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

THE MATTER OF

HASSAN BUNDALA SWAGA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 014/2017

JUDGMENT

7 NOVEMBER 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

Hassan Bundala SWAGA

Represented by:

Mr Daudi Saimalie LAIRUMBE, M/S Northern Law Chambers.

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

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

v. Ms Blandina KASAGAMA, Ministry of Foreign Affairs and East African Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Hassan Bundala Swaga (hereinafter referred to as "the Applicant"), is a national of Tanzania, who at the time of filing the Application, was incarcerated at Butimba Central Prison in the Mwanza. He was convicted of rape of an eight-year-old minor and sentenced to life imprisonment. He alleges violation of his rights before 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 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 16 April 2013, the Applicant lured an eight (8) year old girl to his house with the promise of giving her a bar of soap for her ailing grandmother and subsequently raped her. The Applicant was arrested on 17 April 2013 and charged with rape before the District Court of Chato on 18 April 2013. On 3 February 2014, he was convicted of the offence and sentenced to life imprisonment.

4. On 12 February 2014, the Applicant appealed against his conviction and sentence at the High Court of Tanzania sitting at Bukoba, which dismissed the appeal on 30 October 2014. On 11 November 2014, he filed an appeal to the Court of Appeal which was dismissed for lack of merit on 21 February 2016.

B. Alleged violations

5. The Applicant alleges the violation of his right to a fair trial insofar as:

    i. He was denied the right to be heard; and
    ii. He was not provided with free legal assistance.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Application was filed on 2 March 2017 but was not served on the Respondent State because it was incomprehensible.

7. On 24 March 2017, the Court granted the Applicant legal aid under its *Pro Bono* Legal Aid Scheme and appointed Counsel Daudi Lairumbe to represent the Applicant.

8. On 18 September 2017, Counsel Lairumbe requested for leave to file an amended Application, which the Court granted on 19 September 2017. The amended Application was filed on 20 October 2017 and served on the Respondent State on 25 October 2017.

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

10. Pleadings were closed on 26 June 2019 and the Parties were notified thereof.

IV. PRAYERS OF THE PARTIES

11. The Applicant prays the Court for the following:

    i. A Declaration that the Respondent State violated the Applicant's rights as guaranteed under Articles 1, 3, 5, 6, 7(1) and 9(1) of the African Charter on Human and Peoples' Rights;
    ii. An Order compelling the Respondent State to release the Applicant;
    iii. An Order commanding the Respondent State to make retrial of the Applicant's case;
    iv. An Order for reparations;
    v. An Order compelling the Respondent State to report to this Honourable Court every six (6) months on the implementation of its judgment;
    vi. Any other Order or remedy that this Honourable Court may deem fit.

12. With respect to jurisdiction and admissibility, the Respondent State prays the Court to:

    i. Find that the Honourable Court is not vested with jurisdiction to adjudicate over the matter;
    ii. Find that the Application does not meet the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;

iii. That the Application does not meet the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;
iv. Declare the Application inadmissible and duly dismiss it.

13. With respect to the merits of the Application, the Respondent State prays the Court to:

i. Find that it has not violated Articles 1, 3, 5, 6, 7(1) and 9(1) of the Charter;
ii. Dismiss the Applicant's prayers;
iii. Order that the Applicant continue to serve his sentence; and
iv. Order that the costs of this Application be borne by the Applicant.

V. JURISDICTION

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

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

15. The Court notes that pursuant to Rule 49(1) of the Rules it must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

16. In the present case, the Respondent State objects to the material and temporal aspects of the jurisdiction of the Court. The Court will, therefore, consider the said objections before examining other aspects of its jurisdiction, if necessary.

A. Objection to material jurisdiction

17. The Respondent State argues that the Court does not have the jurisdiction to order the release of the Applicant and thus it should dismiss the Application for lack of material jurisdiction.

18. On his part, citing the jurisprudence of the Court in *Alex Thomas v. Tanzania* and *Peter Joseph Chacha v. Tanzania*, the Applicant avers that the Court has jurisdiction to determine this Application as it alleges violations of his rights protected by the Charter and other human rights instruments ratified by the Respondent State.

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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. 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. The Court thus finds that, in considering these allegations, it will be discharging its mandate to interpret and apply the Charter and other human rights instruments.

