United Republic of Tanzania* (merits) (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.

B. Other aspects of jurisdiction

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

23. 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.

24. 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.[5] 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.

25. With regard to temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a party to the Charter and the Protocol and, had deposited the Declaration required under Article 34(6) of the Protocol. It therefore finds that its temporal jurisdiction has been satisfied.

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

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

[5] *Cheusi v. Tanzania* (merits), *supra,* §§ 37-39.

VI. ADMISSIBILITY

28. Article 6(2) of the Protocol provides that: “the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.”

29. 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.”

30. 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 the African Union, or the provisions of the Charter.

31. The Respondent State raises an objection to the admissibility of the application alleging that it was not filed within a reasonable time. The Court will, therefore, consider the said objection before examining other conditions of admissibility, if necessary.

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

32. According to the Respondent State, the application was not filed within a reasonable time and should, therefore, be declared inadmissible as it does not comply with Rule 40(6) of the Rules[6] and Article 56(6) of the Charter.

33. Citing the case of *Reverend Christopher Mtikila v. Tanzania*, the Applicant avers that there is no set time limit when applications should be filed before the Court. He further argues that, he only found out about the Court in 2017, when Abdallah Sospeter Mabomba filed his case before the Court. He, therefore, avers that given his incarceration and previous lack of knowledge of the Court, the Court should find that he filed his application within a reasonable time.

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34. 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 after exhaustion of local remedies 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.

35. As the Court has previously held "… 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."[7] Some of the circumstances that

[6] Rules of Court, 2 June 2010.
[7] *Norbert Zongo and Others v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92. See also *Thomas v. Tanzania* (merits), *supra*, § 73.

the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance, indigence and illiteracy.[8]

36. In the instant application, the Court observes that the judgment of the Court of Appeal was delivered on 10 March 2014 and the Applicant filed this application on 2 October 2017. The Court notes, in the circumstances, that three (3) years, six (6) months and twenty-three (23) days elapsed between the date of the Court of Appeal's decisions and the filing of this application. The issue for determination, therefore, is whether the period that the Applicant took to file the application before the Court is reasonable.

37. The Court recalls its jurisprudence where it held that the period of five (5) years and one (1) month was reasonable since the Applicants were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not benefit from the assistance of a lawyer in their trials at the domestic court, and were illiterate.[9]

38. In the present case, the Applicant is incarcerated, restricted in his movements and with limited access to information. Taking into consideration these circumstances, the Court finds the period of three (3) years, six (6) months and twenty-three (23) days to be reasonable.

39. For this reason, the Court dismisses the objection relating to the failure to file the application within a reasonable time and finds that the application complies with Rule 50(2)(f) of the Rules.

[8] *Thomas v. Tanzania* (merits), *supra*, § 73; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54 and *Amiri Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[9] *Jonas v. Tanzania* (merits), *supra*, § 54; *Ramadhani v. Tanzania* (merits), *supra*, § 50.

B. Other conditions of admissibility

40. The Court notes that there is no contention regarding the conditions set out in Rule 50(2)(a), (b), (c), (d), (e) and (g) of the Rules. Nevertheless, it must satisfy itself that these conditions have been met.

41. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

42. The Court further 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. Nothing on file indicates that the application is incompatible with the Constitutive Act. Therefore, the Court holds that the requirement of Rule 50(2)(b) of the Rules is met.

43. The language used in the application is not disparaging or insulting to the Respondent State and its institutions or to the African Union in fulfilment of Rule 50(2)(c) of the Rules.

44. The application is not based exclusively on news disseminated through mass media as it is founded on record of the proceedings of the domestic courts in fulfilment with Rule 50(2)(d) of the Rules.

45. With regard to Rule 50(2)(e) of the Rules, the Court notes that it requires that Applicants must exhaust local remedies before seizing the Court.

46. 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 9 August 2011. He then appealed to the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, which on 10 March 2014, upheld the judgment of the High Court.

47. 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 and sentence. The Respondent State thus had ample opportunity to redress the alleged violations. Consequently, the Applicant has exhausted all the available domestic remedies and thus, the application complies with Rule 50(2)(e) of the Rules.

48. Furthermore, the 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, the provisions of the Charter or of any legal instrument of the African Union in accordance with Rule 50(2)(g) of the Rules.

49. The Court, therefore, finds that all the admissibility conditions have been fulfilled and that the application is admissible.

VII. MERITS

50. The Applicant alleges violations of the Charter in relation to the following issues, that:

    i. He was convicted on the basis of a defective charge sheet; and
    ii. His conviction was based on unreliable evidence.

A. Alleged violation based on a defective charge sheet

51. The Applicant alleges that he did not understand the nature of the offence that he was charged with. He avers that he was charged with rape under Section 130 and 131 of the Penal Code 2002 but that the charge sheet did not specify the category of rape that he was charged with.

52. Citing the Tanzanian case of *Oswald Manugula v. Republic*, the Applicant avers that he was not charged with an offence recognised at law because of lack of specification in the charge sheet.

53. The Respondent State argues that the Applicant was charged with rape at the District Court and should, therefore, have raised the defective nature of the charge sheet on appeal to the High Court and Court of Appeal.

