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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF PETER JOSEPH CHACHA

V

THE UNITED REPUBLIC OF TANZANIA

DISSENTING OPINION OF

SOPHIA A. B. AKUFFO, PRESIDENT;

ELSIE N. THOMPSON; AND

BEN KIOKO, JUDGES

(PRELIMINARY OBJECTIONS, EVIDENCE, MERITS, REPARATIONS AND COSTS)

Introduction

1. The background details of this matter have been sufficiently set out in the majority opinion herein. Therefore, in this Dissenting Opinion, we will only narrate such details as we deem necessary for providing a clear grounding for the position we have taken. Whilst agreeing with the conclusions made by the majority of the Court, in respect of the other issues raised in the Respondent's Preliminary objection, we, the undersigned, part company with them on their conclusions on the issue of whether or not the Applicant's Application herein is admissible on grounds of exhaustion of local remedies.

2. In our respectful view, the circumstances of this case clearly place the Application within the exception to the requirement to exhaust local remedies, created by Rule 34(4) of the Rules of Court. Therefore, the Court ought to have found the Application admissible. The said provision reads as follows:-

> *"The application shall specify the… evidence of exhaustion of local remedies or of the inordinate delay of such remedies … ."*

Admissibility of the Application

3. As is patently clear from the facts of this matter, as set out in the majority opinion, after his incarceration by the Respondent, the Applicant made several attempts to cause his complaint, which forms the basis of this Application, to be addressed administratively and by the Courts of the Respondent State. These attempts were made against the background of a plethora of ever-changing criminal charges, which the Respondent repeatedly withdrew and preferred. At all material times, the

Applicant questioned the legality of his incarceration and seizure of his property, for various reasons, including the unlawfulness of the seizure and his arrest, as well as the uncertainty of what charges he was being required to answer.

4. It is worth listing, at this juncture, the various criminal cases that were mounted against the Applicant in the District Court of Arusha, even though they have been set out in detail in the majority opinion.

The Charges:

i. Criminal Case No. 915/2007 dated 8 November 2007 and wherein, he was jointly charged with Akida Mohamed, with conspiracy to commit an offence and stealing.

ii. Criminal Case No. 931/2007 dated 30 November 2007 wherein the Applicant was charged jointly with Hamisi Jumanne and Rajabu Hamisi, with armed robbery. On 19 February 2008, he was charged alone in Criminal Case No. 941 of 2007 with committing the offence of armed robbery. There is nothing on the record to show that the charge against Mr. Hamisi in the earlier charge was withdrawn.

iii. In Criminal Case No. 933/2007, dated 8 November 2007, the charge was murder. This case eventually became Criminal Case No. 3 of 2009 dated 7 February 2009.

iv. Criminal Case No. 1027/2007 was dated 16 April 2008 and the charge was armed robbery. This case was withdrawn and eventually the case was reinstituted as Criminal Case No. 883/2008 dated 2 December 2008 wherein the Applicant was charged with armed robbery and rape.

v. The Applicant was also charged in Criminal Case No. 1029/2007. Though both of the Parties refer to this Case, there is no record of when the Applicant was charged in this regard and what charges were preferred.

vi. In Criminal Case No. 712/2009 dated 21 December 2009 wherein the Applicant was charged with armed robbery, the alleged incident of armed robbery occurred on 12 September 2009 at which date the Applicant was already in remand. During the hearing of the case at the Magistrate's Court, the Applicant raised an objection to the Prosecution's substitution of the charge on 13 November 2012, to reflect the alleged incident of armed robbery as having occurred on 12 September 2007.

vii. Criminal Case No. 716/2009 dated 23 December 2009 which charged the Applicant with armed robbery, kidnapping with intent to do harm and rape.

The Applications

5. In 2007, the Applicant, filed Miscellaneous Criminal Application No. 7 of 2007, originating from Criminal Case No. 933 of 2007, under Section 357 (a) of the Criminal Procedure Act, in the High Court of Tanzania at Arusha, seeking orders against the Attorney General of the Respondent, for restitution of his properties that were seized by the Police on 12 September 2007, allegedly in connection with the murder charge he was facing. There is no record of when this Application was filed. The High Court, in that application, held that because there was no connection between the property seized by the Police and the murder charge that the Applicant was then facing, the Court's jurisdiction to order the restitution of the property was ousted and the only avenue

open to him was to approach the District Court before which he was charged, to seek orders for restitution of his property. The learned High Court Judge added that, since the murder charge he was facing in Criminal Case No. 933 of 2007 was pending, the Applicant's application to the High Court was premature and that it would have to be stayed until final determination of the pending murder charge, unless the seized properties had no connection with the charges he faced. Furthermore, the High Court declined jurisdiction in the application on the ground that there were additional criminal charges pending against the Applicant in the District Court. The application was, therefore, not heard on merits and the Applicant was "referred" back to the District Court as being the proper forum for determining whether the seized property had a connection with the Criminal Cases the Applicant was facing. The application was dismissed on 14 December 2010. Even though the record does not show when this application was filed, it would appear that it took at least three years for it to be determined.

6. In the High Court of Tanzania at Arusha, in 2009, the Applicant filed Miscellaneous Criminal Application No. 54 of 2009 originating from Criminal Case No. 933 of 2007 under Section 91 of the Criminal Procedure Act for the charges preferred against him to be discharged. On 11 August 2010, the Application was struck out on the grounds that it did not specify the subsection of Section 91 of the Criminal Procedure Act under which it was made and that the Applicant's prayers were stated in the affidavit in support of the application rather than in the Chamber Summons.