21. The Court further reiterates that pursuant to Article 27(1) of the Protocol, if it finds a violation of the rights guaranteed by the Charter or any instrument ratified by the Respondent State, it shall make appropriate orders on reparations. Furthermore, where the Court finds that the Applicant has

[3] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45; *Kennedy Owino Onyachi and Charles John Mwanini Njoka v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, §§ 34-36; *Jibu Amir alias Mussa and Said Ally Mangaya 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, § 21.

demonstrated specific and compelling circumstances warranting an order for release, the Court may make such an order.[4] Consequently, the Court notes that, where applicable, it is empowered to issue an order for release which is a measure of restitution within its jurisdiction.

22. From the foregoing, the Court dismisses the Respondent State's objection herein and holds that it has material jurisdiction to hear the Application.

B. Objection to temporal jurisdiction

23. The Respondent State submits that the Court lacks temporal jurisdiction in this Application because the alleged violations are not continuing. Furthermore, the Respondent State argues that the Applicant is serving a lawful sentence for commission of an offence provided for by statute.

24. The Applicant argues that he is a serving an unlawful sentence resulting from alleged violations during the trial procedure. Therefore, he argues that the Court has jurisdiction to determine the Application.

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25. The Court notes, in accordance with the principle of non-retroactivity that it cannot *a priori* consider allegations of human rights violations that occurred before the Respondent State became a party to the Protocol, unless the alleged violations are continuing.[5]

26. The Court notes that, in the present case, the alleged violations occurred between the years, 2013 and 2016. In this regard, the alleged violations occurred after the Respondent State had ratified the Charter on 21 October

[4] See *Mussa* and *Mangaya v. Tanzania* (merits and reparations)*, ibid*, § 97; *Kalebi Elisamehe v. United Republic of Tanzania* (26 June 2020) (judgment) 4 AfCLR 265, § 112; and *Minani Evarist v. United Republic of Tanzania* (21 September 2018) (merits and reparations) 2 AfCLR 402, § 82.
[5] *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabè Human and Peoples' Rights Movement v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, § 68; and *Igola Iguna v. United Republic of Tanzania,* ACtHPR*,* Application No. 020/2017, Judgment of 1 December 2022, § 18.

1986, the Protocol on 10 February 2006 and had deposited the Declaration under Article 34(6) of the Protocol on 29 March 2010.

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

C. Other aspects of jurisdiction

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

29. 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.

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

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

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

VI. ADMISSIBILITY

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

34. 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.”

35. 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.

36. The Respondent State raises two (2) objections to the admissibility of the Application, namely: that the Applicant did not exhaust local remedies, and that the Application was not filed within a reasonable time. The Court will therefore consider the said objections before examining other conditions of admissibility, if necessary.

A. Objections to the admissibility of the Application

i. Objection based on non-exhaustion of local remedies

37. The Respondent State argues that the Applicant did not raise the allegation that he was denied free legal assistance in the proceedings at the national courts and, therefore, he did not exhaust local remedies for this allegation.

38. The Respondent State also contends that, as per the decision of the African Commission on Human and Peoples' Rights in *Article 19 v. Eritrea*, the onus is on the Applicant to demonstrate that he took all the steps necessary to exhaust domestic remedies and not merely cast aspersions on the effectiveness of those remedies.

39. In this regard, the Respondent State argues that there were remedies available to the Applicant which he should have exhausted, but he did not. Furthermore, the Respondent State contends that the Applicant should have filed an application for review of the Court of Appeal's judgment, if he was dissatisfied with its judgment.

40. In light of the foregoing, the Respondent State argues that it was not given the opportunity to redress the alleged violations within the national judicial system and therefore the Application should be dismissed for lack of exhaustion of local remedies.

41. The Applicant avers that he exhausted local remedies when the Court of Appeal dismissed his appeal in its entirety on 21 February 2016.

42. Furthermore, the Applicant argues that he was not required to file an application for review as it would have been determined by the same Court of Appeal. He therefore submits that, he exhausted local remedies and thus complied with Article 56(5) of the Charter.

