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21/09/2018
(000240-000212) ON

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

ANACLET PAULO

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 020/2016

JUDGMENT

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
ARUSHA
TANZANIA

21 SEPTEMBER 2018

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The Court composed of: Sylvain ORÉ, President; Ben KIOKO, Vice-President; Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA and 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"), Judge Imani D. ABOUD, member of the Court and a national of Tanzania did not hear the Application.

In the Matter of:

Anaclet PAULO

self-represented

versus

UNITED REPUBLIC OF TANZANIA

represented by

i. Ms Sarah D. MWAIPOPO, Director of Constitutional Affairs and Human Rights;

ii. Ms Nkasori SARAKIKYA, Deputy Director, Human Rights, Principal State Attorney, Attorney General's Chambers;

iii. Mr. Baraka LUVANDA, Ambassador, Director of the Legal Unit, Ministry of Foreign Affairs, International, Regional and East African Cooperation;

iv. Mr. Richard KILANGA, Senior State Attorney, Division of Constitutional Affairs and Human Rights, Attorney General's Chambers;

v. Mr. Elisha SUKA, Foreign Service Officer, Ministry of Foreign Affairs International, Regional and East Africa Cooperation,

after deliberation,

delivers the following Judgment:

I. THE PARTIES

1. The Applicant, Mr. Anaclet Paulo, is a citizen of the United Republic of Tanzania, who at the time of filing this Application was serving a thirty (30) years prison term at the Butimba Central Prison in Mwanza, Tanzania.

2. The Respondent State is the United Republic of Tanzania which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment an African Court on Human and Peoples' Rights on 10 February 2006. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 29 March 2010.

II. SUBJECT OF THE APPLICATION

A. Facts of the Matter

3. The file record indicates that on the night of 28 July 1997, four individuals forced their way into the home of a certain Benjamin Mhaya Simon, in the village of Izingo Nshamba; and after tying up the latter and his wife, they made away with a sum of Eight Hundred Thousand Tanzania Shillings (TZS 800,000), a radio cassette player, five trousers, two wrist watches and three pairs of loin cloth.

4. On the same night, the Applicant and three other individuals were arrested by the Police and charged with the offence of armed robbery with violence. By

Judgment of the Muleba District Court delivered on 27 November 1997, three of the accused, including the Applicant, were found guilty and each sentenced to a term of thirty (30) years imprisonment.

5. The Applicant lodged an appeal before the High Court of Mwanza and on 6 June 2003, the High Court held a public hearing in the absence of the Applicant and without the original case file. In a Judgment rendered on 17 June 2003, the High Court dismissed the Appeal, and upheld the Judgment of the District Court. The Applicant was notified of the High Court's Judgment on 4 February 2005.

6. On 5 February 2005, the Applicant and his two co-accused filed an appeal before the Court of Appeal of Tanzania sitting at Mwanza. On 28 January 2008, the Registry of the Court of Appeal notified them that their application for appeal had never been received. On 27 February 2008, the Applicants and the co-accused sought an extension of time from the High Court so as to file their appeal before the Court of Appeal of Tanzania.

7. On 29 September 2009, the High Court dismissed the request for extension of time on the basis that the grounds invoked for seeking the extension were irrelevant and that the deadline for appeal had long elapsed.

8. Dissatisfied with the decision dismissing their Application for extension of time to file the appeal, on 18 November 2009, the Applicant and his co-accused, brought the matter before the Court of Appeal in Criminal Appeal No. 120/2012, an appeal dismissed by the Court of Appeal in a Judgment dated 5 August 2013.

B. Alleged Violations

9. The Applicant alleges that:

   i. He was denied bail pending his trial, and this, he claims is unjust and in contravention of the Tanzanian Constitution and his right to personal

freedom, equality before the law and equal protection of the law as guaranteed by the African Charter on Human and Peoples' Rights;

ii. His conviction and sentence to 30 years in prison was based on a crime which did not exist at the time of the alleged facts;

iii. He was not afforded the right to be heard, as he was not present at the proceedings at the High Court and the Court of Appeal;

iv. The proceedings before the High Court and the Court of Appeal were flawed because they were conducted without the original record of the proceedings in Criminal Case No. 123 of 1997 before the District Court of Muleba;

v. He was denied the right to be represented by Counsel before the High Court and the Court of Appeal, contrary to Article 7(1)(c) of the Charter.

