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

CHARO SAID KIMILU

AND

MBWANA RUA KUBO

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 045/2016

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:

Charo Said KIMILU and Mbwana Rua KUBO

Self-represented

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General;
ii. Ms Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General;
iii. Mr Baraka LUVANDA, Ambassador, Head of Legal Unit, Ministry of Foreign Affairs and East African Cooperation;
iv. Ms Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney;

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

v. Mr Mark MULWAMBO, Principal State Attorney, Attorney General's Chambers; and
vi. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Charo Said Kimilu and Mbwana Rua Kubo (hereinafter referred to as "the Applicants") are Tanzanian nationals who, at the time of filing of the Application, were incarcerated at Maweni Prison, Tanga after having been tried, convicted of the offence of trafficking in narcotic drugs and sentenced to twenty (20) years imprisonment. The Applicants allege a violation of their right to a fair trial during domestic proceedings.

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 further 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 bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one (1) year after its deposit.[2]

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

II. SUBJECT MATTER OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that the Applicants, together with a third individual who is not part of this Application, were jointly tried before the High Court sitting at Tanga with the offence of trafficking in *Cannabis Sativa* contrary to the Drugs and Prevention of Illicit Traffic in Drugs Act. On 14 March 2014, they were convicted and sentenced to twenty (20) years imprisonment but the third individual, who had been jointly charged with the Applicants, was acquitted. The Applicants were also ordered to pay a global fine of TSH 95 180 607 (Ninety-five million one hundred eighty thousand and six hundred and seven Tanzanian Shillings), to be split evenly between the two of them.

4. The Applicants appealed against their conviction and sentence before the Court of Appeal but their appeal was dismissed, in its entirety, on 28 July 2016.

B. Alleged violations

5. Without specifying any provisions of the Charter, the Applicants allege a violation of their right to fair trial on the following grounds:

    i. The Court of Appeal failed to determine the exact weight of the *Cannabis Sativa* that was tendered by the prosecution as Exhibit P.2 as well as the types of bags in which it was found;
    ii. The Court of Appeal erred in law by failing to consider if the Applicants were indeed caught in possession of the *Cannabis Sativa*;
    iii. The Court of Appeal failed to establish why it took more than three months for the Respondent State to take the *Cannabis Sativa* to the government chemist for evaluation;
    iv. The absence of a Supreme Court in the Respondent State has contributed to a violation of their rights.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Application was received at the Registry of the Court on 28 July 2016 and served on the Respondent State on 29 August 2016. The Respondent State was given sixty (60) days to file its Response.

7. After several extensions of time, the Respondent State filed its Response on 25 May 2017. The Response was transmitted to the Applicants on 19 July 2017 giving them thirty (30) days to file a Reply.

8. The Parties filed their other pleadings within the time prescribed by the Court.

9. Pleadings were closed on 28 May 2019 and the Parties were duly informed.

IV. PRAYERS OF THE PARTIES

10. In their submissions on the merits**,** the Applicants pray the Court to:

    i. Re-evaluate the proceedings leading up to their conviction and sentence and come up with its own conclusions;
    ii. Quash their convictions and sentences and order their immediate release from prison; and
    iii. Make any order as the Court may deem fit and just.

11. In relation to reparations, the Applicants pray the Court to:

    i. Overturn the findings of both the High Court and Court of Appeal;
    ii. Grant each Applicant reparations in the sum of One Hundred Twenty-Five Million and Seven Hundred Thousand Tanzanian Shillings (TSH125 700 000**)**; and
    iii. Make any other order or remedy as it may deem fit.

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

    i. Find that the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate this Application.
    ii. Find that the Application does not meet the admissibility requirement provided by Rule 40(5) of the Rules of Court.
    iii. Find that the Application does not meet the admissibility requirement provided by Rule 40(6) of the Rules of Court.
    iv. Declare the Application inadmissible and duly dismiss it.

