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28/03/2019  
(000314-000291) ON

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

THE MATTER OF

OSCAR JOSIAH

v.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 053/2016

JUDGMENT  
(MERITS)

28 MARCH 2019



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**The Court composed of:** Sylvain ORÉ, President; Ben KIOKO, Vice-President; Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, 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 8(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Imani D. ABOUD, member of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

OSCAR JOSIAH  
*Self-represented*

*versus*

UNITED REPUBLIC OF TANZANIA,  
*represented by:*

- i. Ms. Sarah D. MWAIPOPO, Director, Division of Constitutional Affairs and Human Rights, Attorney General's Chambers;
- ii. Mr. Baraka LUVANDA, Ambassador, Head of the Legal Unit, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation;
- iii. Ms. Nkasaori SARA KIKYA, Assistant Director, Human Rights; Principal State Attorney, Attorney General's Chambers;

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- iv. Mr. Elisha E. SUKA, Foreign Service Officer, Ministry of Foreign Affairs, East African, Regional and International Cooperation;

after deliberation,

*delivers the following Judgment:*

## I. THE PARTIES

1. Mr. Oscar Josiah, (hereinafter referred to as "the Applicant"), is a national of Tanzania who is imprisoned at Butimba Central Prison in Mwanza, Tanzania after being convicted of murder and sentenced to death.
2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986, and to the Protocol on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State deposited the declaration required under Article 34 (6) of the Protocol, through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

## II. SUBJECT OF THE APPLICATION

### A. Facts of the matter

3. It emerges from the file that the Applicant, Oscar Josiah and his wife, were married in 2011 and were living together at Chankila village in the North West of Tanzania. At the time of their marriage, the Applicant's wife was pregnant by another man but apparently, the Applicant did not have any problem with this situation.

*S* *Mr. Sukam* *2* *Suka* *Ag* *[Signature]* *[Signature]*

4. The couple stayed together until 2 July 2012 when the wife gave birth to a child. On the same day, it is alleged that the baby died of unnatural causes after having been abandoned in the bush. A subsequent post-mortem medical examination revealed that the cause of the death was *Hypoglycemia* (lack of sugar in the blood) and *Hypothermia* (lack of bodily warmth).
5. The Applicant and his wife were later arraigned in the High Court of Tanzania at Bukoba and charged with the offence of murder, contrary to Section 196 of the Penal Code.
6. On 2 October 2015, the High Court acquitted the wife but convicted the Applicant and sentenced him to death. The Applicant subsequently appealed to the Court of Appeal of Tanzania, but the Court dismissed his appeal for lack of merit, in its judgment delivered on 25 February 2016.

#### **B. Alleged violations**

7. The Applicant alleges that the Court of Appeal's judgment was rendered on the basis of evidence derived from statements of Prosecution Witnesses which were marred by inconsistencies and "manifest errors patent in the face of the records". In this regard, he contends that the Court of Appeal misdirected itself by dismissing his grounds of appeal without giving them due consideration by relying on incriminating evidence obtained from an "untruthful" witness.
8. The Applicant consequently submits that the Court of Appeal's wrongful dismissal of his Appeal violated his rights under Article 3(1) and (2) and Article 7(1)(c) of the Charter.

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### III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

9. The Applicant filed his Application before the Court on 2 September 2016 and the same was served on the Respondent State on 15 November 2016.
10. On 18 November 2016, the Court, *suo motu*, issued an Order for Provisional Measures, directing the Respondent State to refrain from executing the death penalty against the Applicant pending the determination of the Application. The Court also requested the Respondent State to report to it within sixty (60) days from the date of receipt, on the measures taken to implement the Order.
11. On 9 February 2017, the Court, *suo motu*, granted an extension of time by thirty (30) days for the Respondent State to respond to the Application and this was again extended by thirty (30) days on 22 March 2017.
12. The Court received the Respondent State's Response to the Application on 22 May 2017 and transmitted it to the Applicant on 28 May 2017.
13. On 28 June 2017, the Court received the Respondent State's report on the implementation of the Order for Provisional Measures. On the same day, the Court also received the Applicant's Reply to the Respondent State's Response.
14. The Registry transmitted the Reply to the Respondent State on 27 July 2017.
15. On 4 October 2017, the pleadings were closed and the Parties were duly informed.