10. Relying on the foregoing allegations, the Applicant submits in conclusion that the judgments of the Respondent State's courts were in violation of Articles 13(6)(a) and 18(a) of the Constitution of the United Republic of Tanzania as well as Articles 2, 3(1) and (2), 6, 7(1)(a) and (c), and 7(2), 9(1) and 9(2) of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THIS COURT

11. The Application was filed on 5 April 2016 and was served on the Respondent State on 10 May 2016.

12. On 3 June 2016, the Respondent State transmitted to the Registry the names and addresses of its representatives and filed its Response on 12 July 2016. The Response was transmitted to the Applicant on 9 August 2016 to which he filed his Reply on 15 September 2016.

13. On 10 June 2016, pursuant to Rule 35(2) and (3) of the Rules of Court the Registry transmitted the Application to the Chairperson of the African Union Commission and through him, to the State Parties to the Protocol. On the same day, the Application was communicated to the African Commission on Human and Peoples' Rights.

14. On 18 January 2017, the Registry informed the Parties that the written phase of the procedure had come to a close and that the matter has been set down for deliberation.

15. By a letter dated 6 November 2017 received at the Registry on 8 November 2017, the Applicant informed the Court that his prison term would come to an end on 26 November 2017and submitted his new address to the Court.

16. On 27 June 2018, the Registry requested the Applicant to submit supporting documents for his claim for reparation, but no response has been received as at the time of this Judgment.

17. By a letter dated 11 September 2018, the Officer-in-charge of Butimba Central Prison, informed the Court of the Applicant's release on 25 December 2017.

IV. PRAYERS OF THE PARTIES

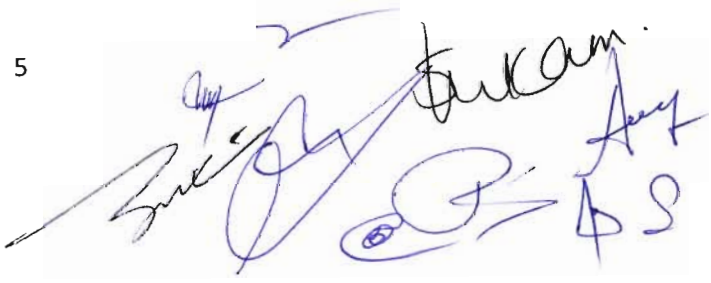
18. In his Application and his Reply to the Respondent State's Response to the Application, the Applicant prays the Court to:

"

(i) intervene in his favour in regard to the violation of the Constitution and his fundamental rights by the courts of the Respondent State;

(ii) Grant him reparations pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules;

(iii) issue such other order(s) or relief(s) as it deems necessary based on the circumstances of the case".



(iv) facilitate his access to legal aid pursuant to Article 10(2) of the Protocol and Rule 31 of the Rules.

(v) declare that it has jurisdiction to hear the matter;

(vi) declare that his Application is well founded; and

(vii) call on the Respondent State to bear the costs."

19. In its Response, the Respondent State prays the Court to:

"

(i) declare that it lacks jurisdiction to hear the matter;

(ii) find that the Application does not meet the admissibility conditions set out in Rule 40(5) and (6) of the Rules of Court, and to dismiss the said Application;

(iii) find that the Respondent State did not violate the rights of the Applicant under Articles 2, 3(1), 3(2), 6, 7(1)(a) and (c), 7(2) of the Charter;

(iv) declare that the Application is unfounded;

(v) dismiss the Applicant's prayer for reparation;

(vi) hold the Applicant liable to bear the cost".

V. JURISDICTION

20. In terms of Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction and the admissibility of the Application..."

A. Objection on material jurisdiction

21. The Respondent State raises an objection to the jurisdiction of the Court, citing Article 3(1) of the Protocol which provides that: "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned". The Respondent State also invokes Rule 26(1)(a) of the Rules of Court which restates the provisions of Article 3(1) of the Protocol.

22. The Respondent State contends that, in the instant Application, and contrary to the above-mentioned provision, the Applicant seems to pray this Court to act as a Court of First Instance and to adjudicate allegations which the Applicant never raised before domestic courts. The Respondent State notes that, before the domestic courts, the Applicant had not raised the issues which he was bringing up for the first time before this Court, in particular:

"

i. denying him bail pending his trial;
ii. application of a penalty based on a crime that was non-existent at the time the incident took place;
iii. the denial of his right to be assisted by Counsel before the High Court and the Court of Appeal;
iv. the conduct of proceedings before the High Court and the Court of Appeal in the absence of the Applicant and without the originals of the record of proceedings on the appeal file."