13. On the merits, the Respondent State prays the Court to:

    i. Find that the United Republic of Tanzania did not violate the Applicant's rights provided under Article 7 of the African Charter on Human and Peoples' Rights.
    ii. Dismiss the Application for lack of merit.
    iii. Dismiss the Applicant's prayers in their entirety.
    iv. Order that the Applicants continue to serve their sentence.

14. On reparations, the Respondent State prays for:

    i. A Declaration that the applicants are not entitled to any payment as reparation.
    ii. A Declaration that the Respondent has not violated the African Charter or the Protocol and that the Applicants were treated fairly and with dignity by the Respondent.
    iii. An Order that the Applicant should pay the fine ordered by the Court to the Respondent.
    iv. An Order to dismiss the prayers for reparations.
    v. Any other order this court might deem right and just to grant under the prevailing circumstances.

V. JURISDICTION

15. The Court recalls 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.

16. The Court further recalls 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."[3]

17. On the basis of the above-cited provisions, the Court must preliminarily establish its jurisdiction and dispose of objections thereto, if there are any.

18. In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction. The Court will thus, first, consider the objection to its material jurisdiction before assessing other aspects of its jurisdiction, if necessary.

A. Objection to the material jurisdiction of the Court

19. The Respondent State, relying on Article 3 of the Protocol, argues that the Court does not have jurisdiction to hear this Application. According to the Respondent State, "… this Application is calling for the Honourable Court to sit as an appellate Court and deliberate on matters of evidence and procedure already finalised by the Court of Appeal …" It is the Respondent State's contention, therefore, that it is not part of the mandate and jurisdiction of the Court to sit as an appellate Court. The Respondent State cited the Court's decision in *Ernest Mtingwi v. Malawi* to buttress its argument.

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

20. In their Reply, the Applicants contend that the Court has jurisdiction to hear this matter. They concede that the Court is not an appellate court, in relation to decisions from domestic courts, but argue that "this does not preclude the jurisdiction of this honourable court to examine whether the procedures before the national courts are consistent with the international touch-stone required by the applicable human rights instruments." In support of their arguments, the Applicants cite the Court's decision in *Mohamed Abubakari v. Tanzania*.

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21. The Court observes that by virtue of Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it provided that the rights alleged to have been violated are protected by the Charter or any other human rights instrument ratified by the Respondent State.

22. As regards the Respondent State's contention that the Court would be exercising appellate jurisdiction by examining the evidential basis of the Applicants' conviction, the Court reiterates its established position that it does not exercise appellate jurisdiction with respect to the decisions of domestic courts.[4] At the same time, however, and notwithstanding that the Court is not an appellate court *vis-à-vis* domestic courts, it retains the power to assess the propriety of domestic proceedings against standards set out in international human rights instruments ratified by the State concerned.[5] In performing the aforementioned function, the Court does not thereby constitute itself as an appellate court.

23. In view of the above, the Court dismisses the Respondent State's objection and holds that it has material jurisdiction to hear this Application.

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[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; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

[5] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Werema Wangoko Werema and another v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29 and *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.

B. Other aspects of jurisdiction

24. The Court notes that other aspects of its jurisdiction are not contested by the Parties and nothing on the record indicates that it lacks jurisdiction. Nonetheless, and in line with Rule 49(1) of the Rules, the Court must satisfy itself that all aspects of its jurisdiction are met.

25. In relation to its personal jurisdiction, the Court recalls that, and as stated in paragraph 2 of this Judgment, the Respondent State is a party to the Charter and has deposited the Declaration. The Court further recalls that the Respondent State deposited the instrument of withdrawal of its Declaration under Article 34(6) of the Protocol on 21 November 2019. The Court reiterates that such withdrawal does not apply retroactively and has no bearing on matters pending before the Court prior to the filing of the instrument withdrawing the Declaration or new cases filed before the withdrawal took effect, being a period of one (1) year after the deposit of the notice of withdrawal; that is, 22 November 2020. This Application having been filed on 28 July 2016, which was before the Respondent State deposited its instrument of withdrawal of the Article 34(6) Declaration, is thus not affected by the withdrawal. The Court's personal jurisdiction is therefore established.

