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:
CHACHA WAMBURA AND MANG'AZI MKAMA

V.

UNITED REPUBLIC OF TANZANIA
CONSOLIDATED APPLICATIONS Nos. 011/2016 AND 012/2016

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.

ln the Matters of:

Chacha WAMBURA

Self-represented

And

Mang'azi MKAMA

Self-represented

v.

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Mr. Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General; and
ii. Ms. Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General.

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

After deliberations,

Renders this Judgment:

I. THE PARTIES

1. Mr. Chacha Wambura and Mr. Mang'azi Mkama (jointly referred to as "the Applicants" or individually as "the First Applicant" and "the Second Applicant") are Tanzanian nationals who were sentenced to thirty (30) years in prison after being found guilty of armed robbery and causing grievous harm to others. The Applicants claim that their fair trial rights were violated during their trial and appeals in the 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 the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases 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 effect on pending and new cases filed before the entry into force of the said withdrawal one (1) year after its deposit which, in the present case, is on 22 November 2020.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

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

3. It emerges from the record that the Applicants were accused of forcibly entering the residence of Ms. Nchagwa Mwita on 29 March 2005. In the process, they allegedly inflicted bodily injury to Ms. Mwita and her grandson and took her money. Subsequently, the Applicants were jointly charged with the offences of armed robbery and causing grievous harm contrary to Sections 285 and 286, and Section 225 of the Respondent State's Penal Code in the District Court of Musoma at Musoma.

4. On 21 February 2006, the District Court found the Applicants guilty on both counts of armed robbery and causing grievous bodily harm, and subsequently sentenced them as follows: on the first count of armed robbery, they were given a thirty (30)-year jail term, ordered to receive twelve (12) strokes of the cane, and to compensate the victim for injuries sustained in the amount of One Hundred Thousand Tanzanian Shillings (TZS 100,000) and to refund the robbed amount of Six Hundred Thousand Tanzanian Shillings (TZS 600,000). In the second count, the Court sentenced the Applicants to five (5) years' imprisonment, twelve (12) strokes of the cane, and ordered them to pay Two Hundred Thousand Tanzanian Shillings (TZS 200,000) in compensation, with each Applicant paying One Hundred Thousand Tanzanian Shillings (TZS 100,000). The sentences imposed with respect to both counts were to run concurrently.

5. Dissatisfied with the decision of the District Court, the Applicants appealed to the High Court of Tanzania at Mwanza and subsequently, to the Court of Appeal of Tanzania. Both Courts upheld the Applicants' conviction and sentences, and dismissed the appeals on 10 November 2010 and 29 July 2013, respectively.

6. The Second Applicant claims that he lodged an application for review with the Court of Appeal on 19 April 2013, but his application was not heard, while similar applications that had been filed after his were heard.

B. Alleged violations

7. The First Applicant, Chacha Wambura, alleges that the Respondent State violated his right to a fair trial guaranteed under Article 7(1)(2) of the Charter and Article 13(6)(c) of the 1977 Tanzanian Constitution.

8. The Second Applicant, Mang'azi Mkama, alleges that the Respondent State violated his rights to non-discrimination guaranteed under Article 2 of the Charter as well as the right to legal assistance and the right to be tried within a reasonable time, protected by Article 7(1)(c) and (d) the Charter and Article 13(6)(c) of the Tanzanian Constitution.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

9. The Applicants filed their separate Applications on 26 February 2016 and both Applications were served on the Respondent State on 21 March 2016.

10. On 31 January 2017 and 12 April 2017, following several extensions of time, the Respondent State filed its Responses to the first and second Applications, respectively.

11. The First and Second Applicants filed their Replies to the Respondent States' Responses on 28 March 2017 and 31 May 2017, respectively.

12. Pleadings were closed in the two Applications on 12 June 2019 and 13 June 2019, and the Parties were duly notified.

13. On 21 June 2023, the Court, on its own motion, issued an order for joinder of the two Applications and the Order was notified to the Parties on 26 June 2023.

IV. PRAYERS OF THE PARTIES

14. The First Applicant prays the Court to find that:

    i. It is vested with jurisdiction to adjudicate on his Application;
    ii. The Application meets the admissibility requirements stipulated under Rule 40(5) of the Rules and is thus admissible;
    iii. The Respondent State violated his right to have his cause heard as stipulated under Article 7(1) of the Charter;
    iv. The Respondent State violated his rights stipulated under Article 7(2) of the Charter;
    v. The Respondent State violated his right under Article 13(6)(c) of the Tanzanian Constitution of 1977; and
    vi. His conviction was based on the weakest evidence which was not admissible, credible, plausible, convincing [enough] as not to leave any room for reasonable doubt.

15. The First Applicant also prays the Court to order the Respondent State to bear the costs.

16. On the other hand, the Second Applicant prays that the Court to find that

    i. The Respondent State violated his rights under Article 7 (1) of the Charter by failing to hear his application for review at the Court of Appeal;
    ii. The Respondent State violated his right to free legal assistance during the domestic proceedings that led to his conviction and sentence, contrary to Articles 2 and 7(1)(d) of the Charter; and
    iii. Grant him reparations pursuant to Article 27 of the Protocol.

17. Furthermore, both the First and the Second Applicants pray the Court “to restore justice where it is overlooked and quash both the conviction and sentence and set him at liberty”.

18. With Respect to the First Applicant, the Respondent State prays the Court to find that:

i. The Court is not vested with jurisdiction to adjudicate over the Application;
ii. The Application does not meet the admissibility requirement stipulated under Rule 40(5) of the Rules of Court so that it should be declared inadmissible and duly dismissed;
iii. It did not violate the Applicant's rights stipulated under Article 13(6)(c) of the 1977 Constitution of the United Republic of Tanzania;
iv. It did not violate the Applicant's right to have his cause heard as stipulated under Article 7(1) of the Charter;
v. It did not violate the Applicant's rights stipulated under Article 7(2) of the Charter;
vi. The Applicant's conviction was based on credible and watertight evidence;
vii. The Application lacks merit and must thus be dismissed; and
viii. That the costs of this Application be borne by the Applicant.

19. With respect to the Second Applicant, the Respondent State prays the Court to find that:

i. The Court is not vested with jurisdiction to adjudicate over this Application;
ii. The Application does not meet the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;
iii. The Application does not meet the admissibility requirements stipulated under Rule 40(6) of the Rules of Court; and
iv. The Application be declared inadmissible and duly dismissed.