23. The Respondent State submits, in conclusion, that the Court lacks jurisdiction to hear this Application.

24. The Applicant refutes the Respondent State's argument, stating that since the Court is empowered to deal with issues of human rights violation in the interest of justice and equity, it is also empowered to examine his Application regardless of its shortcomings and whether or not the issues raised before the Court had been brought before domestic courts.

* * *

25. The Court recalls its long-standing jurisprudence in the matter and reaffirms that its material jurisdiction is established if the Application brought before it raises allegations of violation of human rights; and that it suffices on this issue that the

subject of the Application relates to the rights guaranteed by the Charter or any other relevant human rights instrument ratified by the States concerned.[1]

26. In the instant case, the Court notes that the Application invokes violation of the human rights protected by the Charter and other human rights instruments ratified by the Respondent State.

27. Consequently, the Court dismisses the Respondent State's objection and finds that it has material jurisdiction to hear the case.

B. Other Aspects of jurisdiction

28. The Court notes that the personal, temporal and territorial aspects of jurisdiction have not been challenged by the Respondent State. Furthermore, there is nothing in the record indicating that it lacks personal, temporal and territorial jurisdiction.

29. The Court therefore finds that:

i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has deposited the declaration prescribed under Article 34(6) thereof, allowing individuals to institute cases directly before it, in accordance with Article 5(3) of the Protocol;

ii. it has temporal jurisdiction since the alleged violations are continuous, given that the Applicant remains sentenced on the basis of what he considers as irregularities[2] ;

iii. it has territorial jurisdiction because the facts took place in the territory of a State Party to the Protocol, that is, the Respondent State.

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[1] Application No. 005/2013. Judgment of 20/11/2015, *Alex Thomas v. United Republic of Tanzania (hereinafter referred to as "Alex Thomas v Tanzania* Judgment"). para. 45; Application No. 001/2012. Judgment of 28/03/2014 (merits), *Frank David Omary and Others v. United Republic of Tanzania (hereinafter referred to as "Frank Omary v Tanzania* Judgment"). para. 115; Application No. 003/2012. Ruling of 28/3/2014, *Peter Joseph Chacha v. United Republic of Tanzania (hereinafter referred to as "Peter Chacha v Tanzania* Judgment"). para. 114.

[2] Application No. 013/2011. Judgment of 21/6/2013, *Beneficiaries of Late Norbert Zongo and Others v. Burkina Faso (hereinafter referred to as "Norbert Zongo v Burkina Faso* Judgment"). paras. 73-74.

30. In view of the above considerations, the Court holds in conclusion that it has jurisdiction to hear the instant case.

VI. ADMISSIBILITY OF THE APPLICATION

31. In terms of 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".

32. According to Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of ... the admissibility of the Application in accordance with Articles 50 and 56 of the Charter, and Rule 40 of these Rules".

33. Pursuant to Rule 40 of the Rules which in substance restates the content of Article 56 of the Charter, " ....applications to the court shall comply with 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".

34. The Court notes that, with regard to the admissibility of the Application, the Respondent State raises two preliminary objections concerning exhaustion of local remedies and the deadline for seizure of the Court.

A. Conditions of admissibility in contention between the Parties

i. Objection based on failure to exhaust the local remedies

35. The Respondent State contends that the Applicant raises before this Court allegations of violation of his rights, which were never brought before the domestic courts. The Respondent State further avers that the said rights mentioned by the Applicant as having been violated are guaranteed and protected by the Tanzanian Constitution in its Articles 13 and 15, as summarised hereunder:

    i. equality before the law and equal protection of the law - Article 13(1) and (2);
    ii. the right to a fair hearing and the right to appeal - Article 13(6)(a);
    iii. prohibition of sanctions for acts which do not constitute a crime at the time of its commission - Article 13(6)(c);
    iv. the right to individual freedom - Article 15.

36. The Respondent State contends that, pursuant to Article 30 of its Constitution, anyone claiming that his fundamental rights are violated shall have the right to seek redress before the domestic courts. It further argues that the Applicant should have exercised this remedy before seizing the African Court.

37. The Respondent State also invokes Section 9 of The Basic Rights and Duties Enforcement Act, and contends that the Applicant had the possibility of filing a constitutional petition before the High Court of Tanzania after he was sentenced by the District Court or after the judgment of the High Court.

38. The Respondent State finally submits that the Applicant, having not exercised the aforesaid remedies available at the domestic level, has not met the conditions set forth in Rule 40(5) of the Rules of Court, and therefore his Application must be dismissed for failure to exhaust the local remedies.