### IV. PRAYERS

16. The Applicant prays the Court to:

"

- a. Set him free from custody by quashing the decision and sentence under article 27 of the Protocol to the Charter.
- b. Restore justice where it is overlooked.



c. Order any other measure of benefit to him in the circumstances.”

17. The Respondent State prays the Court to grant the following orders regarding the Application’s admissibility and jurisdiction:

“

1. That the Honourable African Court on Human and Peoples’ Rights is not vested with jurisdiction to adjudicate over this Application.
2. That the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court.
3. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of the Court.
4. That the Application be declared inadmissible.
5. That the Application be dismissed in accordance with Rule 38 of the Rules of Court.
6. That the costs of this Application be borne by the Applicant.”

18. The Respondent State further prays the Court to grant the following orders regarding the merits:

“

1. That the Government of the United Republic of Tanzania did not violate Article 3(1) and (2) of the African Charter on Human and Peoples’ Rights.
2. That the Government of the United Republic of Tanzania did not violate Article 7(1) (c) of the African Charter on Human and Peoples’ Rights.
3. That the Application be dismissed for lack of merit.
4. That the Applicant’s prayers be dismissed.
5. That the costs of this Application be borne by the Applicant.”

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None ✓

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## V. JURISDICTION

19. Pursuant to Article 3 (1) of the Protocol, the material jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned". In terms of Rule 39 (1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction...".

20. The Respondent State raises an objection to the material jurisdiction of the Court.

### A. Objection to material jurisdiction

21. The Respondent State avers that this Court has no appellate jurisdiction to determine matters of fact and law which are finalised by the Court of Appeal, the highest court in Tanzania. In this regard, it claims that the matter relating to the credibility of the witnesses that the Applicant mentioned in his Application were issues of evidence which were determined with finality by the Court of Appeal. The Respondent State argues that this Court thus has no jurisdiction to review such a decision of the Court of Appeal or quash the Applicant's conviction and order his release from prison.

22. The Applicant contends that although this Court is not an appellate court, it has jurisdiction to determine matters of fact and law when the rights violated by the Respondent State are protected by the Charter and other human rights instruments to which the Respondent State is a party. The Applicant avers that this Court has jurisdiction to examine the relevant proceedings in the domestic courts in order to determine whether such proceedings were in accordance with the standards set out in the Charter and other human rights instruments ratified by the Respondent State.

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23. The Applicant submits further that this Court has jurisdiction to quash his conviction and order his release from prison.

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24. The Court has previously held that Article 3 of the Protocol gives it the power to examine an Application submitted before it as long as the subject matter of the Application involves alleged violations of rights protected by the Charter or any other international human rights instruments ratified by a Respondent State.<sup>1</sup>

25. The Court also observes that it is not an appellate court.<sup>2</sup> Nevertheless, even where allegations of violations of human rights relate to the assessment of evidence by the national courts, the Court retains the power to ascertain whether such assessment is consistent with international human rights standards and it has not occasioned a miscarriage of justice to an Applicant.<sup>3</sup>

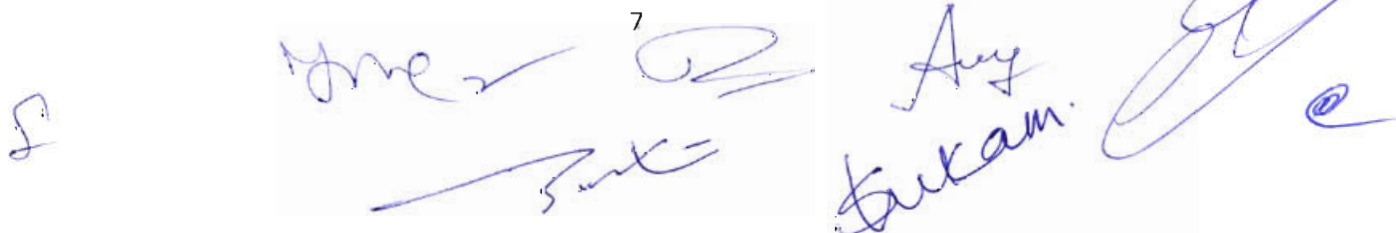
26. In the instant case, the Court notes that the Applicant's complaints relate to the alleged violations of human rights, namely, the right to equality before the law and equal protection of the law and the right to a fair trial, guaranteed under Article 3 and Article 7 of the Charter, respectively.