20. The Respondent State further prays the Court to find that:
i. It did not violate the Applicant's rights provided under Article 7(1)(c) of the Charter;
ii. It did not breach the Applicant's right to be represented;
iii. The Government of the United Republic of Tanzania did not delay determination of the Applicant's Application for review;
iv. It did not violate the Applicant's right to defend himself;

v. The conviction of the Applicant was based on credible and watertight evidence;
vi. The Prosecution in original Criminal Cases No. 155 of 2005 and the Criminal Appeals No. 138 of 2008 and 125 of 2011 were conducted in accordance with the governing laws;
vii. The Application be dismissed in its entirety for lack of merit;
viii. No reparation be awarded in favour of the Applicant;
ix. The Applicant's prayers be dismissed; and
x. The costs of this Application be borne by the Applicant.

V. JURISDICTION

21. Pursuant to Article 3 of the Protocol:

> 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 instruments ratified by the States concerned.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

22. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

23. On the basis of the above-cited provisions, the Court must ascertain its jurisdiction and dispose of objections thereto, if any.

24. The Respondent State raises an objection to the Court's material jurisdiction with respect to both the first and second Applications. The Court will consider the said objection before examining other aspects of its jurisdiction, if necessary.

A. Objections to material jurisdiction

25. The Respondent State argues that the Court's jurisdiction emanates from Article 3(1) of the Protocol and Rule 26 of the Rules of Court, which state that "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." It asserts that while the Protocol and Rules of the Court grant the Court jurisdiction, it is not an unlimited jurisdiction. The Court can only be approached for matters that have already been decided upon by domestic courts and cannot be seized for any other reason.

26. The Respondent State asserts that, in the instant Applications, however, the Applicants request the Court to sit as a court of first instance on matters that were not raised at the domestic level and as an appellate court on issues which have been determined with finality by its highest Court. In this regard, the Respondent State contends that the Second Applicant's allegations that he was not afforded legal assistance during trial and that his right to defence was violated were never raised by the Applicant and heard by its national courts. Accordingly, it submits that the Court lacks jurisdiction to hear the Applications.

27. The Applicants dispute the Respondent State's submissions and assert that the Court has jurisdiction to consider and determine their Applications pursuant to Article 3 of the Protocol and Rule 26 of the Rules. The First Applicant specifically argues that the Court exercises its jurisdiction over an application as long as the complaints relate to the principles of human and peoples' rights and freedoms contained in the Charter.

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28. The Court recalls that by virtue of 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.[3]

29. The Court recalls that, in accordance with its established case-law, it is competent to examine relevant proceedings before domestic courts to determine whether they comply with the standards set out in the Charter or any other instrument ratified by the State concerned.[4] Consequently, the Respondent State's objection that the Court would be sitting as a court of first instance is dismissed**.**

30. The Court further recalls its established jurisprudence "that it is not an appellate body with respect to decisions of national courts."[5] However, "... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are compatible with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[6] Therefore, it would not be sitting as an appellate court if it were to examine the allegations by the Applicants. Accordingly, the Respondent State's objection in this regard is also dismissed.

31. In view of the foregoing, the Court finds that it has material jurisdiction to consider the present Applications.

B. Other Aspects of Jurisdiction

32. The Court notes that the Respondent State does not challenge its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of

[3] *Kalebi Elisamehe v. Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 265, § 18.
[4] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190, § 14; *Kennedy Ivan v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 26; *Armand Guehi v. 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.
[5] *Ernest Francis Mtingwi v. Malawi* (jurisdiction), § 14.
[6] *Ivan v. Tanzania* (merits), § 26*; Armand Guehi v. Tanzania* (merits and reparations*), § 33; Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. Tanzania* (merits), *supra,* § 35.

the Rules,[7] the Court must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding to consider the Application.

33. With regard to personal jurisdiction, the Court recalls, as indicated in paragraph 2 of this judgment that, on 21 November 2020, the Respondent State deposited the instrument of withdrawal of its Declaration under Article 34(6) of the Protocol. The Court has held that such withdrawal does not apply retroactively. Hence, it has no effect on pending and new cases filed before the entry into force of the said withdrawal one (1) year after its deposit which, in the present case, is on 22 November 2020.[8]

34. The instant Applications having being filed before the Respondent State deposited its notice of withdrawal of the Declaration, are thus not affected by the said withdrawal. Therefore, the Court concludes that it has personal jurisdiction.

35. The Court has temporal jurisdiction insofar as the alleged violations contained in the Applications were committed after the Respondent State became a party to the Charter and the Protocol. Additionally, the alleged violations are of a continuing nature, as the Applicants are currently serving their sentences in prison, which they maintain were unfairly imposed and thus constitute a violation of their right to a fair trial.[9]

36. The Court has territorial jurisdiction given that all the alleged violations occurred within the Respondent State's territory.

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

[7] Rule 39(1) of Rules of Court, 2 June 2010.
[8] *Cheusi v. Tanzania* (merits and reparations), *supra,* §§ 35-39. See also *Ingabire Victoire Umuhoza v. Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.
[9] *Beneficiaries of late Norbert Zongo and Others v. Burkina Faso* (jurisdiction) (21 June 2013) 1 AfCLR 197, §§ 71-77.

VI. ADMISSIBILITY

38. 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.”

39. 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.”

40. The Court notes that Rule 50(2) of the Rules, which in substance restates the content 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 though the latter requests anonymity;
> b. are compatible with the Constitutive Act of the African Union and 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.

41. The Respondent State raises objections to the admissibility of both Applications on the basis of failure to exhaust local remedies and, specifically with respect to the second Application, on the basis that his Application was not filed within a reasonable time. The Court will consider these objections before examining other admissibility requirements, if necessary.

A. Objection based on non-exhaustion of local remedies

42. The Respondent State contends that the Applicants had legal remedies available to them within its jurisdiction which they could have pursued prior to filing their Applications before this Court. In this vein, it asserts that instead of prematurely lodging applications in the Court, the Applicants could have instituted a constitutional petition for enforcement of their basic rights under the Basic Rights and Duties Enforcement Act before its High Court if they were aggrieved by the decision of any of its domestic courts. The Respondent State emphasises that this could have been done after their conviction and sentence or during the proceedings at the District Court.

43. The Respondent State further submits that the Second Applicant's allegation that his right to legal assistance was violated is being raised before this Court for the first time. According to the Respondent State, the Applicant had the opportunity of raising this claim at the domestic level, including by requesting for legal aid or defence Counsel in accordance with Section 310 of its Criminal Procedure Act (hereinafter referred to as "the CPA"). The Respondent State contends that the Applicant failed to do so prior to seizing the Court. the Court should thus dismiss his Application for non-exhaustion of local remedies.

44. The Applicants contend that their Applications are consistent with all the admissibility requirements specified in Rule 50(2) of the Rules. On the issue of exhaustion of local remedies, the Applicants aver that their respective Applications meet this requirement as they seized the Court after their

criminal appeal was dismissed by the Court of Appeal, the highest and final appellate court of the Respondent State.