39. In reply, the Applicant submits that he is a layman in legal matters and that he was not provided with legal aid to enable him better understand the issues of law and

procedure before the domestic courts. However, he prays the Court to take into account his appeals before the High Court and the Court of Appeal, find that he has exhausted the local remedies and declare his Application admissible.

* * *

40. The Court notes that, after the District Court Judgment, the Applicant lodged an appeal before the High Court and, subsequently, before the Court of Appeal challenging both the issues of evidence and application of the sentence by the Judges, thus giving the afore-said courts the possibility to adjudicate the different allegations of violation relevant to his trial.

41. The Court notes also that the violations alleged by the Applicant form part of "a bundle of rights and guarantees" which relate to his appeal in the "domestic procedures" that resulted in his being found guilty and sentenced to thirty (30) years prison term. These issues in the instant case are part of "a bundle of the rights and guarantees" relating to the right to a fair trial which were the basis of the Applicant's appeal before the High Court and the Court of Appeal.[3]

42. Given the above findings, the Court holds that the domestic courts had ample opportunity to address the Applicant's allegations even without him having raised them explicitly. The Court notes that it has already in several cases brought before it decided that when alleged violations of the right to a fair trial form part of the Applicant's pleadings before domestic courts, the Applicant is not required to have raised them separately to show proof of exhaustion of local remedies.[4]

43. Regarding the constitutional petition, the Court has already determined that this remedy in the Tanzanian judicial system is an extra-ordinary remedy which Applicants are not required to exhaust before seizing this Court.[5]

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[3] Application No. 006/2015. Judgment of 23/3/ 2018, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania.* para. 53.
[4] *Alex Thomas v. Tanzania* Judgment. op. cit. para. 60.
[5] Idem. paras. 60-65; Application No. 007/2013. Judgment of 3/6/2016, Mohamed *Abubakari v. United Republic of Tanzania.* paras. 65-72; Application No. 011/2015. Judgment of 28/09/2017, *Christopher Jonas*

44. Consequently, the Court dismisses the Respondent State's objection to the admissibility of the Application for failure to exhaust the local remedies.

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

45. The Respondent State contends that the Applicant did not file his Application within a reasonable time as prescribed by Rule 40(6) of the Rules. Citing the Commission's jurisprudence in Communication No. 308/05*: Michael Majuru v. Zimbabwe* before the African Commission on Human and Peoples' Rights, the Respondent State argues that international jurisprudence considers reasonable time as being 6 months. Consequently, since the Applicant filed his Application two (2) years and eight (8) months after the Court of Appeal of Tanzania's Judgment of 5 August 2013, this Court has to consider this time frame as unreasonable and declare the Application inadmissible.

46. The Applicant refutes the Respondent State's argument and contends that despite the fact that he is a lay man in matters of law, he was not afforded legal representation before the domestic courts, and it was therefore impossible for him to have an idea as to the existence of this Court and of issues of procedure and deadlines. In conclusion, he prays the Court to admit and hear his Application by virtue of the powers conferred on it.

* * *

47. The Court reaffirms that Article 56(6) of the Charter, like Rule 40(6) of the Rules, does not lay down any specific timeframe for seizure.[6] The Rules of Court simply stipulate that cases must be filed "within a reasonable time from the date local remedies

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v. United Republic of Tanzania (hereinafter referred to as "Christopher Jonas v Tanzania Judgment*").* para. 44.

[6] *Christopher Jonas v. Tanzania* Judgment. op. cit. para. 36.

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."

48. The Court notes, in the instant case, that between the date of exhaustion of the last local remedy, that is, the Applicant's appeal before the Court of Appeal which delivered its judgement on 5 August 2013 and seizure of this Court on 5 April 2016, a period of two (2) years and eight (8) months had elapsed.

49. The Court recalls its jurisprudence to the effect that to assess the reasonableness of the timeframe for seizure, the Court takes into account the particular circumstances of each case and determines the issue on a case-by-case basis.[7] In its Judgment of 28 September 2017: *Christopher Jonas v. United Republic of Tanzania,* the Court noted that "the fact that the Applicant was incarcerated, is indigent, did not have the benefit of free assistance of a lawyer throughout the proceedings at national level, his being an illiterate and his being unaware of the existence of the Court due to its relatively recent establishment - are all circumstances that can work in favour of some measure of flexibility in determining the reasonableness of the time frame for seizure of the Court."[8]

50. From the record of the instant case, it is inferred that the Applicant is in a situation similar to the one described above because he was self-represented and could not afford the services of a Counsel. The Court further notes that the Applicant, having been in detention since 1997 right up to the date of seizure, he might not have been aware of the existence of this Court. From the foregoing observation, the Court holds in conclusion that the two (2) years and eight (8) months within which it was seized is reasonable in terms of Article 56(6) of the Charter.