27. The Court further notes that the Applicant's allegations substantially relate to the way in which the Respondent State's courts evaluated the evidence that resulted in his conviction. However, this does not prevent the Court from making a determination on the said allegations and ascertaining whether the domestic

<sup>1</sup> Application No. 003/2014. Ruling of 28/3/2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania*, § 114.

<sup>2</sup> Application No. 001/2013. Ruling of 15/03/2015 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*, § 14. Application No. 024/2015. Judgment of 7/12/2018 (Merits), *Werema Wangoko Werema and Waisiri Wangoko Werema v. United Republic of Tanzania*, § 29.

<sup>3</sup> Application No. 005/2013. Judgment of 20/11/2015 (Merits), *Alex Thomas v. United Republic of Tanzania*, (hereinafter referred to as "*Alex Thomas v Tanzania (Merits)*"), § 130; Application No. 007/2013. Judgment of 20/05/2016, *Mohamed Abubakari v. United Republic of Tanzania* (hereinafter referred to as, "*Mohamed Abubakari v Tanzania (Merits)*"), § 26; Application No. 003/2015. Judgment of 28/09/2017 (Merits), *Kennedy Owino Onyanchi and Another v. United Republic of Tanzania*, (hereinafter referred to as "*Kennedy Owino Onyanchi and Another v. Tanzania (Merits)*"), § 35.

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courts' evaluation of evidence is compatible or otherwise with international human rights standards. This would neither make the Court an appellate court nor is it tantamount to exercising an appellate jurisdiction. The Respondent State's objections in this regard lack merit and are thus dismissed.

28. In light of the foregoing, the Court finds that it has material jurisdiction over the instant Application.

#### **B. Other aspects of jurisdiction**

29. The Court notes that the personal, temporal and territorial aspects of its jurisdiction are not disputed by the Respondent State and that nothing on the record indicates that the Court lacks personal, temporal or territorial jurisdiction. The Court accordingly holds that:

- (i) It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the declaration prescribed under Article 34 (6) of the Protocol, which enabled the Applicant to bring this Application directly before this Court, pursuant to Article 5 (3) of the Protocol;
- (ii) It has temporal jurisdiction because the alleged violations occurred subsequent to the Respondent State's ratification of the Protocol establishing the Court;
- (iii) It has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

30. In light of the foregoing, the Court finds that it has jurisdiction to hear the instant case.

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## VI. ADMISSIBILITY

31. Pursuant to Article 6 (2) of the Protocol, "the court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter." Rule 39 (1) of the Rules also provides that "the Court shall conduct preliminary examination of ... the admissibility of the application in accordance with Articles ... 56 of the Charter and Rule 40 of these Rules".

32. Rule 40 of the Rules, which in substance restates Article 56 of the Charter, stipulates that Applications filed before the Court shall be admissible if they fulfil the following conditions:

"

1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. Comply with the Constitutive Act of the Union and the Charter;
3. Not contain any disparaging or insulting language;
4. Not be based exclusively on news disseminated through the mass media;
5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African union, the provisions of the Charter or of any legal instrument of the African Union".

33. While some of the above conditions are not in contention between the Parties, the Respondent State has raised an objection regarding the requirement of exhaustion of local remedies.

### A. Condition of admissibility in contention between the Parties

#### *Objection based on non-exhaustion of local remedies*

34. The Respondent State argues that it was premature for the Applicant to bring this matter before this Court because there were judicial remedies yet to be exhausted

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within its judicial system. In this vein, the Respondent State submits that the Applicant could have sought a review or revision of the Court of Appeal's decision or filed a constitutional petition before the High Court of Tanzania by claiming that his fundamental rights had been or are still being violated, but he did not pursue both remedies before he filed his Application before this Court.

35. The Applicant claims that the Application meets the requirement stipulated in Rule 40(5) of the Rules. He asserts that he has exhausted local remedies because his rights were violated by the Court of Appeal, the highest court of the Respondent State and his appeal to that Court was the last necessary step that he could take to exhaust local remedies.