26. Concerning its temporal jurisdiction, the Court notes that the final domestic determination that the Applicants invoke, as the basis of their alleged violations, is the judgment of the Court of Appeal dated 16 September 2015. This decision, the Court further notes, was delivered after the Respondent State had ratified the Charter, and the Protocol. The Court, therefore, has temporal jurisdiction in this Application.

27. As regards its territorial jurisdiction, the Court holds that it has territorial jurisdiction as all the alleged violations are said to have occurred in the territory of the Respondent State.

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

VI. ADMISSIBILITY

29. Pursuant to Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter."

30. In line with Rule 50(1) of the Rules,[6] "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."

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

> Applications filed before the Court shall comply with all of the following conditions:
>
> a) Indicate their authors even if the latter request anonymity;
> b) Are compatible with the Constitutive Act of the African Union and with the Charter;
> c) Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
> d) Are not based exclusively on news disseminated through the mass media;
> e) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f) Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and

[6] Rule 40, Rules of Court, 2 June 2010.

g) Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

32. In the present case, the Respondent State has raised objections to the admissibility of the Application based on non-exhaustion of local remedies as well the reasonableness of time that the Applicants took to file the Application. The Respondent State's objections will now be addressed seriatim thereafter the Court will consider other conditions of admissibility, if necessary.

A. Objections to admissibility

i. Objection based on non-exhaustion of local remedies

33. The Respondent State argues that the Applicants failed to exhaust available domestic remedies before filing this Application. According to the Respondent State, the Applicants could have filed an application for review of the Court of Appeal's decision or they could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act to challenge the alleged violation of their rights which they did not do.

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34. In their Reply, the Applicants submit that an application for review of the Court of Appeal's decision was neither necessary nor mandatory as "the final appeal process in criminal trials lies as of right in the court of appeal of Tanzania which the applicants proved that they had accessed." The Applicants also submit that "an application for review is an extraordinary remedy because the granting of leave by the court of appeal of Tanzania to lodge an application for review of its decision is based on specific grounds and is grants as the discretion of the court of appeal …" The Applicants

invoke the Court's decision in *Mohamed Abubakari v. Tanzania* in support of their submissions.

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

36. This Court has also stated in a number of cases involving the Respondent State that the remedies of filing a constitutional petition in the High Court and use of the review procedure before the Court of Appeal as provided for in the Respondent State's judicial system are extraordinary remedies that an Applicant is not required to exhaust prior to seizing this Court.[8]

37. The Court holds, therefore, that the Applicants were not obligated to file an application for review of the Court of Appeal's decision or to file a constitutional petition under the Basic Rights and Duties Enforcement Act. This is particularly so because the Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had, by its judgment of 16 September 2015 dismissed the Applicants' appeal against both their conviction and sentence thereby confirming the Applicants' exhaustion of domestic remedies.

38. In light of the above, the Court dismisses the Respondent State's objection alleging that the Applicants did not exhaust local remedies.

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

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

39. According to the Respondent State, the Applicants filed this Application ten (10) months after the Court of Appeal's judgment dismissing their appeal. While conceding that the neither the Charter nor the Rules prescribe the period within which an application must be filed, the Respondent State submits that international human rights jurisprudence has "established that a period of six (6) months is considered reasonable." In support of its submission, the Respondent State cites the decision of the African Commission on Human and Peoples' Rights in *Michael Majuru v. Zimbabwe*.

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40. For their part, the Applicants submit that the Application was filed within reasonable time given that they were in prison and waiting for copies of the judgment of the Court of Appeal. They also point out that the pace at which they filed the Application was affected by the fact that they were relying on prison authorities to access the judgment of the Court of Appeal.

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41. Pursuant to Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, an application must be "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." As the Court has consistently pointed out, these provisions do not set a time limit within which it must be seized of any Application.