51. Consequently, the Court dismisses the Respondent State's inadmissibility objection based on failure to file the Application within a reasonable time.

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[7] *Norbert Zongo v. Burkina Faso* Judgment. op. cit. para. 121.

[8] *Christopher Jonas v. Tanzania* Judgment. op.cit. para. 53.

B. Conditions of admissibility not in contention between the Parties

52. The Court notes that the conditions regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence and the principle that the Application should not concern a 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 (sub-rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules), are not in contention between the Parties.

53. The Court further notes that nothing on the record submitted by the Parties shows that any of these conditions has not been met in the instant case. Consequently, the Court finds that the conditions set out above have been fulfilled.

54. In view of the foregoing, the Court holds in conclusion that this Application meets all the admissibility conditions contemplated in Articles 56 of the Charter and Rule 40 of the Rules, and consequently declares the Application admissible.

VII. MERITS

55. The Applicant alleges that the Respondent State violated his right to liberty and to a fair trial. He contests the legality of the sentence meted to him and with regard to all the violations, invokes the failure to abide by Articles 2, 3(1) and (2), 6, 7(1)(a) and (c) and (2), 9(1) and (2) of the Charter.

A. Alleged violation of the right to liberty

56. The Applicant submits that after his arrest and during his remand in custody, he requested bail pending his trial, which was denied. He contends that denying him bail was a violation of his right to freedom guaranteed under Articles 13 and 15 of the Tanzanian Constitution and Article 6 of the Charter.

57. The Respondent State contends that in conformity with relevant constitutional provisions, release on bail is not an absolute right; the requirements of freedom and its limits having been enshrined in Article 15(1) and (2) of the Tanzanian Constitution.

58. The Respondent State further submits that the right to freedom as provided under Article 6 of the Charter is also not absolute in as much as even the said instrument enshrines some exceptions to freedom.

59. To justify the restriction under Tanzanian law, the Respondent State invokes Section 148(5) of the Criminal Procedure Act, and affirms that the detention of the Applicant and the refusal to grant him bail are consistent with the spirit of the provisions of the Tanzanian Constitution and the Charter, arguing, in conclusion, that the said refusal is not a violation of the Applicant's rights to freedom.

* * *

60. Article 6 of the Charter which guarantees the right to liberty provides that: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by the law..."

61. The Court notes that the possible limits to freedom mentioned in Article 6 of the Charter particularly arrest or detention, are exceptions which the Charter subjects to the strict requirements of legitimacy and legality. In the instant case, to determine whether the refusal to grant bail to the Applicant violated his right to freedom, the Court will determine whether the said denial of bail is provided by law, whether it is justified by legitimate reasons and whether the restriction is proportional.

62. On this issue, the Court notes that Article 15(1) and (2) of the Tanzanian Constitution provides two situations wherein limits to freedom may be placed on an individual, where the person is under the execution of a Judgment, an order or a sentence given or passed by the court following a decision in a legal proceeding

or a conviction for a criminal offence, and under circumstances and in accordance with procedures prescribed by law. The Article in question reads as follows "For the purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only:

(a) under circumstances and in accordance with procedures prescribed by law;

or

(b) in the execution of a Judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence".

63. The Court also notes that Section 148(5) of Tanzania's Criminal Procedure Act provides that:

"a Police Officer in charge of a police station, or a court before whom an accused person is brought or appears, shall not admit that person to bail if:

a) this person is accused of:

(i) murder, treason, armed robbery or rape".

64. The Court further notes that Section 148(5)(a)(i) is worded in sufficiently clear and precise terms so as to be understandable and to "enable individuals to adapt their behavior to the rule"[9] as required by international standards and jurisprudence. Accordingly, the Court finds that the restriction on liberty is duly provided by law.

65. However, the Court reiterates that it is not enough for a restriction to be provided by law; the restriction must have a legitimate aim and the reasons for the restriction must serve a public or general interest.[10]

66. In the instant case, the restriction on liberty provided under Section 148(5) (a)(i) of the Criminal Procedure Act aims to preserve public security, protect the rights of others and avoid possible repetition of the offense insofar as this provision covers cases of armed robbery. The restriction is further justified by the need to ensure

[9] Application No. 004/2013. Judgment of 05/12/2014 , *Lohé Issa Konaté v. Burkina Faso* (hereinafter referred to as *Issa Konaté v. Burkina Faso* Judgment. para. 129.