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43. The Court notes pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, that any application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing states with the opportunity to resolve cases of alleged human rights violations within their jurisdiction before an international human rights body is called upon to determine the state's responsibility for the same.[6]

44. This Court has also held in a number of cases involving the Respondent State that the remedy involving the application for review of the Court of Appeal's decision is an extraordinary remedy that an Applicant is not required to exhaust prior to seizing this Court.[7]

45. In the instant case, the Court notes from the record that the Applicant having been convicted at the District Court of Chato on 3 February 2014, filed an appeal against his conviction and sentence to the High Court, which dismissed his appeal on 30 October 2014. He then appealed to the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, which on 21 February 2016, upheld the judgment of the High Court.

46. Furthermore, the Court notes, that the right to free legal assistance forms part of the bundle of fair trial rights and guarantees which were related to,

[6] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.
[7] See *Thomas v. Tanzania* (merits), *supra*, § 65; *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44.

or were the basis of the proceedings before domestic courts.[8] Therefore, the Respondent State had an opportunity to redress the alleged violations, which it did not. Consequently, the Applicant exhausted all the available domestic remedies.

47. For the foregoing reasons, the Court dismisses the objection relating to the non-exhaustion of local remedies.

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

48. The Respondent State submits that the Application was not filed before the Court within a reasonable time after exhaustion of local remedies. It argues that the Court of Appeal delivered its judgment on the Applicant's case on 27 October 2014 and that the Applicant filed his Application on 8 June 2016. Therefore, according to the Respondent State, a period of one (1) year and seven (7) months elapsed between the date of the Court of Appeal decision and the date that the Applicant seized the Court.

49. The Respondent State argues that even though reasonable time is determined on a case-by-case basis, the Applicant allowed a reasonable amount of time to elapse before filing the matter in this Court. Thus, it contends that the Application should be dismissed.

50. The Applicant avers that the Judgment of the Court of Appeal was delivered on 21 February 2016 and not 27 October 2014 as claimed by the Respondent State.

51. The Applicant further avers that the Application was filed on 13 February 2017 which is within a period of less than a year from the date of delivery of the Judgment of the Court of Appeal. Therefore, he submits that the Application was filed within a reasonable time.

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[8] *Mangaya and Mussa v. Tanzania* (merits and reparations), *supra*, § 37; *Niyonzima Augustine v. United Republic of Tanzania,* ACtHPR*,* Application No. 058/2016, Judgment of 13 June 2023, § 18.

52. The Court notes that Rule 50(2)(f) of the Rules which in substance restates the provision of Article 56(6) of the Charter, requires an Application to be filed within "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

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

54. In the instant Application, the Court observes that the judgment of the Court of Appeal was delivered on 21 February 2016 and not on 27 October 2014 as claimed by the Respondent State, while the Applicant filed the Application on 2 March 2017. The Court notes, in the circumstances, that one (1) year and ten (10) days elapsed between the date of the Court of Appeal's decision 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.

55. The Court recalls that in assessing reasonableness of time, consideration should be given to the situation of the Applicant; namely, whether he was incarcerated, lay and indigent without the benefit of legal assistance[10] or had limited knowledge of the operation of this Court.[11]

56. In the present case, the Applicant is incarcerated, restricted in his movements and with limited access to information. He was also not assisted

[9] *Diocles William v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52; and *Thomas v. Tanzania* (merits), *supra*, § 74.
[10] *Iguna v. Tanzania*, *supra*, § 35; *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.
[11] *Iguna v. Tanzania*, *idem*; *Mohamed Selemani Marwa v. United Republic of Tanzania*, ACtHPR, Application No. 014/2016, Judgment of 2 December 2021, § 61.

by counsel in the cases at the national courts. Taking into consideration these circumstances, the Court finds the period of one (1) year and ten (10) days to be manifestly reasonable.

57. Accordingly, the Court dismisses the Respondent State's objection relating to the non-compliance with the requirement of filing the Application within a reasonable time after exhaustion of local remedies.

B. Other conditions of admissibility

58. The Court notes that there is no contention regarding the conditions set out in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules. Even so, it must satisfy itself that these conditions are met.

59. 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.

60. The Court 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. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union. Therefore, the Court holds that the requirement of Rule 50(2)(b) of the Rules is met.

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

62. 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 of Rule 50(2)(d) of the Rules.

63. 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.

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

VII. MERITS

65. The Applicant alleges the violations of the Charter, insofar as:

i. He was denied the right to be heard; and
ii. He was denied the right to free legal assistance.