7. In 2010, the Applicant, filed, against the Attorney General, of the Respondent Miscellaneous Criminal Application No. 6 of 2010 in the

High Court of Tanzania at Arusha, citing Section 90 (1) (c) (4) of the Criminal Procedure Act, for discontinuance of the Criminal Cases on the grounds that the actions that the Police had taken against him were contrary to Sections 32, 33, 50(1), 51(1) and 52(1), (2) and (3) of the Criminal Procedure Act. On 16 November 2010, the Application was struck out for being incompetent as it was filed under Section 90 (1) (c) (4) of the Criminal Procedure Act, which had been previously repealed by Section 31 of the National Prosecution Act No.27 of 2008 which came into effect on 9 June 2008.

8. The Applicant also filed, on 19 August 2010, in the High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 47 of 2010, against the Respondent. That application originated from the Criminal Cases Nos. 915/2007, 931 of 2007, 1027/2007, 1029 of 2007, 883 of 2008, 712 of 2009 and 716 of 2009 in the District Court of Arusha ("hereinafter referred to as the Criminal Cases"). The Application was grounded on Articles 13(1), 15(1), (2) (a) and 30 (3) of the Constitution of the United Republic of Tanzania guaranteeing equality before the law and dealing with the right not to be arbitrarily deprived of one's freedom. On 14 December 2010, that application was struck out for the reason that it had not been properly made since the Applicant brought it by way of Chamber Summons and Supporting Affidavit, whereas Section 5 of the Basic Rights and Duties Enforcement Act (which governs the procedure for filing and determining applications grounded on Part III of Chapter One of the Constitution under which the above mentioned provisions fall), required that such application be brought by way of a Petition and Originating Summons. In addition, according to the High Court, the aforesaid Act required that such an application be determined by a three - Judge Bench and not a single Judge.

9. On 8 December 2010, the Applicant filed against the Attorney General of the Respondent and the Police Officer in Charge of Arusha, Miscellaneous Criminal Application No. 78 of 2010, in the High Court of Tanzania at Arusha, originating from the Criminal Cases, to enforce his rights under Articles 13(1), 15(1), (2) (a) and 30 (3) of the Constitution. In support of the application, he alleged violation of his right to freedom and to live as a free person. According to the Applicant, the Second Respondent in that application had arrested, detained and interrogated him contrary to the provisions of the Criminal Procedure Act and therefore, the Criminal Cases against him were vitiated by these illegalities. The Applicant consequently, sought a decree, in enforcement of Part III of Chapter One of the Constitution of the United Republic of Tanzania, to this effect. On 18 May 2011, the High Court issued an order to the effect that the Application was withdrawn at the Applicant's instance. It should be noted that, neither the Order nor the record do not indicate the basis for the withdrawal of the Application and merely indicates its withdrawal.

10. On 29 December 2010, the Applicant filed. in the High Court of Tanzania in Arusha, Miscellaneous Criminal Application No. 80 of 2010, originating from the Criminal Cases, alleging violation of his basic rights and freedoms guaranteed under Part III of Chapter 1 of the Constitution of the United Republic of Tanzania, specifically of Articles 24(1), (2) and 30(3) thereof on the right to own property. The Application was against the Attorney General of the Respondent and the Police Officer in Charge of Arusha. The Applicant prayed the High Court to order the Respondents in that application to restore his properties and any other relief it deemed fit to grant. On 18 May 2011, the High Court issued an Order that the application was withdrawn at the instance of the

Applicant. The record does not indicate why the application was withdrawn, only its withdrawal.

11. On 19 May 2011, the Applicant, in the High Court of Tanzania at Arusha, filed against the Attorney General of the Respondent Miscellaneous Criminal Application No. 16 of 2011, originating from the Criminal Cases on the basis of Articles 13(1), 15(1) and 15(2) (a) and 30(3) of the Constitution of the United Republic of Tanzania. In that application, the Applicant alleged that the provisions and laws concerning his rights under Section 13(1)(a), (b), 13 (3) (a), (b) and (c), 32(1), (2) and (3), 33, 50(1), 52(1) and 52 (2) of the Criminal Procedure Act and Articles 14(1) and 15(1), and 15(2)(a) of the Constitution of the United Republic of Tanzania were violated by the Police. He, therefore, sought a decree under Part III of Chapter One of the Constitution of the United Republic of Tanzania. The Respondent therein filed its response on 5 October 2011. The Applicant sought to cause the empanelling of a three-Judge Bench of the High Court to hear this Application (as hinted by the High Court Judge when striking out Miscellaneous Application No. 47 0f 2010). On 29 June 2011, the Applicant wrote to the Registrar of the High Court of Tanzania at Arusha requesting that the three-Judge bench be constituted to hear the Application. He wrote again in this regard on 14 November 2011; it is apparent that there was no formal reaction to this request. On 26 March 2012, the Application was recorded at the High Court as withdrawn, even though the same record indicates that the Applicant was absent from Court. It is in our view, quite baffling that an Application which was required to be heard by a three-Judge Bench was withdrawn on the order of a single Judge. If the Application was to have been withdrawn, it should have been done before the three - Judge Bench.

12. From all the foregoing it is quite evident that the Applicant made several applications to have his complaints determined, all of which proved futile. On closer examination, it is clear that he was caught in a vicious cycle of attempting to find resolution to his complaints and finding himself thwarted at practically every turn by procedural technicalities that effectively had nothing to do with the substance of his complaints. Hence, his complaints were either found premature, not properly made or incompetent. The complaints were also treated as intrinsically tied to the ever-changing and hardly moving criminal charges the Applicant was facing, in that the Courts concluded that they could not grant him the orders he sought to enforce his basic rights until the criminal charges against him were prosecuted to finality, whereas his complaints were essentially against the very legality of his continuing incarceration. The Courts never adverted to the crucial question of whether his detention, the criminal proceedings preferred against him and the seizure of his property allegedly in connection with these criminal charges, were in accordance with the laid down due process, yet this was the gist of his complaints and applications.