45. In his Reply to the Respondent State's Response, the Second Applicant argues that the Respondent State's assertion that he could have initiated a constitutional petition for enforcement of his basic rights, such as the right to legal aid, is untenable. He contends that it was the fundamental responsibility of the Magistrate or Judge to inform him of his rights at every stage of the proceedings. In his case, however, neither the Magistrate nor the Judge fulfilled this obligation. Furthermore, the Second Applicant asserts that although the Respondent State has a legal aid scheme in place, its operation falls within the exclusive mandate and discretion of the Certifying Authority to grant or deny, thus leaving him with no say in the matter.

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46. The Court notes that pursuant to Rule 50(2)(e) of the Rules, any application filed before it must fulfil the requirement of exhaustion of local remedies unless local remedies are unavailable, ineffective, or the domestic procedure to pursue them is unduly prolonged.[10] This requirement seeks to ensure that, as the primary stakeholders, States have the opportunity to address human rights violations occurring within their jurisdiction before an international body is called upon to intervene. It reinforces the subsidiary role of international human rights bodies in the protection of human and peoples' rights. In its established jurisprudence, the Court has also consistently affirmed that in order for this admissibility requirement to be met, the remedies that should be exhausted must be ordinary judicial remedies.[11]

[10] *Thomas v. Tanzania* (merits), *supra*, § 64; *Kennedy Owino Onyachi and Charles Mwanini Njoka v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 56; *Werema Wangoko Werema and Wasiri Wangoko Werema v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 40.
[11] *Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 308, § 95.

47. In the instant case, the Court notes from the record that the Court of Appeal, the highest court in the Respondent State, dismissed the Applicants' appeal on 29 July 2013. Although the Second Applicant claimed to have lodged an application for review of this decision, the procedure by which the Court of Appeal upheld their conviction and sentence is the final ordinary judicial remedy that was available to the Applicants in the Respondent State. In this connection, the Court has previously held that the review procedure at the Court of Appeal constitutes an extraordinary remedy, which an applicant is not required to pursue before seizing the Court.[12]

48. Similarly, concerning the filing of a constitutional petition procedure at the High Court, the Court has consistently held that this remedy in the Respondent State's judicial system is also an extraordinary remedy that Applicants are not required to exhaust prior to bringing their matters before this Court.[13]

49. With regard to the Respondent State's contention that the Second Applicant did not raise the issue of legal aid during domestic proceedings, the Court is of the view that this alleged violation occurred in the course of the domestic judicial proceedings that led to the Applicants conviction and sentence to thirty (30) years' imprisonment. The allegation forms part of the "bundle of rights and guarantees" relating to the right to a fair trial which was the basis of the Applicant's appeals.[14] The domestic judicial authorities thus had ample opportunity to address the allegation even without the Applicant having raised it explicitly. It would, therefore, be unreasonable to require the Applicants to file a new application before the domestic courts to seek redress for this claim.[15]

[12] *Thomas v. Tanzania* (merits), *supra*, § 64; *Onyachi and Njoka v. Tanzania* (merits), *supra*, § 56; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44.
[13] *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 72; *Onyachi and Njoka v. Tanzania* (merits), *supra*, § 56.
[14] *Thomas v. Tanzania* (merits), *supra*, § 60; *Onyachi and Njoka v. Tanzania*, § 68.
[15] *Thomas v. Tanzania* (merits), *supra*, §§ 60-65.

50. Accordingly, the Court finds that the Applicants exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules.

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

51. With respect to the second Application, the Respondent State contends that that the Application is time-barred. It elaborates that the judgment of the Court of Appeal was rendered on 29 July 2013 whereas the Application was lodged in this Court on 26 May 2016, which is two (2) years and six (6) months after the judgment of the Court of Appeal was delivered.

52. The Respondent State concedes that Rule 50(2)(f) of the Rules does not prescribe, define or quantify a specific period for reasonable time. However, it asserts that the reasonable period indicated in the Charter for filing applications after exhaustion of local remedies should be set at six (6) months in line with international human rights jurisprudence.

53. In the present case, the Respondent State avers that the Applicant does not indicate any impediments which prevented him from lodging the Application within six (6) months. In support of its contention, the Respondent State cites the decision of the African Commission on Human and Peoples' Rights in *Michael Majuru v. Zimbabwe (Communication 308/05)*, which set reasonable time at six (6) months. The Respondent State concludes that the delay in filing the Application for more than two (2) years after the delivery of the Court of Appeal's judgment cannot be considered as a reasonable time.

54. Both the first and second Applicants contend that the objection is unfounded and assert that the period between the judgment of the Court of Appeal and when the Applications were filed is a reasonable time.

55. The Applicants maintain that their Applications fulfil all the admissibility requirements outlined in Rule 50(2)(f) of the Rules. The Second Applicant also explains that his delay in filing his Application was due to his attempt to pursue the review procedure at the Court of Appeal. However, he claims that this process did not materialize as he was not summoned until he opted to file his Application before this Court.

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56. The Court notes that pursuant to Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, in order to be admissible, all applications must be filed within a reasonable time.

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

58. In its caselaw, the Court has held 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."[16] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[17] indigence, illiteracy, lack of awareness of the existence of the Court,[18] intimidation and

[16] *Norbert Zongo and Others v. Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also *Thomas v. Tanzania* (merits), *supra*, § 73.
[17] *Thomas v. Tanzania* (merits), *supra*, § 73; *Jonas v. Tanzania* (merits), *supra*, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[18] *Ramadhani v. Tanzania* (merits), *supra*, § 50; *Jonas v. Tanzania* (merits), *supra*, § 54.

fear of reprisal[19] and the use of extra-ordinary remedies.[20] Nevertheless, these circumstances must be proven.

59. In the instant case, the Applicants exhausted local remedies on 29 July 2013 when the Court of Appeal dismissed their appeal against their conviction and sentence. The Applicants subsequently filed their separate Applications on 26 February 2016, which means they approached the Court after a period of two (2) years, six (6) months, and twenty-eight (28) days had elapsed from the date of exhaustion of local remedies. Thus, the issue at hand is whether this time frame is reasonable in the context of Article 56(6) of the Charter, as read together with Rule 50(2)(f) of the Rules.

60. In line with the case-by-case approach**,** the Court has previously held that five (5) years, one (1) month and twelve (12) days,[21] five (5) years, one (1) month and thirteen (13) days[22] four (4) years, nine (9) months and twenty-three (23) days,[23] four (4) years, eight (8) months and thirty (30) days,[24] was a reasonable time in respect of applications filed by lay, indigent and incarcerated applicants.