[10] *Issa Konaté v Burkina Faso* Judgment. op. cit. para. 131.

the actual appearance of the accused for the purposes of proper administration of justice. The Court, consequently, notes that the restriction on liberty is underpinned by legitimate objectives.

67. The Court also notes that the restriction is necessary and appropriate to ensure the reality of the aim pursued without compromising the ideal of liberty and personal security provided under Article 6 of the Charter. In circumstances such as those set out in Section 148 (5) (a) (i) of the Criminal Procedure Act, pre-trial detention is undoubtedly the necessary restriction for attainment of the desired objective.

68. The Court finds, in conclusion, that the Applicant's detention pending trial was not without reasonable grounds and that the refusal to grant him bail does not constitute a violation of his right to liberty. Article 6 of the Charter has therefore not been violated.

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

69. The Applicant submits that the refusal to grant him bail is discriminatory, thus violating his right to equality before the law and equal protection of the law as provided under Article 3(2) of the Charter.

70. The Respondent State has not responded to this allegation.

***

71. The Court recalls that the right to equality before the law requires that all persons shall be equal before the courts and tribunals.[11] It holds however that to claim discrimination or unequal protection of the law, the Applicant must adduce

[11] Application No. 032/2015. Judgment of 21/3/2018, *Kijiji Isiaga v. United Republic of Tanzania* . para. 85.

evidence that those in the same or similar situation as he was, have been treated differently.

72. In the instant case, the Court holds, as a fundamental rule of law, that whoever makes an allegation must adduce evidence thereof. In this matter, the Applicant does not provide evidence that persons who were in the same or similar situation as himself had been treated differently.

73. Consequently, in the absence of evidence by the Applicant as to any differential treatment, the Court finds that the Respondent State has not violated the Applicant's right to equality before the law and equal protection of the law.

C. Alleged violation of the right to a fair trial

74. The Applicant made several allegations of violation of his rights as provided under Article 7(1)(a) and (c) and (2) of the Charter, which stipulates as follows:

"Article 7:

(1) Every individual shall have the right to have his cause heard. This comprises:

a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b) ...

c) The right to defence, including the right to be defended by Counsel of his choice;

(2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed..."

i. Alleged violation of the right to defence

75. The Applicant submits that the proceedings before the High Court and the Court of Appeal were conducted in his absence in violation of his right to be heard by a court as contemplated in Article 7(1)(a) of the Charter.

76. The Applicant also submits that the fact that the High Court and the Court of Appeal held their hearing in his absence, whereas the Prosecutor was present, constitutes a violation of his right to equality before the law and his right to express his opinion as guaranteed by Article 9(1) and (2) of the Charter. He contends that, in the circumstances, he was not afforded the same possibility to express himself as the Prosecution had.

77. The Applicant further submits that throughout the appeal proceedings, a record purporting to be presented as the summary of the evidence before the District Court was used in replacement of the original record of proceedings that was found to be untraceable or indeed lost. Arguing that he has serious doubts about the authenticity of this document, which he considers as having already been tampered with, in favour of the Public Prosecutor, the Applicant denounces the irregularity of the procedure.

78. In his view, as at the time of reconstitution of the record of proceedings, the judicial authorities had taken no steps to guard against the risk of falsification of evidence in favour of the Prosecution. He concludes that the review of his appeal without the original record violates his right to equal protection of the law.

79. The Respondent State refutes the Applicant's allegations, affirming that the latter participated in all stages of the proceedings before the District Court and had opted not to appear at the hearing of the appeal before the High Court. The Respondent State indicates that the Applicant was also present at the hearing before the Court of Appeal and in this regard, that the Applicant cannot hold the Respondent State responsible for his absence at the hearing of the appeal before the High Court.

80. The Respondent State also contests the Applicant's allegations that the appeal proceedings were flawed for lack of the original record of the court's proceedings, arguing that the said records were reconstituted and made available in the end.

* * *

81. The Court reiterates that the right for the Applicant to have his cause heard requires that he should be entitled to take part in all proceedings, and to adduce his arguments and evidence in accordance with the adversarial principle. However, the individual as was the case here, has the right to choose whether or not to take part in proceedings, provided this waiver is unequivocally established.[12]

82. The record before this Court indicates that the Applicant took part in his trial before the District Court and the proceedings before the Court of Appeal. In contrast, when the Parties were summoned for the hearing of the appeal before the High Court, the Applicant and his two co-accused reportedly indicated that they had no intention to appear - a statement which the Applicant did not challenge given that, in his Reply, he had stated that he had taken note of the Respondent State's observations in this regard.