13. In all the Miscellaneous Criminal and Civil applications he filed, the Applicant sought to have his human rights respected within the multiple criminal proceedings he was facing, both procedurally and substantively, but because of the approach of undue regard to circular technicalities that the courts chose to take, this became impossible and delayed final determination of his complaints. A patent example of this unfortunate approach is the decision of 14 December 2010 in Miscellaneous Criminal Application No. 7 of 2007, wherein the High Court found that, although there was no connection between the Applicant's seized property and the murder charge he was facing,

nonetheless it could not order the release of his property as the criminal charges against him were still pending at the District Court, in which it was being alleged that the Applicant's property was connected to the Criminal Cases.

14. The statement made before this Court by Counsel for the Respondent, during the public hearing of this matter, is quite illustrative of the conundrum posed to the Applicant by the approach the Respondent's officials chose to take in the domestic courts:

"With regards to the question posed ... on whether the Applicant had a right to appeal before the finalisation of any criminal proceedings; we pray to submit that the right to appeal is available to anyone after the matter is finally heard by the Court and not at a stage where it is still being heard by the Court. However one can do so after the finalization of the proceedings if he or she believes there are reasonable grounds for doing so. Similarly at any stage of the proceedings, if one feels their right has been violated or threatened he or she can file a constitutional petition before the High Court for the enforcement of his basic rights and duties vide the Basic Rights and Duties Enforcement Act. It is important to note that the effect of doing this stays criminal proceedings in the Subordinate Court."

15. In the Applicant's case, when he first applied to the High Court to enforce his basic rights, contrary to the provisions of the Basic Rights and Duties Enforcement Act, the High Court ruled that it could not decide on the matter as the proceedings against him at the District Court were pending yet the effect of such an application is meant to be the stay of proceedings at the District Court. Most of the applications took a

long time to dispose of yet the Applicant's liberty depended on their finalisation.

16. As a result, if a person is challenging the legality of criminal charges against him, the effect of the said procedure for enforcement of one's basic rights forces one to choose between going through criminal proceedings that may have been brought unlawfully then appealing against the decision therefrom or challenging the legality of those proceedings under the Basic Rights and Duties Enforcement Act and having the criminal proceedings filed against one, stayed. One may have to choose the lesser of two evils in the circumstances, each of which may have the tendency to violate the rights of such a person.

17. In the instant case, the Applicant chose to apply for the respect of his basic rights by challenging the legality of the preferment of the criminal charges against him and his subsequent arrest and detention and the seizure of his property. However, most of his applications were dismissed due to technicalities. Indeed, Counsel for the Respondent stated during the public hearing that:

"... the Applicant was registering his complaints in the form of ordinary criminal applications rather than constitutional petitions vide Basic Rights and Duties Enforcement Act. Hence his applications were being handled by a single Judge."

18. Indeed, being an unrepresented litigant, rather than basing his applications on the Basic Rights and Duties Enforcement Act, the Applicant, in his apparent ignorance, was initially basing them on the Criminal Procedure Act. This was the case in the first two Miscellaneous Applications. Having followed the wrong procedure at the High Court, there would have been no chance of success of an appeal from the

decisions of the High Court, dismissing or striking out his applications, regardless of the submission by the Respondent during the public hearing, to the effect that the Respondent ought to have appealed against these decisions of the High Court. Rather, the Applicant chose to file new applications in which he thought he was following the correct procedure.

19. Though his third application cited the provisions of the Bill of Rights under the Constitution that he alleged were violated, it was dismissed for the reason that it was not filed through a petition and originating summons. Again, it is doubtful that he could have appealed a decision of the High Court that found that his application thereto was filed using the wrong procedure due to the apparently established jurisprudential orientation toward strict regard to technicalities.

20. The fourth and fifth applications also cited provisions of the Bill of Rights under the Constitution that were allegedly violated by the Police but these applications were withdrawn by the Applicant.

21. A day after he withdrew the aforesaid two applications, he filed his final application. This is the application in respect of which the empanelling of the statutory three-Judge Bench to hear it was delayed or denied. On two occasions, on 29 June 2011 and 14 November 2011, the Applicant requested the Registrar in Charge to empanel the Bench to hear his application but this did not happen. What recourse did he have regarding this situation? Logically, it is obvious that he could not have appealed to the Court of Appeal on the issue of empanelling of the three-Judge Bench as there was no judicial decision to appeal from, to the Court of Appeal. He was thus compelled to wait for the empanelling of the three-Judge Bench, and, lacking a mechanism to resolve this

delay in the national jurisdiction, he decided to file an application to this Court on the grounds that his attempts to access local remedies against his rights, were unduly prolonged and delayed. At no time could he have accessed the Court of Appeal as there were no decisions from which he could appeal thereto.

22. It is noteworthy to reiterate that at the point in time, when he filed the Application at this Court on 30 September 2011, the Applicant had been in prison custody for 3 years and 11 months without trial.

23. In this matter, from what point in time ought the consideration of whether or not there has been an undue delay in accessing the local remedies be reckoned? In our considered opinion, this should be reckoned from the time the Applicant filed his first application to the High Court, that is, in 2007. Right from that time, the effect of his application was for the enforcement of his human rights. Even though this and the second and third applications were not expressly based on the Basic Rights and Duties Enforcement Act, they were, in effect, applications for the enforcement of the Applicant's basic rights under the Constitution. A reading of section 4 and 8(2) of the Basic Rights and Duties Enforcement Act shows that matters in respect of which one may apply under the Act to the High Court for redress, might also be resolved through other legal procedures.

