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

EVODIUS RUTECHURA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 004/2016

JUDGMENT

26 FEBRUARY 2021

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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, 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 9(2) of the Rules of Court[1] (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:

Evodius RUTECHURA
Self-represented

Versus

UNITED REPUBLIC OF TANZANIA,
Represented by:

i. Ms. Sarah MWAIPOPO, Director, Division of Constitutional Affairs and Human Rights; Attorney General's Chambers;
ii. Ambassador Baraka LUVANDA, Director, Legal Affairs, Ministry of Foreign Affairs, East Africa and International Cooperation;
iii. Ms. Nkasori SARAKIKYA, Principal State Attorney; Attorney General's Chambers;
iv. Mr. Mark MULWAMBO, Principal State Attorney; Attorney General's Chambers;
v. Ms. Venossa MKWIZU, Principal State Attorney; Attorney General's Chambers;
vi. Elisha SUKA, Foreign Service Officer, Ministry of Foreign Affairs, East Africa and International Cooperation.

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

after deliberation,

renders the following Judgment:

I. THE PARTIES

1. Mr. Evodius Rutechura (hereinafter referred to as "the Applicant") is a national of Tanzania, who at the time of the filing of this Application, was on death row at the Butimba Prison having been convicted of the offence of murder. He alleges the violations of his right to a fair trial.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission (hereinafter referred to as "AUC"), an instrument withdrawing its Declaration under Article 34(6) of the Protocol. The Court held that this withdrawal had no bearing on pending cases and new cases filed before the withdrawal came into effect, one year after its deposit, that is, on 22 November 2020.[2]

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. The record before the Court, indicates that on 13 May 2003 at 8pm, the Applicant in the company of two individuals were involved in a burglary of the house of Erodia Jason in Mwanza. In the course of the burglary, the daughter of Erodia Jason named Arodia, was shot dead as she tried to flee the house. Subsequently, on 15 May 2003, the Applicant was arrested and charged with the murder of Arodia Jason. On 19 November 2008, he was convicted and sentenced to death by hanging at the High Court in Mwanza.

4. The Applicant being dissatisfied with the conviction and sentence from the High Court of Mwanza, filed an appeal on 25 November 2008 to the Court of Appeal of Tanzania sitting at Mwanza, judgment to which was delivered on 18 June 2010, dismissing his appeal.

5. On 10 December 2012, the Applicant filed an application for review of the Court of Appeal's judgment but before the matter was listed for hearing he discovered that he was out of time. On 20 March 2015, he withdrew his application for review requesting instead for extension of time to file the application for review. The request for extension of time was denied by the Court of Appeal on 8 June 2015, because the Applicant did not "show good cause."

B. Alleged violations

6. The Applicant alleges the following:
    i. That the Court of Appeal violated his rights under the Charter by dismissing his request for extension of time to file the application for review;

ii. That the High Court and Court of Appeal violated his rights under the Charter by failing to provide him with free legal representation of his choice during his trial and appeal;

iii. That the Court of Appeal erred by relying on the visual identification evidence adduced by the prosecution witnesses who were related;

iv. That the Court of Appeal "overlooked the law relevant to admission of documentary evidence", thereby violating his rights under Articles 3(1) and (2) of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was filed on 13 January 2016, served on the Respondent State on 18 February 2016 and transmitted to the entities listed under Rule 35(3) of the Rules[3] on 18 March 2016.

8. On 18 March 2016, the Court issued an order for provisional measures *proprio motu*, in consideration of the situation of extreme gravity and the risk of irreparable harm associated with the death penalty. The Court ordered the Respondent State to "refrain from executing the death penalty against the Applicant pending the determination of the Application."[4]

9. The Parties filed their pleadings within the time stipulated by the Court.

10. On 26 September 2018, the Applicant filed a request for amicable settlement under the auspices of the Court, requesting the Court to facilitate a settlement which would result in the determination of his application for review in his favour. On 26 September 2018, the request was served on the Respondent State for its response within (30) thirty days.

[3] Rule 42(4) of the Rules of Court, 25 September 2020.
[4] *Evodius Rutechura v. United Republic of Tanzania* (provisional measures) (18 March 2016), 1 AfCLR 596 § 20.

11. The Respondent State did not file any observations on the proposal for amicable settlement and thus the Court decided to close written pleadings on the 3 September 2020 and the Parties were notified thereof.