A. Allegation based on the denial of the right to be heard

66. The Applicant alleges that the Court of Appeal did not consider all the grounds of his appeal. He buttresses his argument by quoting the judgment of the Court of Appeal as follows:

> Mr Ngole, for obvious reasons resisted the Appeal very strongly. First of all, he pointed out that the first and third grounds were not raised in the first Appellate Court and have been raised for the first time before us. We agree with him that the grounds must have been an afterthought.

67. He further argues that the Court of Appeal's refusal to hear the first and third grounds of appeal were based on a "flimsy" reason which denied him the right to be heard. According to the Applicant, the Court of Appeal should have considered the defence of intoxication which he raised as the third ground of appeal.

68. The Respondent State denies the allegation of the Applicant and puts him to "strict proof". It argues that the Court of Appeal considered all the Applicant's grounds of appeal and dismissed them. According to the Respondent State, the fact that the Court of Appeal rejected the Applicant's grounds of appeal does not mean that they were not considered**.**

69. Furthermore, the Respondent State reiterates that the Applicant should have filed an application for review of the Court of Appeal's judgment if he was aggrieved with the same.

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

71. 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 the purport of the right to the presumption of innocence also enshrined in Article 7 of the Charter."[12]

72. In the instant case, the Applicant alleges that the Court of Appeal only considered some of his grounds of appeal which resulted in prejudice against him. He especially argues that the defence of intoxication was not considered.

73. The Court observes**,** based on the record that, the Court of Appeal noted that the Applicant raised three (3) grounds of appeal, namely, the age of the victim was not proved; penetration was not proved and lastly, that his defence of intoxication was not considered in the District Court and the High Court. Citing its jurisprudence in the case of *Jafari Mohamed v. the Republic*, the Court of Appeal held that the grounds of appeal related to the

[12] *Abubakari v. Tanzania* (merits), *supra*, § 174; *William v. Tanzania* (merits), *supra*, § 72. *Majid Goa alias Vedastus v. United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 498, § 72.

age of the victim and the defence of intoxication had not been raised in the High Court and therefore, it could not determine whether the High Court made an error in the consideration of the appeal.

74. Furthermore, the Court of Appeal found that, not only was the age of the victim mentioned in the charge sheet but also there was medical evidence adduced by the doctor who examined the girl, that proved that she was eight (8) years old.

75. As regards the defence of intoxication, the Court of Appeal held that it was neither raised during the Applicant's trial nor is it a defence for rape. The Court of Appeal then evaluated the evidence adduced by the witnesses during the Applicant's trial and found that the charge had been proved beyond a reasonable doubt and the sentence was legal.

76. The Court finds that the manner in which the Court of Appeal evaluated the Applicant's appeal does not disclose any manifest error or miscarriage of justice.

77. Consequently, the Court, dismisses this allegation and finds that the Respondent State has not violated Article 7(1) of the Charter.

B. Alleged violation of the right to free legal assistance

78. The Applicant avers that Section 3 of the Legal Aid Act (criminal proceedings) (Act 21 of 1969) imposes an obligation on the "certifying authority" to grant legal aid where it is desirable in the interest of justice or where the accused does not have the means to retain an advocate. He therefore argues that, there is no stipulation in the Legal Aid Act (criminal proceedings) (Act 21 of 1969) that the accused must request for legal aid in order for it to be granted.

79. Relying on the case of *Moses Muhagama Laurence v. the Government of Zanzibar*, the Applicant avers that the purposive reading of Section 3 of the Legal Aid Act (criminal proceedings) (Act 21 of 1969) is to the effect that "…a poor accused person has a statutory right to be provided with free legal aid and to be informed of that right by the Court." The Applicant therefore claims that his right to free legal assistance was violated by the Respondent State.

80. The Respondent State refutes the allegation of the Applicant and submits that he did not raise the allegation of denial of free legal assistance before the national courts and is therefore raising it here for the first time before this Court.

81. Furthermore, the Respondent State argues that the provision of free legal assistance is only statutorily mandatory in the cases where the accused has been charged with manslaughter, murder or treason. The Respondent State therefore contends that for every other offence, an applicant must request for free legal assistance in order for the trial court to consider it, which the Applicant in the present case did not do. It therefore prays the Court to dismiss this allegation.