24. Section 4 of the Act provides that:

"If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."

25. Section 8(2) of the same provides that:

"The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious."

26. These provisions indicate that basic rights provided for under section 12 to 29 of the Constitution of the United Republic of Tanzania need not be enforced only through this Act; thus, the Applicant's application for redress under the Criminal Procedure Act ought to have been properly considered as applications for enforcement of his basic rights, albeit not under the Basic Rights and Duties Enforcement Act. Therefore, the Applicant's actions for redress including seeking administrative remedies through the Ministry of Home Affairs, Ministry of Justice and Constitutional Affairs, the Directorate of Public Prosecutions of the Attorney General's Chambers and the Commission on Human Rights and Good Governance, which commenced in 2007 and continued until the time he applied to this Court for a remedy, were appropriate within the meaning of the Basic Rights and Duties Enforcement Act.

27. In these circumstances, we find, therefore, that the obstacles placed in the way of the Applicant's attempts to access the local remedies effectively rendered the remedies inaccessible and unduly prolonged. The principle established by the African Commission on Human and Peoples' Rights in Communications 147/95 and 149/96 (Consolidated) *Sir Dawda K. Jawara v The Gambia* in this regard is that:

"A remedy is considered available if the petitioner can pursue it without impediment. It is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."[1]

28. In the instant case, the Applicant's attempts to enforce his basic rights were fraught with impediments, which unduly prolonged the process of accessing local remedies. In this regard therefore, his Application herein is, in our view, admissible before this Court under the exception to the principle of exhaustion of local remedies, by virtue of the process of accessing local remedies being unduly prolonged.

29. In the circumstances we are also of the view that the Application was brought within a reasonable time.

Objection to the Expert Witness

30. By a letter dated 23 September 2013 and confirmed by a letter dated 5 November 2013, the Applicant notified the Registrar of Court (which notice was also served on the Respondent) that he intended to call one Professor Leonard P. Shaidi, a Professor of Law at the University of Dar es Salaam School of Law to "*testify and assist the Honourable Court to understand the obtaining criminal law and procedure of the Respondent State, which should apply or should have been applicable to the Applicant.*"

31. During the public hearing, the Respondent objected to the calling of the expert witness. The Parties made submissions on this issue.

[1] Thirteenth Activity Report, 1999 – 2000 paragraph 32.

The Position of the Respondent

32. The Respondent contended that three things are essential for one to be qualified as an expert witness, that is;

i. The expert should possess special knowledge;
ii. Special skill; and
iii. Experience or training in that particular field.

33. The Respondent maintained that expert witnesses should only be allowed if they are chosen by the Court, and that the Court does not need an expert opinion on the Criminal Procedure applicable in Tanzania as these are common statues that can be easily interpreted. Furthermore, Counsel for both parties are officers of the Court who ought to assist the Court to come to a just decision without resorting to experts

34. The Respondent maintained that the interpretation of statues is the preserve of Courts and not of experts. The Respondent cited the decision of the Court of Appeal of Tanzania, in the Case of *Director of Public Prosecutions v Shida Manyama and Selemani Mabuba*, App No. 81 of 2012 (Unreported), wherein the Court (per Rutakangwa, JA) quoted the opinion of the Supreme Court of India in *Alamgir v State of Delhi (2003)* ISCC 21 to the effect that:

"We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now settled law that expert opinion must always be received with great caution".

35. On this basis, the Respondent called on the Court to exercise caution and disqualify the witness as an expert.

36. According to the Respondent, in the same cited case (supra), the Court of Appeal of Tanzania also quoted the decision of the Indian Supreme Court in the case of *Romesh Chandra Aggaraval v Regency Hospital Ltd* (2009) 9 SCC 709 which set out three requirements for the admission of an expert witness as follows:

i. An expert witness must be within a recognized field of expertise;
ii. Evidence must be based on reliable principles;
iii. The expert witness must be qualified in the discipline.

37. The Respondent argued that the expert witness the Applicants intend to call does not meet these three requirements, as he is not an expert in any field of law, let alone Criminal Procedure, with renowned writings that have given substantial contribution to the knowledge of Criminal law in Tanzania. On this basis the Respondent prayed that its objection to the expert witness be sustained.

The Position of the Applicant

38. The Applicant opposed the Respondent's preliminary objection on three grounds.

39. The first ground is that the Respondent's objection to the expert witness is not in good faith as it has been done very late in the day despite the Respondent being aware as far back as 23 September 2013 that the Applicant intended to call the expert witness.

40. Further, according to the Applicant, the Respondent did not provide any basis for challenging the witness's qualification. Instead, the Respondent merely requested the Court to provide it with grounds for challenging this expert yet the Respondent's sole duty is to plead their case. They submitted that the Court is under no obligation to provide the Respondent or any of the Parties for that matter with grounds for argument or objection.

41. The Respondent, in support of the objection, had cited Rule 53(2) and Article 19(1) of the Rules of Court and the Statute, of the Inter-American Court of Human Rights respectively, which provides for disqualification of experts on the basis that they have a direct interest in the matter. The Applicant maintained that the Respondent did not put forward any evidence to show what, if any, relationship exists between the expert and the matter currently before the Court. The Applicant pointed out that, unlike the Inter-American Court of Human Rights, this Court's Rules of Procedure do not contain any explicit provisions on disqualifications of experts. In view of this, the Applicant urged the Court, as a human rights court to adopt a liberal and victim-centered approach to this issue towards ensuring truth and justice is achieved.