83. The Applicant having refused to appear before the Court, the Court in conclusion holds that the hearing before the High Court in the absence of the Applicant does not constitute a violation of his right to have his cause heard.

84. On the Applicant's allegation that he was not heard on account of the Court of Appeal adjudicating on the matter without the original record of proceedings, the Court holds that whereas, in every procedure, original documents constitute crucial and precious evidence in the determination of a case, such that the non-existence of such documents can cast serious doubt on the fairness of the case, the fact remains that it is possible to reconstitute the whole record or parts thereof.

85. In the instant case, it is apparent from the records before this Court that in order to lodge the Applicant's appeal at the Court of Appeal, his case file was reconstituted from the High Court's Judgment and the notes taken at the hearing before that Court. The Applicant challenges the authenticity of the reconstituted record without proof as to how the reconstituted elements lack credibility.

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[12] *Sejdovic v. Italy* no. 56581/00, § 39, ECHR 2004-II; or *Poitrimol v. France* no. 14032/88, §33, ECHR 1993-II.

86. The Court therefore holds that, in the absence of any evidence that the reconstituted record of proceedings has been wholly or partly falsified, it dismisses the Applicant's claims and holds that the procedure before the High Court has not been vitiated as alleged by the Applicant.

ii. Alleged failure to provide legal aid

87. The Applicant complains that he was not afforded legal aid before the High Court and the Court of Appeal. He contends that by not doing so, the domestic courts failed in their duty as set out in Section 3, of the Criminal Procedure Act, thus violating Article 7(1)(c) of the Charter.

88. The Respondent State argues that though the right to defence is an absolute right in its domestic law, the right to legal aid is mandatory only in cases of homicide, murder or manslaughter; that for all other criminal cases, legal aid is granted only at the request of the accused if it is proven that he or she is indigent and cannot afford to pay lawyers' fees. It therefore refutes the allegations made by the Applicant who, it claims, at no time during the proceedings, made any such request for legal aid, but rather chose to represent himself.

89. In his Reply, the Applicant contends that as a layman, he was completely unaware that it was possible to be granted legal aid under the legal provisions, particularly , Section 3 of the Criminal Procedure Act as indicated in the Respondent State's Response. He further submits that, in view of the amendment to the Penal Code on the offence of armed robbery offence raising the minimum sentence from 15 years to a 30 years' imprisonment, it was incumbent on the Respondent State to grant him legal representation before its courts.

* * *

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

> "Every individual shall have the right to have his cause heard. This comprises:
>
> ...c) the right to defence, including the right to be defended by Counsel of his choice."

91. The Court notes that, though Article 7 of the Charter guarantees the right to defence, including the right to be assisted by Counsel of one's choice, the Charter does not clearly provide for the right to free legal assistance.

92. The Court however recalls that its jurisprudence according to which free legal aid is a right inherent in a fair trial, and that when the interests of justice so require, any person accused of a criminal offence must be informed of his right to legal assistance or to be granted Counsel if he is indigent or where the offence is serious and the penalty provided by law is severe.[13]

93. In the instant case, the Applicant was accused of an offence punishable by a heavy sentence of 30 years imprisonment and it was in the interest of justice to provide him with free legal aid. This was made even more necessary by the fact that the Applicant claims to be a layman in law and was also unable to pay for the services of a Counsel.

94. The Court further notes that at no time was the Applicant informed that he may request and be provided with legal aid even though the Respondent State does not refute the fact that the Applicant was indigent.

95. The Court finds in conclusion that, by failing to do so, the Respondent State violated Article 7(1)(c) of the Charter.

iii. Allegation that the 30 years prison sentence is not provided by law

96. The Applicant submits that the conviction and thirty (30) years prison sentence pronounced against him were based on a non-existent crime and constitute a violation of Article 7(2) of the Charter, which stipulates that: "no one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only

[13] *Mohamed Abubakari v. Tanzania* Judgment. op. cit. para. 139. See also *Christopher Jonas v. Tanzania* Judgment. op. cit. para. 77.

on the offender...". The Applicant avers that the thirty (30) years prison sentence was not applicable at the time the offence of which he is accused was committed; that at the time, the maximum sentence applicable was fifteen (15) years.