36. The Applicant further submits that he had filed an application for review or revision of the Court of Appeal's decision but it was denied. As regards the possibility of filing a constitutional petition in the High Court, the Applicant argues that since the violations were committed by the highest Court of the Respondent State, the matter cannot be successfully resolved by a lower court.

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37. The Court notes that in accordance with Article 56 (5) of the Charter and Rule 40 (5) of the Rules, in order for any application before the Court to be admissible, local remedies must have been exhausted, unless the domestic procedure to pursue them is unduly prolonged.

38. In its established jurisprudence, the Court has consistently held that an Applicant is only required to exhaust ordinary judicial remedies.<sup>4</sup> With respect to similar applications against the Respondent State, the Court, after having examined the domestic laws of the Respondent State, has further observed that the filing of a constitutional petition in the High Court and an application for review of the Court

<sup>4</sup> *Alex Thomas v Tanzania* (Merits), § 64. See also Application No. 006/2013. Judgment of 18/03/2016 (Merits), *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania*, § 95.

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of Appeal's judgment are extraordinary remedies in the Tanzanian judicial system, which an applicant is not required to exhaust prior to filing an application before this Court.<sup>5</sup>

39. In the instant case, the Court notes from the records that the Applicant went through the required trial and appellate processes up to the Court of Appeal, which is the highest Court in the Respondent State, before filing his Application before this Court. The Court thus finds that the Applicant has exhausted the local remedies available in the Respondent State's judicial system. In line with this Court's abovementioned established position, the Applicant was also not required to pursue the constitutional petition in the High Court and the review procedure in the Court of Appeal of the Respondent State before seizing this Court, as both procedures are extraordinary remedies.

40. Accordingly, the Court dismisses the Respondent State's objection that the Applicant did not exhaust local remedies.

**B. Conditions of admissibility not in contention between the Parties**

41. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 40, Sub-rules 1, 2, 3, 4, 6 and 7 of the Rules, on the identity of Applicant, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case respectively, and that nothing on the record indicates that these requirements have not been complied with.

42. The Court therefore finds that all the admissibility conditions have been met and that this Application is admissible.

<sup>5</sup> *Alex Thomas v Tanzania (Merits)*, §§ 63- 65.

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## VII. MERITS

43. The Court notes that the Applicant alleges violation of the right to equality before the law and equal protection of the law, and the right to fair trial as provided under Articles 3 and 7 of the Charter, respectively. Considering that the Applicant's allegation of violation of Article 3 essentially stems from the alleged violation of his right to a fair trial, the Court will first examine the allegations relating to Article 7.

### A. Alleged violations of the right to a fair trial

44. The Applicant makes two allegations which would fall within the scope of the right to a fair trial enshrined under Article 7 of the Charter.

#### i) The Court of Appeal's judgment had manifest errors

45. The Applicant claims that the Court of Appeal's judgment had manifest errors 'patent in the face of records that resulted in the miscarriage of justice'. He elaborates his allegation by stating that the Court of Appeal misdirected itself by dismissing his second ground of appeal while it was argued that the evidence presented before it concerning the cause of the death of the baby had contradictions and inconsistencies. The Applicant in this regard claims that one of the prosecution witnesses first indicated that the deceased baby was strangled and carried on a plate but another witness mentioned that he saw a spear in the bush where the baby was abandoned, suggesting that the baby was killed with a spear.

46. The Applicant also cites the testimony of his wife, and the mother of the deceased baby (DW2), who at first is reported to have said that the baby slipped into a pit latrine but later changed her statement, and said that the Applicant snatched the baby and threw it in the bush. Despite this inconsistency and the fact that the Court of Appeal itself declared this witness as unreliable, the Applicant alleges that her

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testimony was used as an incriminating evidence to convict him and that the Court of Appeal expunged part of her statements that were exculpatory.

47. According to the Applicant, the said contradictions and inconsistencies were the root of the matter, as they related to the evidence on the cause of death of the baby and were contrary to the medical report (exhibit 1), submitted by Prosecution Witness (PW1), the medical doctor who undertook the *post-mortem* examination on the deceased baby. The Applicant concludes by asserting that his conviction on the basis of the testimony provided by an unreliable witness and without consideration of the exculpatory evidence occasioned a miscarriage of justice.