42. The second ground argued by the Applicant was that the expert witness is competent and credible because he is a Professor of Law at the Faculty of Law of the University of Dar es Salaam with relevant scholarly research and professional expertise. The Applicant also called on the Court to apply Rule 45(1) which empowers the Court to call for "*any evidence which in its opinion may provide clarification of the facts of a case or which in its view is likely to assist it in carrying out its task*" to

admit the oral evidence of the expert as well as the particulars of his qualification including his Curriculum Vitae.

43. The third ground on which Counsel for the Applicant based his argument, was that the testimony of the expert was intended to be limited in scope to issues of domestic law which would assist the Court in reaching a fair and just decision on the same. This, in the Applicant's view, would not be prejudicial to the Respondent. In addition, according to the Applicant, the Court may order that the expert testimony be limited to specific areas of competence. This would be in line with the approach adopted by various international courts and tribunals such as in the case of Prosecutor *v Bagasora* et al, ICTR Case Number 98/41T.[2] On these grounds, the Applicant pleaded for the admission of Professor Leonard P. Shaidi as an expert witness in this case.

Our Opinion

44. We observe that, the practice in international courts shows that they are "intolerant of any restrictive rules of evidence that might tend to confine the scope of a search after those facts. With certain exceptions, they do not hesitate to supplement, upon their own initiative, the evidence supplied by the parties if they regard it as inadequate."[3]

45. The Inter-American Court of Human Rights, for example, will admit testimony from a qualified expert when it is consistent with the

[2] Decision of 20 September 2004.

[3] Durward V Sandifer *Evidence Before International Tribunals* (Chicago: Foundation Press 1939) 3-4.

purpose for which it is proposed.[4] Experts may testify regarding a wide range of topics. They are often called to testify as to the domestic law in the Respondent State, as domestic law must be proven as a fact before international tribunals. Furthermore, any party can name expert witnesses and the Court may also appoint an expert.

46. Taking into account the scope of this case and having considered the corresponding arguments of the Parties, and, bearing in mind that it is essential to assure not only the determination of truth and the most complete presentation of facts and arguments from the Parties, we are of the view that, other than general assertions, the Respondent did not present any objective or cogent grounds for the disqualification of the expert witness and his alleged bias. Furthermore, the cases cited in support of the objection were irrelevant and immaterial to the objection, that is, the qualification of the proposed witness, not the quality of evidence to be given by him. Indeed, the Respondent asserted in Court that they did not know the exact nature of the evidence that the witness was going to adduce nor did they know whether he was an expert or not. The Respondent then went on to argue that the expert witness was not an "authority on criminal law and procedure of Tanzania." This is even though the objection was made before the witness had been sworn in and given the opportunity to highlight his qualifications and expertise. Thus it is rather unfortunate that the learned majority of this Court was taken in by such unfounded assertions on the part of the Respondent.

47. As regards the alleged concurrence of the expert's opinion with the position of the Applicant, we are of the view that, even when the statements of an expert witness would contain elements that support the

[4] *Painagua Morales v Guatemala* (Reparations, 2001) paragraph 71.

arguments of one of the parties, this does not, *per se*, amount to bias such as would disqualify the expert. In any event, as is the norm with all testimony, a Court would normally only admit expert witnesses' testimony that is in keeping with the purpose for which it is required and will evaluate it together with the body of evidence, taking into account the rules of sound judicial discretion. For these reasons, the Court should have admitted the testimony of the expert witness.

48. For these reasons, the Court ought to have admitted the testimony of the expert witness. In our respectful view, the reasons upon which the majority members of this Court refused to admit the Applicant's witness as an expert witness are unacceptable, particularly since the matters in respect of which the Applicant sought to call him were statutory law, to be treated as peculiar to the Respondent State and foreign to the Court, and the Court cannot arrogate to itself an omnipotent power to know and/or interpret the same. Moreover, the jurisdiction of the Court in terms of Article 3(1) of the Protocol does not extend to the interpretation of domestic law. We reject the rationales given for declining the expert witness. We also reject the purported interpretation of Rule 45(1) of the Rules of Court which is tantamount to the creation of a new rule outside the normal procedure of the Court.

49. Consequently, we maintain the view that Applicant's expert should have been heard, to help the Court decide whether or not the Applicant's arrest, detention and the seizure of his properties were in compliance with the national criminal law procedure, the crux of Applicant's case. Fortunately for the Applicant, the Respondent, apart from a little more than a mere bald assertion that the arrest, detention and the seizure of

his properties were in accordance with the law, offered nothing substantive to controvert the Applicant's systematic factual outline, with reference to the provisions of the Criminal Procedure Act, to buttress its case; as a result, no real contest ensued between the parties around this issue. That being the case, the Court was, mercifully, saved from an untoward situation where it would have needed the assistance of the evidence of an expert, something which could have happened had the Respondent offered a more diligent contrary case. In our view, a Court should not lightly, or as a matter of routine, bar a party from adducing expert evidence; it may not always and necessarily find itself in the fortunate situation in which we fortuitously found ourselves on this occasion.

The Evidence

50. Having concluded that the Application is admissible, we will proceed to express ourselves on the merits of the matter. Though it may appear to be an exercise in futility, because the case was heard on the merits, we will consider the merits of the Application.

51. The Applicant alleges that he was unlawfully arrested, interrogated, detained, charged and imprisoned contrary to the provisions of the Criminal Procedure Act. The Applicant also alleges violation of his rights under the Constitution of the United Republic of Tanzania and the African Charter on Human and Peoples' Rights ("hereinafter referred to as the Charter").