42. In the present Application, the Court notes that the issue for determination is whether the time taken by the Applicants to seize the Court is reasonable within the meaning of Article 56(6) of the Charter as read together with Rule 50(2)(f) of the Rules. In this regard, the Court observes that the Court of Appeal delivered its judgment, dismissing the Applicants appeal, on 16 September 2015 and the present Application was received at the Court's

registry on 28 July 2016. In total, therefore, the Applicants took ten (10) months and twelve (12) days before filing the Application. It is this period that the Court must assess for reasonableness under Article 56(6) of the Charter.

43. 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."[9] Following this approach, the Court has taken into consideration circumstances such as incarceration and being on death row with the resultant limited movement and limited flow of information[10] in determining the reasonableness of time. In all instances, however, the Applicant bears the burden of proving how his/her personal circumstances affected the time within which the Application was filed.

44. Regarding the Respondent State's submission that a period of six (6) months is accepted as reasonable time for filing applications in international human rights law, the Court reiterates the open-ended nature of Article 56(6) of the Charter, which is replicated in Rule 50(2)(f) of the Rules. The result is that no pre-fixed time frame applies for determining reasonableness of time for filing an Application before the Court. The Court thus rejects, as being without legal basis, the Respondent State's submission that a period of six (6) months should be applied in determining reasonableness of time for filing Applications.

45. In considering the Applicants' situation as incarcerated individuals who had to rely on prison authorities to access their court records, and also considering the time at stake herein, ten (10) months and twelve (12) days, the Court holds that the time it took the Applicants to file their Application is

[9] *Zongo and Others v. Burkina Faso* (merits), *supra*, § 92. See also *Thomas v. Tanzania* (merits) *supra*, § 73.
[10] *Igola Iguna v. United Republic of Tanzania*, ACtHPR, Application No. 020/2017, Judgment of 1 December 2022 (merits and reparations), §§ 37-38.

manifestly reasonable within the meaning of Article 56(6) of the Charter as restated in Rule 50(2)(f) of the Rules.

46. The Court, therefore, dismisses the Respondent State's objection to the admissibility of the Application on the basis that it was not filed within a reasonable time.

B. Other conditions of admissibility

47. The Court notes that there is no contention regarding the Application's compliance with the conditions set out in Rule 50(2) (a), (b), (c), (d) and (g) of the Rules. It must, however, satisfy itself that the Application fulfils these requirements.

48. From the record, the Court notes that, the Applicants have been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

49. The Court also notes that the Applicants' claims seek to protect their rights guaranteed under the Charter. It also notes that one of the objectives of the Constitutive Act of the African Union as stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court, therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter and thus meets the requirements of Rule 50(2)(b) of the Rules.

50. The Court further notes that the Application does not contain any disparaging or insulting language regarding the Respondent State, its institutions or the African Union, in compliance with the Rule 50(2)(c) of the Rules.

51. The Court also finds that the Application is not based exclusively on news disseminated through mass media, rather, on decisions of the Respondent State's municipal courts. Thus, the Application complies with Rule 50(2)(d) of the Rules.

52. The Court also holds that the Application does not raise any matter or issues previously settled by the Respondent State 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 as required under Rule 50(2)(g) of the Rules.

53. As a consequence of the foregoing, the Court finds that the Application fulfils all the requirements set out under Article 56 of the Charter as restated in Rule 50(2) of the Rules and accordingly declares the Application admissible.

VII. MERITS

54. As indicated earlier, although the Applicants did not cite any specific provisions of the Charter, all their allegations relate to the right to a fair trial under Article 7 of the Charter.

55. According to the Applicants, their right to fair trial was violated due to the following: the Court of Appeal's failure to determine the exact weight of the *Cannabis Sativa* tendered in evidence during their trial (A); the alleged failure to determine if indeed the Applicants were caught with the *Cannabis Sativa* (B); the three (3) months delay to send the impounded *Cannabis Sativa* for examination by the government chemist (C) and the absence of a supreme court in the Respondent State (D).

56. The Court will proceed to examine each of the Applicants' contentions to determine if the right to a fair trial was infringed upon or not.