48. On its part, the Respondent State disputes the Applicant's allegations and prays the Court to put him to strict proof. It states that the Court of Appeal thoroughly assessed and determined all contradictions that were pointed out by the parties during the appeal and concluded that the contradictions were minor and did not go to the root of the case. The Respondent State reiterates its earlier position that, if the Applicant believed that there were errors in the judgment of the Court of Appeal, he could have requested for a review of the judgment at the Court of Appeal or filed a constitutional petition at the High Court to seek redress for the violation of his fundamental rights.

49. In his Reply, the Applicant reiterates that he was not required to seek a review of the Court of Appeal's judgment, because it is the same Court, the highest Court in the Respondent State, which violated his rights. He adds that he was also not required to file the constitutional petition at the High Court and that it is unlikely that the High Court, presided by a single Judge, would reverse the decision of the Court of Appeal rendered by a panel of three (3) Judges.

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50. Article 7 of the Charter provides that:

"Every individual shall have the right to have his cause heard. This comprises:

1. 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;
2. The right to be presumed innocent until proved guilty by a competent court or tribunal;
3. The right to defence, including the right to be defended by counsel of his choice;
4. The right to be tried within a reasonable time by an impartial court or tribunal."

51. The Court observes that the right to a fair trial and specifically, the right to presumption of innocence requires that a person's conviction on a criminal offence which results in a severe penalty and in particular to a heavy prison sentence, should be based on solid and credible evidence.<sup>6</sup>

52. The Court also recalls its jurisprudence in the *Matter of Kijiji Isiaga v United Republic of Tanzania*, where it held that:

"Domestic courts generally enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court does not and should not replace itself for domestic courts and investigate the details and particularities of evidence used in domestic proceedings."<sup>7</sup>

53. However, the Court reiterates its position in paragraph 27 above that, the fact that the Court is not concerned with detailed assessment of evidentiary issues does not prevent it from examining whether the manner in which domestic courts assessed evidence is compatible with international human rights standards. Consequently, the Court retains, for instance, the power to examine "whether the evaluation of facts or evidence by the domestic courts of the Respondent [State] was manifestly arbitrary or resulted in a miscarriage of justice to the Applicant".<sup>8</sup>

<sup>6</sup> *Mohamed Abubakari v Tanzania* (Merits), § 174.

<sup>7</sup> Application No. 023/2015. Judgment of 23/03/2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania*, (hereinafter referred to as *Kijiji Isiaga v Tanzania* (Merits)), § 61.

<sup>8</sup> *Ibid*, § 62; See also *Mohamed Abubakari v. Tanzania* (Merits), §§ 26, and 173; *Kennedy Owino Onyachi and Another v Tanzania* (Merits), § 38.

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54. In the instant Application, the Court observes from the judgment of the Court of Appeal that the Applicant had raised five grounds of appeal, namely:

- “1. That, the prosecution evidence was not proved beyond reasonable doubt;
2. That the evidence for cause of death has contradictions;
3. That the evidence of DW2, the co-accused of the appellant, was not credible as the witness had confused and contradicted itself;
4. That exhibits P2 and P3 were illegally admitted and considered as their recording was done contrary to the law; and
5. That the Court did not comply with section 231 (1) (Sic. 293 (2)) of the Criminal Procedure Act (CPA) by failure to explain to the accused (appellant) the rights expressed therein.”

55. The Court notes from the record that the Court of Appeal considered all of the above grounds of appeal and reached the conclusion that the Applicant was responsible for the death of the baby. With respect to the first ground of appeal, the Court of Appeal held that the testimonies of PW2, PW3 and PW4 dispelled any reasonable doubt as to the culpability of the Applicant and provided adequate evidence to sustain his conviction.

56. As regards the second ground of appeal, the Court of Appeal noted that there were some contradictions between the testimonies of PW2, PW3, and PW4. Whereas PW2 stated that the appellant showed them a plate in the bush which was used to carry the baby, the other two witnesses did not mention this. Furthermore, only PW 4 testified about the spear.