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82. Article 7(1)(c) of the Charter provides as follows: "[e]very individual shall have the right to have his cause heard. This comprises: […] c) The right to defence, including the right to be defended by counsel of his choice."

83. The Court notes that Article 7(1)(c) of the Charter does not explicitly provide for the right to free legal assistance. This Court has, however, interpreted this provision in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR"),[13] and determined that the right to defence includes the right to be provided with free legal

[13] The Respondent State became a State Party to ICCPR on on 11 June 1976.

assistance.[14] The Court has also held that an individual charged with a criminal offence is entitled to free legal assistance without having requested for it, provided that the interest of justice so require. This will be the case where an accused is indigent and is charged with a serious offence which carries a severe penalty.[15]

84. In the present case, the Court notes that the Applicant was not granted free legal assistance throughout the proceedings in the national courts. The Court further notes that the Respondent State does not dispute that the offence is serious and the penalty provided by law is severe. However, it contends that free legal assistance is only granted to an accused that has been charged with manslaughter, murder or treason, and, further that the Applicant ought to have requested for free legal assistance.

85. The Court notes, however, that the Applicant was charged with the serious crime of rape, carrying a severe punishment of life imprisonment. Thus, the interest of justice warranted that he ought to have been provided with free legal assistance even without him having requested for it.[16]

86. By failing to provide the Applicant with free legal assistance, the Court finds, therefore, that the Respondent State violated Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

87. Having found the violation of Article 7(1)(c) of the Charter, the Court notes that, in addition to his specific prayer for a finding of a violation of the right to free legal assistance, the Applicant prays the Court to make any other order as it deems necessary. In this regard, the Court observes that while the Respondent State's Legal Aid Act 2017 (herein after referred to as "LA 2017"), provides for legal aid for accused persons upon the certification of the judicial officer, it does not address the issue raised by the Court in its

[14] *Thomas v. Tanzania* (merits), *supra,* § 114; *Kijiji Isiaga v. United Republic of Tanzania* (21 March 2018) (merits) 2 AfCLR 218, § 72; *Onyanchi and Njoka v. Tanzania* (merits), *supra*, § 104.
[15] *Thomas v. Tanzania* (merits), *ibid*, § 123; see also *Abubakari v. Tanzania* (merits), *supra,* §§ 138-139.
[16] *Ibid*.

previous judgments[17] that accused persons charged with serious offences carrying heavy sentences should be granted free legal assistance as a matter of course. As such, the Court finds that the LA 2017 is not fully aligned with the Charter and its case law.

VIII. REPARATIONS

88. The Applicant prays the Court for the following:

    i. An Order for his release;
    ii. An Order for his retrial; and
    iii. Any other Order or remedy that this Honourable Court may deem fit.

89. The Respondent State prays the Court to dismiss the Applicant's prayers herein.

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90. 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.

91. The Court recalls its earlier judgments and restates its position that, "to examine and assess applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim".[18]

[17] *Thomas v. Tanzania, supra,* § 159; *Abubakari v. Tanzania* (merits), *supra,* § 236.
[18] *Abubakari v. Tanzania* (merits), *supra*, § 242 (ix); *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 19.

92. The Court also restates that reparations "…must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."[19]

93. Measures that a State may 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.[20]

94. The Court further reiterates that the general rule with regard to material prejudice is that there must be a causal link between the established violation and the prejudice suffered by the Applicant and the onus is on the Applicant to provide evidence to justify his prayers.[21] With regard to moral prejudice, the Court exercises judicial discretion in equity.

A. Pecuniary Reparations

95. The Applicant did not make specific submissions on pecuniary reparations.

96. The Respondent State prays the Court to dismiss the Applicant's prayers for reparations.

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97. The Court notes that the purpose of reparations is to erase the consequences of the wrongful act and restore the victim to his or her position prior to the occurrence of the violation.

[19] *Mohamed Abubakari v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 334, § 21; *Alex Thomas v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 287, § 12; *Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 308, § 16.
[20] *Umuhoza v. Rwanda* (reparations), *supra*, § 20.
[21] *Christopher R. Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, § 15.

98. In the instant case, the Court recalls that its only finding of violation against the Respondent State relates to the failure to avail him free legal assistance in the course of domestic courts.