A. Alleged violation due to failure to determine the exact weight of the impounded *Cannabis Sativa*

57. The Applicants aver that the Respondent State failed to determine the exact weight of the *Cannabis Sativa* which had been tendered in evidence during their trial, including the type of bags in which it was contained. According to

the Applicants, the documents pertaining to their arrest suggested that the *Cannabis Sativa* weighed Two hundred and ninety kilogrammes (290kgs) while the evidence tendered following examination by the government chemist suggested that the weight was Three hundred seventeen two hundred sixty-eight point sixty-nine (317 268.69 grams). They also submit that the evidence did not clearly establish the type of bags in which the *Cannabis Sativa* was found.

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58. For its part, the Respondent State disputes the Applicants' arguments and submits that this issue was also raised by the Applicants before the Court of Appeal which interrogated the matter and dismissed the allegations. According to the Respondent State, "the Applicants were represented by counsel and when the Court of Appeal showed counsel how the weight of the drugs had been resolved during trial to be 317 68.69 grammes, defence counsel abandoned the ground of appeal as the matter had been resolved."

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59. The Court recalls that Article 7(1) of the Charter provides as follows:

> 1. Every individual shall have the right to have his cause heard. This comprises:
>   a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>   b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
>   c. The right to defence, including the right to be defended by counsel of his choice;
>   d. The right to be tried within a reasonable time by an impartial court or tribunal.

60. The Court notes that the guarantees contained in Article 7 of the Charter are meant to ensure fairness to all individuals that come into contact with the criminal justice system. As the Court has noted, Article 7 of the Charter can be read together with Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"), particularly in respect of States that have ratified the ICCPR.[11] It is thus the duty of every State to ensure that the protections contained in Article 7 of the Charter are observed during the conduct of trials.

61. The Court further notes that, in the present Application, the crux of the Applicants' contention relates to the determination of the weight of the *Cannabis Sativa* that was impounded.

62. The Court's perusal of the record reveals that, before the Court of Appeal, the Applicants' first ground of appeal challenged the discrepancies in the weight of the *Cannabis Sativa* which had been tended into evidence as Exhibit P2. On page 8 of the Court of Appeal's judgment, it is stated as follows:

> When we showed Mr Akaro the original record of appeal which indicates the weight of exhibit P2 to be 317 268.69 which also appears in trial court's judgment, he abandoned the ground of appeal contesting the discrepancy.

63. The Court of Appeal also noted, at page 13 of its judgment:

> … that the discrepancy in the weight of exhibit P2 raised by assessors is well addressed in the charge sheet itself, evidence of PW9 and detailed report of the Government Chemist who weighted and made chemical analysis of each and every sack. The exercise by the Government Chemist enabled every sack to be weighed and tested separately and eventually total weight was gathered. Moreover, at page 42 of the record, it is the evidence of PW2 that at the time of arrest exhibit P2 was not weighted. The weighing was done by

[11] *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 165. The Respondent State became a State party to the ICCPR on 11 June 1976.

> PW9 who testified to the same effect…the record shows that throughout from committal proceedings, preliminary hearing right up to the trial, the appellants were made to understand that they were being charged with trafficking 317 268.69 grammes of bhang and not 290 kilogrammes.

64. It is clear from the above that the Applicants' contention before this Court was already dealt with by the Court of Appeal. As earlier pointed out, the Applicants' counsel abandoned the ground of appeal upon being shown proof, by the Court of Appeal, that the ground had no merit. In line with its established jurisprudence, the Court is not mandated to supplant domestic courts especially in relation to issues revolving around the assessment of evidence.[12] In the present Application, the Applicants have merely restated the arguments they made before the Court of Appeal without offering the Court any basis for it to determine whether the Court of Appeal erred in its assessment or not.

65. In the circumstances, the Court holds that the Applicants have not established any violation of their right to fair trial by reason of the manner in which the Court of Appeal dealt with the question of the weight of the *Cannabis Sativa*. The Court thus dismisses the Applicants' allegation on this point.

B. Alleged violation relating to the possession of the *Cannabis Sativa*

66. The Applicants contend that the "Court of Appeal erred in law by failing to consider if truly the appellants were nabbed with the alleged drug …" According to the Applicants, no evidence was tendered proving that they had loaded the impounded drugs unto the truck. This, they submit, is "a blatant error on the face of justice" necessitating their acquittal.