57. However, the Court of Appeal held that these were minor contradictions that did not go to the root of the matter, that is, the baby's cause of death. The Court of Appeal emphasised that all the three witnesses testified that it was the Applicant who led them to the bush from where they recovered the baby's corpse and that

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he would not have known where the baby was abandoned if he was not involved in the commission of the crime.

58. Concerning the third ground of appeal, the Court of Appeal agreed with the Applicant that DW2, the wife of the Applicant and the mother of the deceased baby, was not a reliable witness as she contradicted her statements when questioned by the other witnesses concerning the whereabouts of the baby, first indicating that the baby slipped into the latrine and later, stating that the Applicant snatched the baby from her and threw the baby in the bush. Nevertheless, the Court of Appeal noted that her second statement was subsequently found to be true and it considered it relevant as corroborating evidence. The Court of Appeal also indicated that the Applicant's conviction withstood the inconsistent testimony of DW2.

59. As regards the fourth and fifth grounds of appeal, the Court of Appeal also considered them in detail and decided that the procedural irregularities and omissions pointed out by the Applicant were justified under the Tanzanian laws and in the circumstances surrounding his case.

60. From the foregoing, this Court observes that the manner in which the Court of Appeal assessed the evidence reveals no apparent or manifest errors that occasioned a miscarriage of justice to the Applicant. In this regard, this Court notes, as the Court of Appeal did, that the discrepancies in the witnesses' testimony were minor and that the most important issues for determination were consistent in the testimonies of PW2, PW3, and PW4. All three witnesses narrated that the Applicant took them to the place where the baby was abandoned, whereas his wife only went part of the way before needing to have rest. This was substantiated by the *post mortem* examination report of PW 1, which disclosed that the cause of the death was hypoglycaemia (lack of sugar in the blood) and hypothermia (lack of warmth).

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61. The Court also notes that the alleged inconsistencies in the testimonies of PW2, PW3, and PW4 were not in direct contradiction to each other, but rather certain details were only mentioned by one witness and not by the others.

62. The Court thus dismisses the allegations of the Applicant that the Court of Appeal failed to properly examine his grounds of appeal and that the evidence that was used to uphold his conviction was not watertight.

63. In light of the above, the Court therefore holds that the Respondent State has not violated the Applicant's right to a fair trial with respect to the alleged inconsistencies among witnesses' testimonies and the alleged lack of proper evaluation of evidence and of his grounds of appeal by the Court of Appeal.

**ii) The right to defence**

64. In his Application, the Applicant alleges a violation of Article 7(1)(c) of the Charter by the Respondent State.

65. The Respondent State reiterates its submission that all the Applicant's grounds of appeal were examined and determined by the Court of Appeal and thus, there was no violation of Article 7(1) (c) of the Charter.

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66. The Court notes that Article 7 (1) (c) of the Charter as indicated above, provides for the right to defence, including the right to be defended by counsel of one's choice. This Court has consistently interpreted this provision in light of Article 14 (3) (d) of the International Covenant on Civil and Political Rights (ICCPR)<sup>9</sup>, which establishes the right to free legal counsel and determined that the right to defence

<sup>9</sup> The Respondent State became a State Party to ICCPR on on 11 June 1976.

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includes the right to be provided with free legal assistance in circumstances where the interest of justice so require.<sup>10</sup>

67. In the instant Application, the Applicant makes a mere allegation, without substantiation, that the Respondent State violated his right to defence. The Court notes from the record that the Applicant had defence counsel at the trial and appellate levels and also that, he was able to testify and call witnesses in his defence. As observed above, the Court of Appeal also addressed all his grounds of appeal, as submitted by his counsel.

68. In view of the above, the Court dismisses the Applicant's allegation that the Respondent State has violated his right to defence under Article 7 (1) (c) of the Charter.

**B. Alleged violation of the right to equality before the law and equal protection of the law**

69. In his Application, the Applicant claims that the Respondent State has violated his rights enshrined under Article 3(1) and (2) of the Charter by convicting him on the basis of contradictory and "incriminating" evidence.

70. The Respondent State contests the Applicant's claim and prays the Court to declare that it has not violated Article 3 (1) and (2) of the Charter.