61. The Applicants in the instant case are in a comparable situation to the applicants in the foregoing cases. It is clear from the record that they are lay and incarcerated and, therefore, with limited access to information and were self-represented when filing their Application. The Court also notes that the Applicants did not have legal representation at the domestic level, and thus may have been unsure of the next course of action to take after the Court of Appeal had dismissed their joint appeal. Furthermore, the Second

[19] *Association Pour le Progrès et la Defense 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.
[20] *Guehi v. Tanzania* (merits and reparations), *supra*, § 56; *Werema and Werema v. Tanzania* (merits), *supra*, § 49; *Alfred Agbessi Woyome v. Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 83-86.
[21] *Jonas v. Tanzania* (merits), *supra*, § 55.
[22] *Ramadhani v. Tanzania* (merits), *supra,* § 49.
[23] *Cheusi v. Tanzania* (merits and reparations), *supra*, § 71.
[24] *Thobias Mangara Mango and Shukurani Masegenya Mangov. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 55.

Applicant claims, albeit without substantiation, that he was pursuing the review procedure at the Court of Appeal.

62. In view of the foregoing, the Court finds that a delay of two (2) years, six (6) months, and twenty-eight (28) days is reasonable within the meaning of Rule 50(2)(5) of the Rules. Accordingly, it dismisses the Respondent State's objection in this regard.

C. Other admissibility requirements

63. The Court notes that there is no contention regarding compliance with the requirements set out in Rule 50(2) (a), (b), (c), (d) and (g) of the Rules. Yet, it must satisfy itself that these conditions have been met before proceeding with the determination of the merits of the Application.

64. The record shows that the Applicants have been clearly identified by name, in fulfilment of Rule 50(2)(a) of the Rules.

65. The Court also notes that the Applicants' claims seek to protect their rights guaranteed under the Charter in conformity with one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, which is the promotion and protection of human and peoples' rights. Furthermore, the Applications do not contain any claim or prayer that is incompatible with a provision of the said Act. Therefore, the Court considers that the Applications are compatible with the Constitutive Act of the African Union and the Charter and holds that they meet the requirements of Rule 50(2)(b) of the Rules.

66. The language used in the Applications is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

67. The Applications are not based exclusively on news disseminated through mass media as they are based on court documents from the municipal courts of the Respondent State in fulfilment of Rule 50(2)(d) of the Rules.

68. Further, the Applications do 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 fulfilment of Rule 50(2)(g) of the Rules.

69. The Court therefore concludes that the instant Applications meet all the admissibility conditions under Article 56 of the Charter as read together with Rule 50(2) of the Rules, hence, declares them admissible.

VII. MERITS

70. In their separate Applications, the Applicants allege that their right to a fair trial was violated in that their conviction was based on unreliable evidence and without proper consideration of their defence of *alibi*.

71. The Applicants also make individual allegations. The First Applicant claims that the Respondent State violated his right to a fair trial under Article 7(2) of the Charter and Article 13(6)(c) of the Respondent State's Constitution, which prohibits the punishment of an act that did not constitute a crime at the time of its commission.

72. The Second Applicant makes two additional allegations. Firstly, he claims that he was not afforded legal assistance during the domestic proceedings that led to his conviction and sentence, which he argues violated his rights under Articles 2 and 7(1)(d) of the Charter. Secondly, he claims that the Respondent State violated his rights under the same provisions of the Charter by failing to hear his application for review at the Court of Appeal.

73. The Court notes, as mentioned in paragraph 3 of this Judgment, that the Applicants were co-accused in the domestic proceedings and the circumstances of their conviction were identical. The Court will therefore simultaneously consider the allegations raised by both Applicants as well as the separate allegations made by each Applicant in a sequential and systemic manner.

A. Alleged violation of the right to a fair trial

74. The Applicants make two allegations relating to their right to a fair trial: first, that their conviction and sentence were based on unreliable evidence, and second, that the domestic Courts failed to properly consider their defence of *alibi*. The Court will proceed to consider each of these two allegations.

i. Allegation that the conviction and sentence were based on unreliable evidence

75. The Applicants assert that the Respondent State violated their rights to a fair trial by convicting and sentencing them on the basis of unreliable evidence. They maintain that the domestic courts relied on visual identification of witnesses who claimed to have identified them as the main perpetrators of the crime.

76. According to the Applicants, this evidence was short of meeting the standards of proper evidence for criminal proceedings. They claim that first, the visual identification was allegedly made at around 9 p.m. when it was dark with little or no lighting and that no description of the culprits was ever disclosed; second, the witnesses were members of the same family; thirdly, the offence was poorly investigated and that neither the investigator nor the arresting police officer testified before the Court. Furthermore, the First Applicant adds that the local leaders of the alleged area where the crimes were committed did not testify in support of the prosecution.

77. The Respondent State disputes the Applicants' allegations and prays the Court to put them to strict proof. It contends that its domestic courts convicted and sentenced the Applicants after carefully weighing the evidence adduced by the Prosecution and making a finding beyond reasonable doubt that the Applicants were the perpetrators.

78. The Respondent State specifically contests the Applicants' claim that their conviction was based solely on visual identification at the scene of the crime, asserting that the prosecution witnesses had prior knowledge of the Applicants before the incident. Additionally, it challenges the Applicants' assertion that the evidence was not reliable, arguing that the use of witnesses who were members of the same family neither constitutes a violation of the Applicants' rights nor compromises the credibility of the witnesses. The Respondent State further argues that there is no legal prohibition on the prosecution's use of evidence from family members.

79. The Respondent State further contests the Applicants' assertion that the case was poorly investigated and that certain individuals, such as the investigator, arresting officer, and local leaders, did not testify. It argues that the right to call witnesses in support of the prosecution is the prerogative of the Prosecutor, and that it is not mandatory for all individuals involved in the case to testify. The Respondent State maintains that the investigation was conducted in accordance with applicable laws and regulations, and that the evidence presented at trial was sufficient to warrant the Applicants' conviction. It stresses that both the trial Court and appellate Courts duly analysed the evidence and came to a just conclusion that the Applicants committed the offence.