99. The Court notes that the violation established caused moral prejudice to the Applicant and therefore, in exercising its discretion in equity, awards him Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[22]

B. Non-Pecuniary Reparations

100. The Applicant prays the Court to order:

i. His release from prison;
ii. A retrial of his case; and
iii. Any other remedy that the Court may deem fit.

101. The Respondent State submits that the Court has no jurisdiction to order the release of the Applicant. It, therefore, prays the Court to reject this prayer.

i. On the prayer for release

102. As regards the prayer for release, the Court has held that this measure can only be ordered in specific and compelling circumstances. This would be the case "if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice."[23]

[22] See *Anaclet Paulo v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 107; *Evarist v Tanzania* (merits), *supra*, § 85.
[23] *Evarist v. Tanzania* (merits), *ibid*, § 82.

103. In the instant case, the Court recalls that it has found that the Respondent State violated the Applicant's right to a fair trial by failing to provide him with free legal assistance. Without minimising the gravity of the violation, the Court considers that the nature of the violation in the instant case does not reveal any circumstance that signifies that the Applicant's conviction was based on arbitrary considerations or his continued imprisonment amounts to a miscarriage of justice. The Applicant also failed to elaborate on specific and compelling circumstances to justify the order for his release.[24]

104. Consequently, the Court dismisses the Applicant's prayer for release.

ii. On the prayer for the retrial of the Applicant's case

105. With regards to the prayer for retrial of the Applicant's case, the Court recalls its jurisprudence that it can be ordered in a situation whereby the violations found had a significant impact on the right to a fair trial.[25] In the instant case, although, the Court found the violation of the right to free legal assistance, it did not fault the trial procedure or the procedures in the subsequent appeals in the High Court or Court of Appeal. The Court, therefore, does not find a justification to order the retrial of the Applicant.

106. In view of the foregoing, the Court dismisses the Applicant's prayers for a retrial of his case.

iii. Guarantees of non-repetition

107. The Court notes its earlier finding that the LA 2017 is not aligned to and the Charter and its previous judgments in respect of the right to free legal assistance.[26] The Court, therefore, deems it necessary to make an order in this regard, and thus Orders the Respondent State to take all constitutive and legislative measures to amend the LA 2017 in order to fully align it with

[24] *Mussa and Mangaya v. Tanzania* (merits and reparations), *supra*, § 97; *Elisamehe v. Tanzania* (judgment), *supra*, § 112; and *Evarist v. Tanzania* (merits), *ibid*, § 82.
[25] *William v. Tanzania* (merits), *supra,* § 105.
[26] See paragraph 87 above.

the Respondent State's international obligations as reflected in the Charter and ICCPR.

IX. COSTS

108. The Respondent State prays the Court to order the Applicant to bear the costs of the Application.

109. The Applicant did not make any submissions on costs.

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110. 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."

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

X. OPERATIVE PART

112. For these reasons,

THE COURT,

Unanimously,

On jurisdiction

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

On admissibility

iii. *Dismisses* the objections to the admissibility of the Application;
iv. *Declares* the Application admissible.

On merits

v. *Finds* that the Respondent State did not violate the right to be heard protected under Article 7(1) of the Charter in relation to the Applicant's grounds of appeal at the Court of Appeal;
vi. *Finds* that the Respondent State violated the Applicant's right to defence under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR due to the failure to provide free legal assistance.

On reparations

On pecuniary reparations

vii. *Orders* the Respondent State to pay the Applicant, the sum of Tanzanian shillings Three Hundred Thousand (TZS 300,000) free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

On non-pecuniary reparations

viii. *Orders* the Respondent State to take all necessary constitutive and legislative measures, within a reasonable time, and in any case not exceeding two (2) years, to ensure that the Legal Aid Act 2017 is amended and aligned with the provisions of the Charter and ICCPR;

ix. *Dismisses* the Applicant's prayers for release and a retrial of his case.

On Implementation and Reporting

x. *Orders* the Respondent State to submit to the Court, within six (6) months from the date of notification of this Judgment, a report on the status of implementation of orders under paragraphs (vii) and (viii) of this operative part and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xi. *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 Algiers, this Seventh Day of November in the Year Two Thousand and Twenty-Three in English and French, the English text being authoritative.