52. At the public hearing of this matter, the Court received testimonies as follows:

i. The Applicant testified to the events leading to his alleged unlawful arrest, detention, interrogation and preferment of charges of murder, kidnapping, armed robbery and rape and the alleged unlawful seizure of his property by the Police.

ii. Mr. Ramadhani Athumani Mungi, currently the Regional Police Commander in Iringa , who was the Officer Commanding the Criminal Investigation Department (OCCID) in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred. He testified regarding the various criminal incidents of crime that had occurred between July and September 2007, in Arusha, as well as the particular incident leading to the Applicant's detention, interrogation and subsequent charging in Court.

iii. Mr. Salvas Viatory Makweli, currently a Police Officer in Muleba District, and Assistant Superintendent of Police who was an Inspector of Police in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred, and who was in charge of the search conducted in the Applicant's house on 12 September 2007. He testified on the procedure that was followed following the seizure of the Applicant's property, allegedly in connection with the crimes with which the Applicant and his wife were eventually charged. According to him, he supervised the search process though he did not personally conduct it.

iv. Mr. John Mathias Maro, currently the OCCID in Shinyanga District and Assistant Superintendent of Police, was an officer on the Criminal Investigation Department in Arusha of the rank of Assistant Inspector at the time the events forming the basis of the application occurred.

He testified as to how he conducted the search of the Applicant's house and seized his property allegedly in connection with the crimes that the Applicant and his wife were eventually charged with.

v. Mr. Leonard Paul, currently an Assistant Commissioner of Police and the Regional Police Commander of Geita Region, who had the rank of Superintendent of Police in Arusha was a Regional Criminal Officer at the time the events forming the basis of the Application occurred. According to him, he was in charge of ensuring prevention of crimes and supervised the administration of the Department of Criminal Investigation. He testified that, in this capacity, he handled several police files involving the Applicant, particularly involving incidents of kidnapping, rape and armed robbery and armed robbery that occurred in Njiro, Arusha on 24 August 2007 and on 12 September 2007 respectively, with which the Applicant was charged and in respect of which he allegedly refused to attend the trial proceedings, leading to their withdrawal and reinstitution. He also testified to his handling of the Case No. 993/2007 where the Applicant was charged with murder and in respect of which the Applicant was acquitted to due to lack of evidence.

vi. Mr. Wilson Mushida an Assistant Superintendent of Prisons at the Central Prison of Arusha who, at the time the events forming the basis of the Applicant's complaints allegedly occurred, was an Assistant Inspector of Prisons working at the Reception Department of the Central Prison of Arusha. He testified to the handling of the Applicant while in remand at the Arusha Central Prison including the facilitation of his Court appearances and how the Applicant's alleged refusal to attend Court for his cases was addressed.

53. Additionally, we admit the evidentiary value of those documents, filed by the Parties at the appropriate procedural stage, that were not disputed or challenged and those that the Court ruled were admissible, as the case may be.

Assessment of the Evidence

54. Given that the Applicant has a direct interest in the case, his testimony is useful insofar as it provides more information on the alleged violations and their consequences. It is the well-established case law of the Inter-American Court of Human Rights that a person's interest in the outcome of a case is not sufficient, *per se*, to disqualify him or her as a witness.[5] In most cases, particularly those involving alleged violation of human rights, often the only witnesses who are willing to put themselves at risk to testify are those who have a personal interest in the case. Thus, the Inter-American Court of Human Rights has stated that the testimony of the victim has a 'unique import', as the victim may be the only person who can provide the necessary information.[6]

55. As to the testimony of the Respondent's witnesses, overall, it is our view, as well as apparent from the record, that they were self-serving and geared towards justifying their possibly illegal actions. It appears to us that their actions regarding the matters they testified to lean more towards an indication that, in their respective opinions it was a foregone conclusion that the Applicant should be the one held responsible for the

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[5] *Suarez Rosero v Ecuador* (Merits), Inter-American Court of Human Rights 12 November 1997 Ser C No 35 paragraph 32.

[6] *Loayza Tamayo v Peru* (Reparations, 1998) paragraph 73.

alleged incidents of crime that were happening in Arusha, and it was simply a matter of throwing at him, as many charges as possible in the expectation that some would eventually stick. Despite this concerted activity, there were contradictions in their testimony.

56. Witnesses Ramadhani Athumani Mungi and John Mathias Maro testified to the occurrence of several incidents of crime prior to 12 September 2007 when the incident in which the Applicant was allegedly involved occurred. According to Mr. Mungi, despite the fact that other suspects in respect of these criminal incidents had been identified, only the Applicant was ever charged in any of the Criminal Cases. Witness Leonard Paul, however, testified that other suspects were charged with these crimes and that the cases against them proceeded, but no concrete information was provided to the Court in relation to those other cases. There is no evidence showing that the cases against the other suspects with whom the Applicant was initially charged proceeded. Even the Respondent has not argued so.

57. Regarding the search, even assuming that Police Officers could conduct a search of the Applicant's property without a search order or search warrant, witnesses Ramadhani Athumani Mungi, Salvas Viatory Makweli and John Mathias Maro were hard pressed to explain why a Seizure List or Certificate of Seizure was never issued in respect of the seized property, as required under the Criminal Procedure Act and conceded in Court. It is evident that this was not drawn up.