\* \* \*

71. The Court notes that Article 3 of the Charter guarantees the right to equal protection of the law and to equality before the law as follows:

- "1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law"

<sup>10</sup> *Alex Thomas v Tanzania* (Merits), § 114; see also *Kijiji Isiaga v Tanzania* (Merits), § 72, *Kennedy Owino Onyachi and Another v Tanzania* (Merits), § 104.

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72. With regard to the right to equal protection of the law, the Court observes that this right is recognised and guaranteed in the Constitution of the Respondent State. The relevant provisions (Articles 12 and 13) of the Constitution protect the right in terms similar to the Charter, including prohibiting discrimination. In this regard, the Applicant has not indicated in his submissions any other law that runs counter to the essence of the right to equal protection of the law.

73. With respect to the right to equality before the law, the Court notes from the record that the Court of Appeal examined all the Applicant's grounds of appeal and found that they lacked merit. As specified in paragraph 60 above, this Court has not found that the Court of Appeal's assessment of the evidence was done in a manner that infringed on the Applicant's rights to equality before the law and to equal protection of the law. Furthermore, the Court has found no evidence showing that the Applicant was treated differently, as compared to other persons who were in a situation similar to his.<sup>11</sup>

74. In view of the foregoing, the Court dismisses the Applicant's allegation that the Respondent State has violated Article 3 (1) and (2) of the Charter.

### VIII. REPARATIONS

75. In his Application, the Applicant, among others, prays the Court to order his release from custody by quashing his conviction. The Applicant also requests the Court to issue any other order for his benefit.

76. Article 27(1) of the Protocol stipulates that: "If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

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<sup>11</sup> Application No. 006/2016. Judgment of 07/12/2018 (Merits). *Mgosi Mwita Makungu v United Republic of Tanzania*, § 66.

*Subcam.*  
*Subcam.*  
*Subcam.*

77. The Court, having found that the Respondent State has not violated the rights of the Applicant, dismisses the Applicant's prayers that the Court should quash his conviction and order his release.

#### IX. COSTS

78. The Court notes that the Applicant made no submission on costs, but the Respondent State prays that the costs of the Application be borne by the Applicant.

79. Rule 30 of the Rules states that "unless otherwise decided by the Court, each Party shall bear its own costs".

80. In the present Application, the Court decides that each Party shall bear its own costs.

#### X. OPERATIVE PART

81. For these reasons,

The COURT,

Unanimously

*On jurisdiction*

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

*On admissibility*

- (iii) *Dismisses* the objection on the admissibility of the Application;
- (iv) *Declares* that the Application is admissible.

*Sukam.*

*S*

*At*

*At*

*On merits*

- (v) *Finds* that the Respondent State has not violated the Applicant's right to equality before the law and equal protection of the law guaranteed under Article 3 (1) and (2) of the Charter;
- (vi) *Finds* that the Respondent State has not violated the right to a fair trial of the Applicant under Article 7(1) of the Charter.

*On reparations*

- (vii) *Dismisses* the prayers of the Applicant for reparation to quash his conviction and order his release.

*On costs*

- (viii) Decides that each Party shall bear its own costs.

Signed:

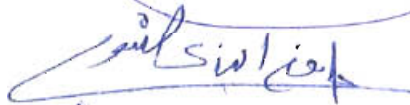
Sylvain ORÉ, President;



Ben KIOKO, Vice-President;



Rafaâ BEN ACHOUR, Judge;



Ângelo V. MATUSSE, Judge;



Suzanne MENGUE, Judge;



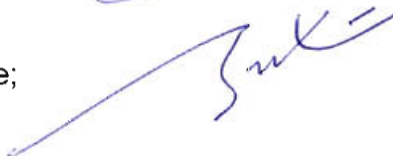
Tujilane R. CHIZUMILA, Judge;



Chafika BENSAOULA, Judge;



Blaise TCHIKAYA, Judge;



Stella I. ANUKAM, Judge; *Anukam.*

and Robert ENO, Registrar. *[Signature]*

Done at Arusha, this Twenty Eighth Day of March in the year Two Thousand and Nineteen, in English and French, the English text being authoritative.



*Mme [Signature]*

*[Signature]*

*[Signature]*

*Anukam.*  
*[Signature]*