97. The Respondent State refutes the Applicant's allegation, arguing that in Criminal Case No. 123/1997, the Applicant was accused of armed robbery, contrary to Sections 285 and 286 of the Penal Code, that at the time of his conviction and sentencing , the law known as the *Minimum Sentence Act* of 1972 had been amended by Law No. 6/1994; that this new law of 1994 repealed the 15 years sentence and introduced a mandatory minimum sentence of thirty (30) years in cases of armed robbery and robbery with violence.

* * *

98. The Court notes that, in his Reply, the Applicant affirms having taken note of the Respondent State's observations on this argument. Furthermore, the Court recalls that it has already noted that in the United Republic of Tanzania, the minimum sentence applicable for armed robbery or robbery with violence is 30 years imprisonment since the 1994 law.[14]

99. The Court therefore holds, in conclusion, that the Respondent State did not violate Article 7(2) of the Charter and that the Applicant's conviction and sentence to thirty (30) years imprisonment was in accordance with the law.

VIII. REPARATION

100. As stated in paragraph 18 of this Judgment, the Applicant prays the Court to: (i) grant him adequate reparation pursuant to Article 27 of the Protocol; (ii) order the

[14] *Mohamed Abubakari v. Tanzania* Judgment. op. cit. para. 210; *Christopher Jonas v. Tanzania* Judgment. op. cit. para. 85.

Respondent State to bear the costs; (iii) issue such other order(s) or measure(s) as the Court deems appropriate in the circumstances of the instant case.

101. However, when requested to clarify and substantiate his claim for reparation, the Applicant did not file any submissions.

102. The Respondent State in its submission prayed the Court to dismiss the Applicant's claim for reparation and order him to pay the costs.

* * *

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

104. Rule 63 of the Rules, stipulates that: "the Court shall rule on the request for reparation... by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision".

105. The Court recalls its jurisprudence in *Reverend Christopher R. Mtikila v. United Republic of Tanzania* in application of Article 27(1) of the Protocol whereby "...any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation."[15]

106. The Court notes that, in the instant case, the Applicant's right to legal aid was violated but this did not affect the outcome of his trial. The Court further notes that the violation it found caused non-pecuniary prejudice to the Applicant who requested adequate compensation in accordance with Article 27(1) of the Protocol.

107. The Court therefore awards the Applicant an amount of three hundred thousand Tanzania Shillings (TZS 300,000) as fair compensation.

[15] Application No. 011/2011. Ruling of 13/6/2014, *Reverend Christopher R. Mtikila v. United Republic of Tanzania.* para. 27.

IX. COSTS

108. In terms of Rule 30 of the Rules: "unless otherwise decided by the Court, each party shall bear its own costs."

109. The Court notes that the parties did express their positions on costs even though they did not indicate the amounts. Both parties requested the Court to order the other Party to bear the costs.

110. In the instant case, the Court decides that the Respondent State shall bear the costs.

X. OPERATIVE PART

111. For these reasons,

THE COURT,

Unanimously

On jurisdiction:

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

On admissibility:

iii. *Dismisses* the objection to admissibility of the Application;

iv. *Declares* the Application admissible;

On the merits:

unanimously

i. *Declares* that the Respondent State did not violate the Applicant's right to freedom as provided under Article 6 of the Charter;

ii. *Declares* that the Respondent State did not violate Articles 2 and 3 (1) and (2) of the Charter on non-discrimination, equality before the law and equal protection of the law;

iii. *Finds* that the Respondent State did not violate the Applicant's right to have his cause heard as provided under Article 7(1)(a) of the Charter;

iv. *Declares* that the 30 years prison sentence is in accordance with the law and is not in violation of Article 7(2) of the Charter;

v. *Declares* that the Respondent State violated the Applicant's right to defence under Article 7(1)(c) of the Charter for failure to provide him with free legal assistance;

vi. *Awards* the Applicant an amount of Three Hundred Thousand Tanzania Shillings (TZS 300,000) as fair compensation;

vii. *Orders* the Respondent State to pay the Applicant the said sum and report to the Court thereon within six (6) months from the date of notification of this Judgment; and

viii. *Orders* the Respondent State to pay the costs.

Signed:

Sylvain ORÉ, President;

Ben KIOKO, Vice-President;

Rafaâ BEN ACHOUR, Judge;

Ângelo V. MATUSSE, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

and

Robert ENO, Registrar.

Done at Arusha, on this Twenty-First Day of September in the year Two Thousand and Eighteen, in English and French, the English text being authoritative.