58. In addition, witness Ramadhani Athumani Mungi conceded that an arrest warrant was never issued in respect of the Applicant from 12 September 2007 when the alleged incident of crime that the Applicant

was allegedly involved in occurred, until he was detained from 26 October 2007, when he went to the Police Station to find out about his wife, and further on until 8 November 2007 when he was first arraigned before a Magistrate. This, in our view, evidences an intention on the part of the Police to disregard the laid down procedures relating to arrest of suspects and the provision of twenty (24) hours period within which suspects must be arraigned in Court as set out in Section 32(1) of the Criminal Procedure Act. Hence, even where it became apparent that the "evidence" that the Police had mounted against the Applicant in respect of the various charges would not pass muster, as admitted by witness Leonard Paul on cross-examination by Counsel for the Applicant, there were still continuous attempts to manufacture evidence to ensure that the murder charge against the Applicant would be upheld. However this failed as the Applicant was eventually acquitted of that charge in May 2013.

59. The testimony of Wilson Mushida an Officer of the Arusha Central Prison also failed to convincingly establish that the Applicant refused to attend Court in respect of the Criminal Cases he was facing such as to justify the long period of detention of over five and half years without trial. We observed that the witness appeared to have selective memory and could only recall the Applicant's movements (or lack thereof) in respect of the criminal charges he was facing but virtually nothing of his movements regarding the Miscellaneous Applications he had filed, except for Miscellaneous Application No. 16 of 2011 in respect of which the Respondent, unsuccessfully sought, by doubtful evidence, through this witness, to prove that the Applicant was in Court when the Application was withdrawn, even though, as evidenced by the

Respondent's own pleadings and the documentary evidence on record, the contrary was true.

The Merits

60. To recap briefly, the Applicant alleges that he was unlawfully arrested, interrogated, detained, charged and imprisoned without trial contrary to Sections 13(1)(a) and (b), 3(a), (b) and (c), 32(1), (2) and (3), 33, 38 (1), (2) and (3), 50 (1) and 52(1), (2) and (3) of the Criminal Procedure Act, Chapter 20 of the Laws of Tanzania (Criminal Procedure Act). These provisions deal with warrant of arrest, detention of persons arrested, police to report apprehensions, power to authorise search warrant or authorise search, periods for interviewing persons and questioning suspect persons, respectively. According to him, his unlawful arrest, detention, charging and imprisonment in relation to the multifarious Criminal Cases mounted against him violated his right, under Article 15(1) and (2)(a) of the Constitution of the United Republic of Tanzania, to freedom and the guarantee that such freedom shall only be deprived under circumstances, and in accordance, with procedures prescribed by law, respectively and that the unlawful seizure of his property in this regard is in contravention of his right to property as set out in Article 24(1) and (2) of the Constitution of the United Republic of Tanzania. The Applicant also claims the violation of his rights as enshrined in Articles 3, 5, 6, 7(1), 14 and 26 of the Charter.

61. Article 3 of the Charter provides for equality before the law and equal protection of the law. Article 5 thereof provides for the right of

every individual to the respect of the dignity inherent in a human being and to the recognition of his legal status. Article 6 provides for the right of every individual to liberty and to the security of his person and a right not to be deprived of his freedom except for reasons and conditions previously laid down by law. Article 7(1) of the Charter provides for the right of every individual to have his cause heard and for due process rights. Article 14 of the Charter provides for the right to property which may only be encroached upon in accordance with the provisions of appropriate laws. Article 26 of the Charter commits States Parties to the Charter to guarantee the independence of the Courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed in the Charter.

62. For purposes of this dissenting opinion, we shall examine whether or not the actions of the Respondent in arresting, interrogating, detaining, charging and imprisoning the Applicant and the seizure of his property was in compliance and consonance with the Criminal Procedure Act and the Constitution of the United Republic of Tanzania, and more importantly, in compliance with the aforesaid provisions of the Charter.

63. Central to this is the question of the procedural integrity or lawfulness of the Applicant's arrest, detention in custody at the Police station and subsequent detention in prison awaiting trial. From the outset, it should be reiterated that the Applicant was purportedly arrested when he presented himself at the Police station to enquire why his wife was being detained. Strangely, no warrant of arrest had been issued against the Applicant at any time during the period of two months that,

as alleged in Court, he had run away and the Police were looking for him. In the absence of a warrant of arrest, the Police could arrest the Applicant provided that they strictly complied with the other procedural requirements particularly that requiring that he be arraigned in court within twenty (24) hours. There is no good reason and none was provided to this Court for not charging him in court within twenty (24) hours and for detaining him at the Police Station for fourteen (14) days in violation of the Criminal Procedure Act and the Charter. In addition, the charges in these cases kept metamorphosing and increasing year to year. From the time the Applicant was arrested and detained in remand and subsequently in prison awaiting trial from 26 October 2007 to 3 May 2013, when he was released, a period of about five and half years had lapsed.

64. Our examination of the documentary and testamentary evidence presented shows that the Respondent has failed to prove that the Applicant's arrest and detention for fourteen (14) days before trial is a matter of grave concern. As this is an issue dealing with the Applicant's liberty, the presumption is in favour of the Applicant and the onus is on the Respondent to rebut the Applicant's allegations of the Respondent's unlawful action in respect of his interrogation, detention and charging with serious crimes. The documentary and, particularly, the testimonial evidence leads us to the conclusion that the Respondent has not discharged this onus of proof, therefore, the presumption being in favour of the Applicant, we have no hesitation in finding that he was unlawfully detained, interrogated and charged. When it comes to an individual's liberty, the onus of proof that he or she has been lawfully arrested lies with the State.

65. Flowing from the actions of the Respondent as indicated above, we make the following findings:

66. The Applicant's right to equality before the law and equal protection of the law (Article 3 of the Charter) was violated as the laid down procedures for arrest, interrogation and charging of the Applicant were not followed.