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[12] *Oscar Josiah v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 83, § 52.

67. The Respondent State did not specifically address this dimension of the Applicant's submissions.

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68. The Applicants' contention on this point revolves around their presence at the alleged scene of the crime and whether the *Cannabis Sativa* was found in their possession.

69. From the record, the Court observes that this question was addressed in various parts of the judgment of the Court of Appeal. For example, at page 15 of its judgment, the Court of Appeal found as follows:

> We would also wish to make clear that, the fourteen (14) sacks which PW9 received from PW8 is bhang found to be trafficked by the appellants on the strength of evidence of PW2, PW3, PW4, PW5, PW7 who were involved in the arrest of appellants, search and seizure of impugned stuff at Hale Police Check Point before they were taken to Tanga police station in town.

70. The Court of Appeal also specifically dealt with the identification of the Applicants. At page 19 of its judgment, the Court of Appeal agreed with the Applicants' contention that the conditions for their visual identification, by PW6, were not ideal. It nevertheless held that "even if evidence of PW6 is expunged, the remaining testimony of PW2, PW3, PW4, PW5 PW7 and PW8 cumulatively is to the effect that the appellants were arrested at Hale trafficking narcotic drugs confirmed by PW9 to be bhang."

71. The record, therefore, demonstrates that there was a cumulation of evidence which established the presence of the Applicants at the scene of the crime together with the impounded *Cannabis Sativa,* notwithstanding that the evidence of PW6 was disregarded. Before this Court, the Applicants have not made any submissions to impeach the findings of the Court of Appeal.

72. The Court finds no reason to interfere with the findings of the domestic courts. In the circumstances, the Court, therefore, dismisses the Applicants' allegations.

C. Alleged violation due to the three (3) months delay in sending the seized *Cannabis Sativa* to the government chemist

73. The Applicants submit that the Court of Appeal failed to consider why it took more than three (3) months for the police to submit the impounded *Cannabis Sativa* to the government chemist. According to the Applicants, this was contrary to the Respondent State's Drugs Act and led to a violation of their rights.

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74. The Respondent State points out that this issue was considered and finalised by the Court of Appeal. According to the Respondent State, when the Applicants' counsel raised this matter before the Court of Appeal, it recalled the evidence of PW7 before the trial court and endorsed the explanation he had given as accounting for the delay in taking the drugs to the government chemist. It submits that the delay in taking the drugs to the chemist was due to transportation challenges since the whole impounded lot had to be transported at once. It thus prays that the Court find that the Applicants' allegation lacks merit and should be dismissed.

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75. The Court notes that the Applicants' grievance relates to the time it took the Respondent State to transport the impounded *Cannabis Sativa* from Tanga, where it was stored, to the government chemist in Dar es Salaam.

76. The Court further notes that the question of the delay in transportation of the *Cannabis Sativa* to Dar es Salaam arose during proceedings before the Court of Appeal. According to the record, it took a total of three (3) months before the seized *Cannabis Sativa* was sent to the government chemist.

The Court of Appeal, after reviewing all the evidence, concluded that no other person(s) had handled the *Cannabis Sativa* "until when it was handed over to PW 8 for transportation to PW9 the Government Chemist …". Overall, the Court of Appeal held that "considering that exhibit P2 was sealed and stored by PW7 before transportation, the three months delay to transport to the Chief Government Chemist could not result into its mixing up …".

77. The Court of Appeal thus held that there was a reasonable account for the delay in transportation of the *Cannabis Sativa* to the government chemist more so because "the impugned stuff could not be transported in piecemeals or else, higher risk on chances of tampering or mixing up of the Exhibit 2." It also held that the chain of custody was not broken from the moment the police arrested the Applicants and impounded the *Cannabis Sativa* to the time it was handed over for testing to the government chemist.