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80. The Court notes that Article 7(1) of the Charter guarantees the fundamental principles of a right to fair trial by prescribing that, *inter alia*, every individual has the right to have his cause heard and the right to be presumed innocent until proven guilty by a competent court or tribunal. The respect for the right to 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". [25]

81. On the issue of visual identification, the Court recalls its position in a similar case against the Respondent State that:

> (…) when visual identification is used as a source of evidence to convict a person, all circumstances of possible mistakes should be ruled out and the identity of the suspect should be established with certainty. This is also the accepted principle in the Tanzanian jurisprudence. In addition, the evidence of visual identification must demonstrate a coherent and consistent account of the scene of the crime.[26]

82. The Court has also previously stated that it is not an appellate court and as a matter of principle, it is up to national courts to decide on the probative value of a particular piece of evidence.[27] The Court has thus consistently affirmed that it cannot assume the role of the domestic courts and investigate the details and particulars of evidence used in domestic proceedings.[28]

83. In the instant case, the record shows that the domestic courts convicted the Applicants on the basis of evidence tendered by five (5) prosecution witnesses, four (4) of whom were present at the scene of the crime. The statements made by these witnesses were generally similar and revealed a consistent account of the crime scene. In addition, there were three (3) exhibits adduced by the prosecution, including medical reports from the Hospital, although two of them were later expunged from record by the High Court, as they were obtained without full compliance with domestic laws.

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[25] *Abubakari v. Tanzania* (merits), *supra*, § 174; *Kijiji Isiaga v. United Republic of Tanzania* (merits) (2018) 2 AfCLR 218, § 67.
[26] *Werema v. Tanzania* (merits), *supra*, § 60.
[27] *Isiaga v. Tanzania* (merits), *supra*, § 65.
[28] *Ibid*.

84. The Court also notes from the record that the domestic courts thoroughly analysed the evidence tendered before them and concluded that the Applicants were properly identified as being the actual perpetrators of the crimes of which they were subsequently convicted. The trial court as well as appellate court ascertained that all circumstances of possible mistakes were ruled out and the identity of the suspects was established with certainty.

85. Notably, the domestic courts addressed the Applicants' claim that the crime was committed at night and that they were not properly identified and their arrest and conviction were based on mistaken identity. The courts took into account the specific circumstances of the crimes including the fact that the incident took fairly a long period of time; the Applicants were previously known to the victims prior to the incident; that the Applicants were unmasked during the incident; that the victims used a lamp and torch light to see the Applicants in close proximity; and that the victims named the Applicants to other villagers immediately after the incident.

86. The Court is of the view that the manner in which the domestic courts evaluated the evidence does not reveal any manifest error or a miscarriage of justice to the Applicants.

87. As regards the Applicants' submissions that the witnesses were members of the same family and thus, their testimony should not be deemed credible, the Court notes from the record that this issue was raised and properly dealt with by the Court of Appeal. The Court observes that the fact that evidence is obtained from relatives alone does not compromise the credibility of the evidence, as long as the testimony tendered by witnesses offers a consistent account of the crimes committed and the identity of the perpetrators.

88. Furthermore, the Applicants' allegation that the case was not properly investigated and that the evidence should have been corroborated by testimonies of the arresting officer and local leaders lacks merit. It is up to the domestic authorities to decide on whether the evidence proffered by the

prosecution was adequate to support conviction or should be corroborated by additional sources of evidence.

89. In light of the above, the Court dismisses the Applicants' allegations that their conviction and sentence were based on unreliable evidence and finds that the Respondent State did not violate Article 7(1)(a) and (b) of the Charter.

ii. Allegation that the defence of *alibi* was not properly considered

90. The Applicants argue that their right to a fair trial was violated by the Respondent State in that their defence of *alibi* was not properly considered by the domestic Courts. In this regard, the First Applicant claims that the High Court wrongly rejected his defence of *alibi* on the basis that he failed to notify the prosecution as required by the CPA. He maintains that he had in fact informed the courts, at the preliminary hearing stage, that he no longer resided in the same village where the crime was committed and that this was supported by the second Prosecution Witness (PW II). Similarly, the Second Applicant claims that the failure of the High Court to consider his defence of *alibi* caused him a miscarriage of justice.

91. The Respondent State disputes the Applicants' contentions and asserts that they should be put to strict proof. It avers that the trial court examined the Applicants' defence of *alibi* but rejected it as it was not reliable. The Respondent State asserts that the First Applicant did not raise the same defence at the High Court, but the Second Applicant raised it after the Prosecution closed its case and that he had not given a notice of intention to rely on such defence before the hearing of the case, as required by Section 194 (4) of its CPA. The Respondent State submits that the High Court, using its discretion, still looked at his defence of *alibi* and concluded that it was not strong enough to cast any doubt on the prosecution's case. Furthermore, it submits that the Court of Appeal also examined the record and reached the same conclusion.

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92. The Court notes that, in the judicial system of the Respondent State, as well as in other jurisdictions, *alibi* is an important element in criminal defence, which when established with certitude, can be decisive on the determination of the guilt of the accused. Accordingly, whenever it is raised by an applicant, the defence of *alibi* must always be seriously considered, thoroughly examined and possibly set aside, prior to a guilty verdict.[29]

93. In the present case, the records of the domestic judicial proceedings clearly show that the Applicants had raised a defence of *alibi* during their trial, and the trial court after weighing it against the testimonies tendered by the prosecution witnesses, found that it was not credible enough "to shake the Republic's case".[30] Despite the fact that the Second Applicant failed to raise his defence of *alibi* in the manner required by the domestic law, the High Court applied its discretion, considered the defence and similarly concluded that it "does not create any doubt to the prosecution's case as the evidence is watertight".[31] The issue was not raised at the Court of Appeal but the Court of Appeal upheld the position of the lower courts that the evidence adduced by the prosecution was watertight and credible to sustain the conviction against both Applicants.

94. The Court finds no anomality or manifest error in the manner the domestic courts dealt with the Applicants' defence of *alibi* to warrant its own intervention. Consequently, the Court dismisses the Applicants' contentions in this regard and holds that the Respondent State dd not violate the Applicants' right to defence under Article 7(1)(c) of the Charter.

iii. Alleged violation of the right to free legal assistance

[29] *Abubakari v. Tanzania*, *supra*, § 26; *Onyachi and Njoka v. Tanzania* (merits) *supra*, § 93.
[30] Judgment of the District Court, p. 18.
[31] Judgment of the High Court, p. 9.

95. The Second Applicant alleges that he was not represented by Counsel in the proceedings against him before the domestic courts; hence, the Respondent State violated Article 7(1)(c) of the Charter. The Second Applicant claims that the domestic courts should have taken cognisance of the serious nature of the charge of armed robbery and provided him with a lawyer. He admits that there is a legal aid scheme in the Respondent State for poor prisoners but he asserts that the decision to grant or deny legal aid is within the absolute discretion of the Certifying Authority and the prisoner does not have any say on it. He contends that as an indigent and illiterate Applicant, the Respondent State's failure to afford him legal assistance created an imbalance in his prosecution and occasioned him a miscarriage of justice.