67. The Applicant's right to the respect of the dignity inherent in a human being and to protection from cruel, inhuman or degrading punishment and treatment (Article 5 of the Charter) was violated.

68. The Applicant's right to liberty and to the security of his person and to not be deprived of his freedom except for reasons and conditions previously laid down by law, in particular, the right not to be arbitrarily arrested or detained (Article 6 of the Charter) was violated.

69. Article 7(1) of the Charter provides that:

"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 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"

70. Article 26 of the Charter provides that:

"State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

71. These two provisions of the Charter come into play when considering the inordinate length of the disparate proceedings in the Criminal Cases against the Applicant, as well as in the handling of his attempts to seek redress before the Courts of the Respondent for the alleged violation of his basic rights, as provided for under the Constitution of applicable laws of the United Republic of Tanzania. This resulted in his languishing in prison for five (5) years plus, without trial.

72. Having believed, and we agree with the Applicant on this score, that his rights were violated, the Applicant sought redress for the violation of his rights through various domestic procedures in consonance with Article 7(1)(a) and 26 of the African Charter. The basic import of these applications was that he sought enforcement of his rights. But due to the unduly technical approach of the courts, he was unable to obtain redress. Jurisprudential developments across the world require that when addressing issues of fundamental rights, Courts should not take an overly technical approach which do not ensure

substantial justice but rather tend to derogate from it. Indeed, so important is this that, some jurisdictions, such as India, provide for epistolary jurisdiction wherein petitions regarding the respect for fundamental rights need not follow a specific format, what is considered important is the content therein, and it will be admissible if it indicates possible violations of basic rights.

73. This Court is also following this jurisprudential orientation as, in the instant case, it has decided that Applicants need not specify the particular provisions of the Charter that have allegedly been violated, rather, that they only need to be discernible from the alleged violations.

74. With regard to the Respondent, the enactment of the Basic Rights and Duties Enforcement Act was evidently intended to provide a procedure for the enforcement of the rights set out in Articles 12 to 29 of the Constitution of the United Republic of Tanzania. Though, in theory, there is such a procedure, as evidenced by this Application, there is a *lacuna* in its application which is detrimental to an applicant in the situation the Applicant herein found himself. The Applicant knows only too well about this as his attempts to enforce his basic rights since 2007 came to naught.

75. Articles 7(1) (b) to (d) of the Charter are relevant in respect of the Criminal Cases facing the Applicant. The issue here is whether the time taken to conclude the cases against him was reasonable. The time lapse between his detention in 2007 until May 2013 when he was acquitted of the murder charge is in our view not a reasonable time. This is particularly so considering the Respondent's almost culpable actions of withdrawing and reinstituting the charges. It behoves the Respondent to

withdraw the cases against the Applicant if there was insufficient evidence against him, no matter how heinous the crimes alleged to have been committed, rather than detaining the Applicant indefinitely while attempting to obtain evidence against him. The rule of law demands that laid down procedures should be followed. It is telling that there was chilling witness testimony by Mr. Ramadhani Mungi, who was a witness for the Respondent that the Respondent was waiting for the matter before this Court to come to an end to deal with the Applicant's cases. When asked to clarify his statement, the witness indicated that he meant preferment of more criminal charges against the Applicant and not as a threat to the person of the Applicant. We merely observe that criminal prosecution is not a game to be played whimsically and vengefully for gratification.

76. Freedom of the person is sacrosanct, and in our view, any act on the part of the State which curtails such freedom must fulfil the requirements of the Charter, in both word and spirit. Where a person is incarcerated pending trial, justice requires that the trial be concluded in the optimal time to enable the person know his or her fate, and more importantly, to prevent inordinately lengthy remand of a possibly innocent person; this is merely the concomitant of the presumption of innocence.

77. Article 26 of the Charter is also relevant in the instant case. It provides that:

"States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and

improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

78. Our admission of the Applicant's application on the ground that the local remedies were unduly delayed and prolonged is an indication that there exists in the Respondent State ample room for improvement to assure adequate protection of human rights in the administration of criminal justice.

79. Regarding the claim concerning the guarantee of the right to property (Article 14 of the Charter), it is our view that on the face of the record, the seizure of the Applicant's property was not done in accordance with the law. However, this is a moot point as the judgment dated 30 April 2013 delivered in respect of Criminal Case No. 712 of 2009 ordered the return of his property after the Court found that the prosecution had failed to prove the case against the Applicant in that matter. We will say no more on this aspect of the Application.

Compensation and Reparation

80. Since this a dissenting opinion, even if we would otherwise have been inclined to grant to the Applicant, in due course, compensation and or reparation, and costs, such orders would in the circumstances hereof be mere *brutum fulmen* and we will, therefore, not embark on such an exercise in futility.

81. **On the prayers:**

In Conclusion:

82. Having found the application admissible and that the Court has jurisdiction to consider the applications, we find that:

1. The Respondent has violated Articles 3, 5, 6, 7(1) (a) and (d) and 26 of the Charter;
2. There is no need to make a finding with regard to the alleged violation of Article 14 of the Charter, because the matter is moot;
3. The finding of a violation constitutes *per se* a form of reparation;
4. The Respondent must take steps to examine and address the possible *lacunae* occurring in the implementation of the Basic Rights and Duties Enforcement Act and remedy the same.

Done at Arusha, on this Twenty Eighth Day of the month of March in the year Two Thousand and Fourteen, in English.

Signed by:

Sophia A.B. AKUFFO, President

Elsie N. THOMPSON, Judge

Ben KIOKO, Judge

and Robert ENO, Registrar.