54. Furthermore, the Respondent State argues that since this Court is not a court of appeal for criminal matters, the Applicant is proscribed from raising the issue of the charge sheet before this Court.

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55. Article 7(1) of the Charter provides that "(e)very individual shall have the right to have his cause heard …"

56. In its jurisprudence, the Court has interpreted Article 7(1) of the Charter[10] in light of the provisions of Article 14 (1) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR")[11] which provides that:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to *a fair* and public hearing by a competent, independent and impartial tribunal established by law ...".

57. In the instant case, the record before this Court shows that the Court of Appeal found that the initial charge sheet was defective as the Applicant was charged with rape rather than statutory rape defined as rape of a girl

[10] See *Jonas v. Tanzania* (merits), *supra*, § 64.
[11] The Respondent State ratified the ICCPR on 11 June 1976.

who is under the age of eighteen (18) years.[12] The Court of Appeal however indicated that the District Court had subsequently corrected the error by charging the Applicant with the correct charge and, therefore, the Applicant was convicted under the right charge.

58. Consequently, the Court finds that the conduct of the Applicant's trial does not disclose any manifest error or miscarriage of justice to the Applicant. The Court, therefore, dismisses the Applicant's allegation on this point.

B. Allegation related to the evidence of the complainant

59. The Applicant argues that the evidence of the complainant was wrongfully taken on oath and relied upon, since the victim was twelve (12) years old and she was not asked whether she understood the nature of an oath.

60. The Respondent State contends that the District Court conducted the *voir dire* proceedings[13] as required by Section 127(2) and (3) of the Evidence Act 2002 and found that the complainant was able to distinguish between truth and lies. The Respondent State avers that although the appellate courts were not convinced that the *voir dire* proceedings were properly undertaken, they found that the other evidence adduced was sufficient to convict the Applicant.

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61. Article 7(1) of the Charter provides that "(e)very individual shall have the right to have his cause heard …"

62. This Court has in the past noted "… that a fair trial requires that the imposition of a sentence in a criminal offence, and in particular a heavy prison sentence, should be based on strong and credible evidence. That is

[12] Section 130(2) of the Penal Code (2002).
[13] This is a procedure conducted by a court where it assesses whether a child of tender years is capable of comprehending the nature and obligation an oath.

the purport of the right to presumption of innocence, which is also enshrined in Article 7 of the Charter."[14]

63. The Court further recalls:[15]

> [a]s regards, in particular, the evidence relied on in convicting the Applicant, the Court holds that it was indeed not incumbent on it to decide on their [probative] value for the purposes of reviewing the said conviction. It is however of the opinion that nothing prevents it from examining such evidence as part of the evidence laid before it so as to ascertain in general, whether consideration of the said evidence by the national Judge was in conformity with the requirements of fair trial within the meaning of Article 7 of the Charter in particular.

64. In the instant case, the Applicant challenges the conduct of the *voir dire* proceedings. The record shows that the Court of Appeal found that the *voir dire* proceedings did not establish that the victim understood the meaning of the oath and the duty to speak the truth, therefore, such evidence would be treated as unsworn evidence and would require corroboration. To this end, the Court of Appeal held that the unsworn evidence of the complainant was corroborated with the evidence of the victim's mother, to whom she reported the incident and who testified that she was crying while holding her underwear after the rape incident. Furthermore, that Prosecution Witness 3 – father of the complainant and Prosecution Witness 4 – the Village Chairman testified that the Applicant had confessed to the crime and asked for forgiveness. The Court of Appeal thus found that the Applicant was convicted on the basis of proof beyond a reasonable doubt.

65. In light of the foregoing, the Court finds that the assessment of evidence leading to the Applicant's conviction does not disclose any manifest error or miscarriage of justice. The Court, therefore, dismisses this allegation.

[14] *Abubakari v. Tanzania* (merits), *supra*, § 174; *Diocles Williams v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 426, § 72; *Majid Goa v. United Republic of Tanzania* (merits and reparations) (2019) 3 AfCLR 498, § 72.
[15] *Abubakari v. Tanzania* (merits), *supra*, § 26.

VIII. REPARATIONS

66. The Applicant prays the Court to order the Respondent State to quash his conviction and sentence; order his release, grant him reparations to the tune of Tanzanian Shillings Two Hundred and Eighty-eight Million (TZS 288,000,000); and grant any other remedy that it deems fit.

67. The Respondent State prays the Court to dismiss the Applicant's prayer for reparations.

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68. 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.

69. In the instant case, given that no violation has been found, the consideration of the prayer for reparation is no longer warranted. The Court, therefore, dismisses the Applicant's prayer for reparations.

IX. COSTS

70. The Respondent State prays the Court to order the Applicant to bear the costs of the application. The Applicant did not make a prayer on costs.

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71. 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."

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

X. OPERATIVE PART

73. For these reasons,

THE COURT,

Unanimously,

On jurisdiction

i. *Dismisses* the objection to its material 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 the right to defence protected under Article 7(1) of the Charter in relation to the legality of the charge sheet;
vi. *Finds* that the Respondent State has not violated the right to a fair trial protected under Article 7(1) of the Charter in relation to the evidence relied upon to convict the Applicant.

On reparations

vii. *Dismisses* the prayer for reparations.

On costs

viii. *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.