96. In response to the Second Applicant's submissions, the Respondent State concedes that the hearing of the case against the Second Applicant was conducted without the assistance of a lawyer. Nonetheless, it argues that that the right to legal representation is not an absolute right as it is subject to two conditions; first, the applicant must request for legal representation of his choice and second, there should be available funds to support the applicant's prayer for legal aid once granted. The Respondent State avers that in the present case, the Second Applicant did at not request for legal assistance or complain that his right to defence was contravened at any stage in the domestic proceedings. As such, it prays the Court that it should apply the principle of margin of appreciation, taking into consideration its limited financial capacity, and dismiss the Second Applicant's allegation.

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97. According to Article 7(1)(c) of the Charter, the right to have one's cause heard includes "the right to defence, including the right to be defended by counsel of [their] choice."

98. The Court has previously interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights

(ICCPR),[32] and determined that the right to defence includes the right to be provided with free legal assistance.[33]

99. In the instant case, the Court observes that although it is only the Second Applicant who alleges the violation of his right to legal assistance, the record shows that both the First and Second Applicants were not represented by Counsel during the domestic proceedings. They both faced a serious charge of armed robbery carrying a minimum thirty (30) years of prison sentence. Yet, they were not informed of their right to legal assistance. The Court further notes that, the Respondent State did not dispute that the Applicants were not provided legal assistance although they were indigent and were charged with grave offences.

100. The Court has established that where accused persons are charged with serious offences which carry heavy sentences and they are indigent, free legal assistance should be provided as of right, whether or not the accused persons request for it.[34]

101. The Court has also held that, the duty to provide free legal assistance to indigent persons facing serious charges which carry a heavy penalty is for both the trial and appellate stages.[35] States should, therefore, automatically grant legal assistance as long as the interest of justice require, irrespective of whether an applicant has not requested for it.

102. In the instant case, the Court is of the considered view that given their circumstances, the interests of justice ought to have been considered to provide the Applicants with legal assistance throughout their trial and appeals.

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[32] The Respondent State became a State Party to the ICCPR on 11 June 1976.
[33] *Thomas v*. *Tanzania*, (merits), § 114; *Isiaga v. Tanzania* (merits) *supra*, § 72; *Kennedy Owino Onyachi and Njoka v. Tanzania* (merits) *(28 September 2017) 2 AfCLR 65*, § 104.
[34]*Thomas v*. *Tanzania* (merits), ibid, § *123*; *Isiaga v. Tanzania*, ibid, § 78; *Kennedy Owino Onyachi and Njoka v. Tanzania*, *ibid*, §§ 104 and 106.
[35] *Thomas v. Tanzania* (merits), § 124; *Wilfred Onyango Nganyi 9 Others v. United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 183.

103. In view of this, the Court dismisses the Respondent State's claim that free legal representation should first be requested by an applicant and that its provision depends on availability of resources.

104. The Court, therefore, finds that the Respondent State has violated Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

iv. Alleged violation of the right to be tried within a reasonable time

105. The Second Applicant alleges that after the Court of Appeal dismissed his Appeal, he lodged an application for review of the decision with the same Court on 19 April 2013, which he asserts was not heard while similar applications for review which were filed after his were heard by the said Court. Accordingly, he contends that the Respondent State has violated his right to be tried within a reasonable time contrary to Article 7(1)(d) of the Charter.

106. The Respondent State disputes the Second Applicant's contention and prays that he should be put to strict proof thereof. It asserts that no evidence has been submitted by the Second Applicant to show that he lodged the alleged application for review. Furthermore, the Respondent State avers that applications for review are scheduled on a first come first served basis and also depends on the capacity of the judiciary to hold sessions.

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107. Article 7(1)(d) of the Charter stipulates that the right to have one's cause heard comprises "the right to be tried within a reasonable time by an impartial court or tribunal."

108. The Court notes that the review procedure in the Respondent State's Court of Appeal is not an automatic right and depends on the discretion of the same Court. However, the Court is of the considered view that once an applicant chooses to pursue this procedure, the demands of justice and

fairness, which are implicitly embodied in the right to a fair trial, require that the domestic courts should complete the review within a reasonable time, as a required in Article 7(1)(d) of the Charter.

109. In the present case, the Second Applicant alleges that he filed an application for review of the Court of Appeal's decision on 19 April 2013. However, the Respondent State disputes this claim, and the case file does not contain any record of the Second Applicant having submitted such an application for review to the Court of Appeal. In his Reply to the Respondent State's response, the Second Applicant simply reiterated his claim that he had lodged his application but he failed to provide any supporting evidence and did not provide an explanation for that. The burden of proof, however, remained with the Second Applicant, but he has not discharged.

110. Consequently, the Court dismisses the Second Applicant's contention that the Respondent State delayed hearing his application for review in violation of Article 7(1)(d) of the Charter.

v. Allegation that the conviction and sentence was based on unclear domestic law

111. The First Applicant contends that he was charged with and convicted of the offence of armed robbery in accordance with Section 285 and 286 of the Respondent State's Penal Code as amended by Act 10/89 and 27/1991. He asserts that the said sections of the law do not define the offence of armed robbery and as such, his conviction and sentence violate Article 7(2) of the Charter and the corresponding provision, that is, Article 13(6)(c) of the Respondent State's Constitution.

112. The Respondent State disputes the Applicant's submission and asserts that Section 285 and 286 of the Penal Code describe the ingredients required for the offence of armed robbery. It further states that the sentence of thirty (30) years in prison for the offence is not heavier than the penalty in force at the time when the offence was committed.

113. The Respondent State elaborates that the prerequisites for the offence of armed robbery stated in Section 286 of the Penal Code are: being armed with a dangerous or offensive weapon or instrument or being in the company of any other person or if, at or immediately before or after the time of robbery, he causes injury or uses personal violence on any person. Further to that, Section 286 of the Penal Code has set out the maximum sentence for armed robbery to be life in prison with or without corporal punishment.

114. The Respondent State further affirms that when sentencing an accused, these sections have to be read together with the Minimum Sentences Act, as amended in 1994 by Section 2 of the Written Laws (Miscellaneous Amendment) Act No. 6 of 1994. This Act amended the minimum sentence from fifteen (15) years which was provided in the Written Laws (Miscellaneous Amendment) Act No. 10 of the 1989 to thirty (30) in prison for the offence of armed robbery. The Respondent State thus submits that the First Applicant's allegation on this point lacks merit.

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115. The Court notes that Article 7(2) of the Charter stipulates the rule of *"nullum crimen sine lege, nulla poena sine lege"* (also called the principle of legality), as follows:

> No one may be condemned for an act of omission, which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

116. This provision contains three elements of the principle of legality. The first element embodies the principle of "no law, no crime" (*nullum crimen sine*

lege), that is, no one shall be penalized for an act or omission which was not a punishable conduct at the time of its commission.