78. In reviewing the record, the Court finds no fault in the manner in which the Court of Appeal dealt with the question of delay in submitting the *Cannabis Sativa* to the government chemist. More importantly, the Applicants have not demonstrated that there was any tampering with the exhibits once it had been confiscated by the Respondent State's agents.

79. In the circumstances, the Court dismisses the Applicants' allegations of a violation of their right to fair trial.

D. Alleged violation due to the lack of a supreme court in the Respondent State

80. The Applicants submit that they are suffering due to the repressive judicial system in the Respondent State. According to their submission, if there was a Supreme Court in the Respondent State, the deficiencies that they have identified with the Court of Appeal's process would have been resolved in their favour.

*

81. The Respondent State disputes the Applicants' allegation and submits that "if the Applicant is aggrieved with the Court of Appeal's decision he has the remedy of filing an Application to review its decision …" According to the Respondent State, the "Applicant cannot fault the judicial system if he has not exhausted all available legal remedies." It thus submits that the allegation lacks merit and should be dismissed.

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82. The Court recalls that under Article 7(1)(a) of the Charter every individual has a right to be heard and this includes the right to appeal to competent national organs against acts violating his/her rights.

83. As the Court has previously held, the right to appeal requires that individuals be provided with an opportunity to access competent organs, to appeal against decision or acts violating their rights.[13] The duty on States, therefore, is to establish mechanisms for such appeal and take necessary action that facilitate the exercise of this right by individuals, including providing them with the judgment or decisions that they wish to appeal against within a reasonable time.

84. The Respondent State's duty, therefore, is to ensure that there is, at least, a two-tier jurisdiction in respect of all criminal matters i.e. an avenue for appealing all first instance decisions.[14] As noted by the United Nations Human Rights Committee, the right to appeal in criminal matters does not prescribe a particular number of the levels at which an appeal must occur so far as there is an opportunity for appealing a first decision.[15] As the Court has previously held, the essence of the right is that findings of a trial court must be amenable to review by another court.[16]

[13] *Benedicto Daniel Mallya v. United Republic of Tanzania* (26 September 2019) 3 AfCLR 482, § 43.
[14] Cf. *Sebastien Germain Ajavon v. Republic of Benin* (29 March 2019) 3 AfCLR 171, § 212.
[15] Human Rights Committee *General Comment No. 32* § 45.
[16] *Yahaya Zumo Makame and 3 others v. United Republic of Tanzania*, AfCHPR, Application No. 023/2026, Judgment of 25 June 2021 (merits and reparations) § 74.

85. In the circumstances, the absence of a court above the Court of Appeal, in the Respondent State's system, does not amount to a violation of the Applicants' rights. The Court, therefore, finds that the Applicants' contention has no merit and accordingly dismisses it.

VIII. REPARATIONS

86. The Applicants pray the Court to quash their conviction and order their release and that they be awarded reparations in the sum of TSH125 700 000 (One hundred twenty-five million and seven hundred thousand Tanzanian Shillings). They also pray that the Court make any other order or remedy as it may deem fit.

87. The Respondent State prays the Court to dismiss all the Applicant's prayers and find that it did not violate the Charter or the Protocol. It also prays that the Court make any such order as may be just in the circumstances.

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88. 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 the fair compensation or reparation.

89. In light of the above, the Court is entitled to order reparations in instances where human rights violations have been proved.

90. In the present case, the Court having found no violation by the Respondent State, the Applicants' claims for reparations are all dismissed.

IX. COSTS

91. None of the Parties made any prayers in respect of costs.

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92. The Court notes that Rule 32(2) of the Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs, if any".[17]

93. In this case, the Court finds no reason to depart from the above stated principle and, therefore, orders that each Party shall bear its own costs.

X. OPERATIVE PART

94. For these reasons:

THE COURT,

Unanimously:

On jurisdiction

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

On admissibility

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

[17] Formerly Rule 30(2) of the Rules of 2 June 2010.

On the merits

v. *Finds* that the Respondent State did not violate the Applicants' right to fair trial as guaranteed by Article 7 of the Charter.

On reparations

vi. *Dismisses* the prayers for reparations.

On costs

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