117. The second element is the principle of' "no law, no punishment" (*nulla poena sine lege)*: that is, no one shall be given a penalty for the commission of an act unless such penalty is provided for the act prior to its commission. Together with the principle of "no law, no crime", this principle prohibits the retroactive application of criminal law.

118. The third element is the principle of individual punishment and the prohibition of collective punishment.

119. The Court observes that implicit in the principle of legality is the requirement that the law must have sufficient clarity in defining a particular crime and specifying the penalty. It is essential to note that clarity is one of the most important qualitative requirements of any law and more specifically, criminal law. It is not sufficient that a law exists, in addition the law must possess a reasonable level of clarity to enable individuals to conform to the boundaries it sets.

120. In the present case, the First Applicant's claim is based on the fundamental principle of 'no law, no crime'. The Applicant is not arguing that there was no law in place, but instead asserts that the law which defines the crime he was charged with, namely, armed robbery, is insufficiently defined. This, according to the First Applicant, violates Article 7(2) of the Charter as well as the corresponding provision, Article 13(6)(c), of the Constitution of the Respondent State.

121. The Court notes from the record that the First Applicant and the Second Applicant were jointly charged with the offence of armed robbery in accordance with Sections 285 and 286 of the Respondent State's Penal Code as amended by Act No 10 of 1989 and 27 of 1991, and sentenced in accordance with the Minimum Sentences Act No. 1 of 1972, which was amended by Section 2 of the Written Laws (Miscellaneous Amendment) Act

No. 6 of 1994. It emerges from the file that the armed robbery was committed on 29 March 2005, that is, after the said laws were enacted. It follows that the Applicants were convicted and punished on the basis of legislation that existed and was in force at the time of commission of the crime.

122. Moreover, the Court observes that the laws in question, specifically Sections 285 and 286 of the Penal Code, provide a clear definition of the elements that constitute the crime of armed robbery. The domestic courts also found that these sections were complied with in the case of the Applicants. The Second Applicant does not provide any explanation as to why he believes these sections did not sufficiently define the offence of armed robbery, nor does he specify which part of these sections he finds unclear.

123. In view of the foregoing, the Court dismisses the contention that Sections 285 and 286 of the Respondent State's Penal Code does not define the offence of armed robbery. The Court holds, therefore, that the Respondent State did not violate Article 7(2) of the Charter.

B. Alleged violation of the right to non-discrimination

124. The Second Applicant asserts that the Respondent State violated his right under Article 2 of the Charter. He asserts that the analysis and scrutiny of evidence by domestic Courts was not based on objective appreciation of the entire evidence on record and on equal treatment of the adverse parties.

125. Without responding directly to this allegation, the Respondent State in its Response, reiterates that the domestic courts properly examined all evidence on record and found the Applicant and his co-accused guilty as charged.

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126. The Court notes that Article 2 of the Charter stipulates that every individual shall enjoy the rights and freedoms guaranteed in the Charter without

distinction of any kind based on race, ethnic group, colour and any other status. The provision seeks to ensure that individuals are not subjected to discriminatory or differential treatment *vis-à-vis* others of same or similar status.

127. In the present case, the Second Applicant merely alleges that the Respondent State violated his right to non-discrimination, but does not provide any explanation on how he was treated differently compared to other individuals with a similar status as him. Regarding his reference to the assessment of evidence by domestic courts, the Court recalls its earlier finding in paragraphs 85-88 above where it concluded that there was no apparent error in the way domestic courts examined the evidence that they relied upon to convict the Applicants.

128. Consequently, the Court holds that the Respondent State did not violate Article 2 of the Charter.

VIII. REPARATIONS

129. The Applicants pray the Court "to restore justice where it is overlooked and quash both the conviction and sentence and set [them] at liberty".

130. Additionally, the Second Applicant prays the Court to grant him reparations pursuant to Article 27 of the Protocol.

131. The Respondent State contends that the Applicants are imprisoned as a result of the crime that they committed and thus, their request for reparations should be dismissed.

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132. The Court notes that Article 27(1) of the Protocol stipulates that "[If] the Court finds that there has been violation of a human or peoples' right, it shall

make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

133. The Court has consistently held that, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and when granted, reparation should cover the full damage suffered.

134. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers, particularly for material damages.[36] With regard to moral damages, the Court has held that the requirement of proof is not strict,[37] since it is presumed that there is prejudice caused when violations are established.[38]

135. The Court also restates that the measures that a State must take to remedy a violation of human rights include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.[39]

136. In the instant case, the Court has established that the Respondent State violated the Applicants' right to defence under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR by failing to afford them free legal assistance during their trial and appeals in the domestic courts. It is on this basis that reparations must be determined.

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[36] *Kennedy Gihana and others v. Republic of Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139; See also *Reverend Christopher R. Mtikila v. Republic of Tanzania* (reparations), § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016), 1 AfCLR 346, § 15(d); and *Kalebi Elisamehe v. Tanzania* (merits and reparations), § 97.

[37] *Norbert Zongo and Others v. Burkina Faso* (reparations) (3 June 2016), 1 AfCLR 258, § 55. See also *Kalebi Elisamehe v. Tanzania* (merits and reparations), § 97.

[38] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, § 136; *Armand Guehi v. Tanzania* (merits and reparations), *supra* § 55; *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119; *Zongo and Others v. Burkina Faso*, ibid, § 55; and *Elisamehe v. Tanzania* (merits and reparations), § 97.

[39] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also *Elisamehe v. Tanzania,* ibid, § 96.

A. Pecuniary reparations

i. Material prejudice

137. The Court recalls that for it to grant reparations for material prejudice, there must be a causal link between the violation established by the Court and the prejudice caused and there should be a specification of the nature of the prejudice and proof thereof.[40]

138. In the instant case, the First Applicant simply prays the Court to grant him reparations in accordance with Article 27 of the Protocol, without specifying the nature of the reparations sought. He does not indicate the nature of the material prejudice he suffered and how this is linked with the violation of his fair trial rights, particularly, his right to legal assistance under Article 7(1)(c) of the Charter.

139. In the circumstances, the Court does not grant reparations for material prejudice.

ii. Moral prejudice

140. The Applicants do not specifically request the Court to grant reparations for moral prejudice. However, as indicated above, the First Applicant prays in general terms that the Court should grant him reparations. Both Applicants also pray the Court to "restore justice where it was overlooked". Accordingly, the Court will examine whether the Applicants are entitled to moral damages.

141. In this regard, in line with established case-law that moral prejudice is presumed in cases of human rights violations, the Court notes that the quantum of damages in this respect is assessed based on equity, taking

[40] *Kijiji Isiaga v. Republic of Tanzania*, AfCtHPR, Application n° 011/2015, judgment of 25 June 2021 (reparations), § 20.

into account the circumstances of the case.[41] The Court has, thus, adopted the practice of granting a lump sum in such instances.[42]

142. The Court has also established that the Applicants' right to legal assistance under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR was violated. The Applicants are, therefore, entitled to moral damages as there is a presumption that they have suffered some form of moral prejudice as a result of the said violation.[43]

143. The Court's practice has been that it grants applicants an average amount of Three Hundred Thousand Tanzanian Shillings (TZS 300,000) in instances where free legal assistance is not availed by the Respondent State, where an applicant is charged with a serious offence, and where there are no extenuating circumstances.[44] Consequently, exercising its discretion in equity, the Court awards the instant Applicants the amount of Three Hundred Thousand Tanzanian Shillings (TZS 300,000) for moral prejudice they suffered in relation to this violation.

B. Non-Pecuniary Reparations

144. The Applicants pray the Court to quash their conviction and sentence and restore their liberty.

145. The Respondent State reiterates that the jurisdiction of the Court does not extend to the reversal or overturning of decisions made by its national courts. It stresses that this Court is not empowered to function as "a fourth instance" or an appellate court. Accordingly, the Respondent State submits

[41] *Zongo and Others v. Burkina Faso* (reparations), *supra,* § 55; *Umuhoza v. Rwanda* (reparations), *supra,* § 59; *Christopher Jonas v. Republic of Tanzania* (reparations) (25 September 2020), 4 AfCLR 545, § 23.
[42] *Rashidi v. Tanzania* (merits and reparations), *supra,* § 119; *Minani Evarist v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, §§ 84-85; *Guehi v. Tanzania* (merits and reparations), *supra,* § 177; *Jonas v. Tanzania*, *ibid,*, § 24.
[43] *Cheusi v. Tanzania* (merits and reparations), *supra* § 151.
[44] *Evarist v. Tanzania* (merits and reparations), *supra,* § 90; *Anaclet Paulo v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 446, § 111; *Jonas v. Tanzania* (reparations), *supra,* § 25.

that the Court cannot set aside or quash the decision of its highest national court, namely the Court of Appeal, once the same has rendered a final and conclusive judgment on the matter in question.

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146. Regarding the Applicants' prayer to set aside their conviction and sentence, the Court notes that it has not determined in this matter whether the conviction and sentences of the Applicants were warranted or not.[45] The Court is rather concerned with whether the procedures in the national courts are compatible with international standards enshrined in the international human rights instruments ratified by the Respondent State. As a result, the Court dismisses the request that it should quash the Applicants' conviction and sentence.

147. With regard to the Applicants' prayer to be released from prison, the Court has established that it would make such an order, "if an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice."[46]

148. In the instant case, the Court recalls that it has found that the Respondent State violated the Applicants' right to defence by failing to provide them with free legal assistance. Without minimising its gravity, the Court considers that the nature of the established violation does not reveal any circumstance to consider the Applicants' imprisonment as arbitrary or as causing a miscarriage of justice. The Applicants also failed to elaborate on specific and compelling circumstances to justify an order for their release.[47]

[45] *Stephen John Rutakikirwa v. United Republic of Tanzania*, ACtHPR, Application No. 013/2016. Judgment of 24 March 2022 (merits and reparations), § 88.
[46] *Evarist v. Tanzania* (merits and reparations), *supra,* § 82; See also *Amir (Mussa) and Saidi Ally (Mangaya) v. United Republic of Tanzania* (merits and reparations) (28 November 2019), § 96; *Mgosi Mwita Makungu v. United Republic of Tanzania*, (merits) (7 December 2018) 2 AfCLR 550, § 84.
[47] *Amir and Ally v. Tanzania, ibid*, § 97; *Elisamehe v. Tanzania* (merits and reparations), *supra,* § 112; and *Evarist v. Tanzania* (merits and reparations), *supra,* § 82.

149. The Court, therefore, dismisses the Applicants' prayer that the Court quashes their conviction and sentence and order their release from prison.

IX. COSTS

150. Rule 32(2) of the Rules of Court stipulate that, "Unless otherwise decided by the Court, each party shall bear its own costs, if any".[48]

151. The First Applicant prays the Court to order the Respondent State bear the costs.

152. The Respondent State submits that the costs associated with the instant Applications should be borne by the Applicants.

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153. The Court reiterates its jurisprudence that reparations may include legal costs and other costs incurred in the international proceedings. Further, it is up to the Applicant to provide justifications and proof any cost incurred.

154. The Court holds that in the instant case, there is no reason for it to depart from the provisions of Rule 32(2) of the Rules and, consequently, rules that each Party shall bear its own costs.

X. OPERATIVE PART

155. For these reasons:

THE COURT,

[48] Rule 30(2) of the Rules of Court, 2 June 2010.

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* that the Application is admissible.

On merits

v. *Finds* that the Respondent did not violate the Applicants' fair trial rights guaranteed under Article 7(1)(a) and (b) of the Charter by allegedly convicting and sentencing them based on unreliable evidence;
vi. *Finds* that the Respondent State did not violate the Applicants' right to defence under Article 7(1)(c) by allegedly not properly considering their defence of *alibi*;
vii. *Finds* that the Respondent State did not violate the Second Applicant's right to be tried within a reasonable time in violation of Article 7(1)(d) of the Charter by not hearing his application for review timeously;
viii. *Finds* that the Respondent State did not violate Article 7(2) of the Charter and that the Applicants were not convicted and sentenced on the basis of unclear law;
ix. *Finds* that the Respondent State did not violate the Second Applicant's right to non-discrimination enshrined in Article 2 of the Charter;
x. *Finds* that the Respondent State did violate the Applicants' right to defence under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the International Covenant on Civil and Political

Rights, for failure to provide the Applicants free legal assistance during domestic proceedings;

Pecuniary reparations

xi. *Does not* grant reparations for material prejudice;

xii. *Grants* the Applicants reparations for the moral prejudice arising from the violation of their right to free legal assistance and awards each Applicant the sum of Three Hundred Thousand Tanzanian Shillings (TZS 300,000);

xiii. *Orders* the Respondent State to pay the amounts set out under (xii), free of tax, as fair compensation, within six (6) months from the date of notification of judgment, failure to which, it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment until the accrued amount is fully paid.

Non-pecuniary reparations

xiv. *Dismisses* the Applicants' prayer for setting aside of their conviction and sentence and release from prison.

On implementation and reporting

xv. *Orders* the Respondent state to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On Costs

xvi. *Dismisses* the First Applicant's prayer related to legal costs incurred in the proceedings before this Court;

xvii. *Orders* each Party to 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.