IV. PRAYERS OF THE PARTIES

12. The Applicant prays the Court to:

    (i) Quash both the conviction and sentence imposed upon him;

    (ii) Order his release from Custody;

    (iii) Grant him reparations pursuant to Article 27(1) of the Protocol; and

    (iv) Grant him any other orders or reliefs that the Court may deem fit in the circumstances.

13. The Respondent State prays the Court to grant the following orders:

    i) That, the Honourable Court is not vested with jurisdiction to adjudicate the Application;

    ii) That, the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;

    iii) That, the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;

    iv) That, the costs of the Application be borne by the Applicant;

    v) That, the Applicant's conviction and sentence be maintained;

    vi) That, the Application lacks merit;

    vii) That, the Applicant's prayers be dismissed;

    viii) That, the Application be dismissed with costs;

    ix) That, the Applicant not be granted reparations.

14. Furthermore, the Respondent State prays the Court to declare that it has not violated any of the rights alleged by the Applicant.

V. JURISDICTION

15. The Court observes that Article 3 of the Protocol provides as follows:

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

16. In accordance with Rule 49(1) of the Rules, "the Court shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

17. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

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

A. Objection to material jurisdiction

19. The Respondent State raises an objection to the material jurisdiction of the Court, in that, the Applicant is asking the Court to sit as an appellate court on matters that have already been concluded by its Court of Appeal, the highest Court in its judicial system.

20. According to the Respondent State, Rule 26 of the Rules[5] does not provide the Court with “unlimited jurisdiction”, rather, it limits the Court’s jurisdiction to the interpretation and application of the Charter and other human rights instruments ratified by the State concerned.

21. The Applicant, citing *Alex Thomas v Tanzania*, submits that the Court has jurisdiction to consider this Application, as it raises alleged violations of his rights which are protected by the Charter.

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22. The Court notes in accordance with its established jurisprudence that, it is competent to examine relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other instruments related to human rights ratified by the State concerned.[6]

23. Furthermore, the alleged violations relating to the procedures at the domestic courts are of rights provided for in the Charter. Thus, the Court is not being required to sit as an appellate court but to act within the confines of its powers.

24. The Court notes that the Applicant raises allegations of violations of the human rights enshrined in Articles 3 and 7 of the Charter, whose interpretation and application falls within its jurisdiction. The Respondent State's objection in this respect is therefore dismissed.

25. Consequently, the Court holds that it has material jurisdiction.

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[5] Rule 29(1)(a) of the Rules of Court, 25 September 2020.

[6] *Ernest Francis Mtingwi v. Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14.; *Kenedy Ivan v. United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations) § 26; *Armand Guehi v. Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 247 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018), 2 AfCLR 287 § 35.

B. Personal jurisdiction

26. Although, the Respondent State has not objected to the personal jurisdiction of the Court, the Court notes, as earlier stated in this Judgment, that, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited the Declaration provided for under Article 34(6) of the Protocol with the AUC. On 21 November 2019, it deposited an instrument withdrawing the Declaration with the AUC.

27. The Court recalls that, the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the deposit of the instrument of withdrawal of the Declaration, as is the case with the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, in this case, on 22 November 2020.[7]

28. In view of the above, the Court finds that it has personal jurisdiction.

C. Other aspects of jurisdiction

29. The Court notes that the 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 such jurisdiction. The Court accordingly holds that:

    (i) that it has temporal jurisdiction on the basis that the alleged violations are continuing in nature, in that the Applicant remains convicted and is

[7] *Ingabire Victoire Umuhoza v. Rwanda* (juridiction) (3 June 2016) 1 AfCLR 540 § 67; *Cheusi v Tanzania* (merits), *op.cit*, §§ 5-39.

on death row on grounds which he considers are wrong and indefensible;[8]

(ii) 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 holds that it has jurisdiction to hear this Application.

VI. ADMISSIBILITY

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." Pursuant to Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

32. Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> b. comply with the Constitutive Act of the Union and the Charter;
> c. not contain any disparaging or insulting language;
> d. not based exclusively on news disseminated through the mass media;
> e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

[8] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (preliminary objections) (21 June 2013), 1 AfCLR 197 §§ 71 - 77.

f. 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;
g. 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.

A. Conditions of admissibility in contention between the Parties

33. The Respondent State submits that the Application does not comply with Rule 40(5) [9] and 40(6) [10] of the Rules in relation to admissibility requirements, namely, regarding exhaustion of local remedies and on the requirement to file applications within a reasonable time after exhaustion of local remedies.

i. Objection on non- exhaustion of local remedies

34. The Respondent State contends that the Applicant has raised some allegations of human rights violations in this Court, for the first time. It is of the view, that the Applicant only raised one ground in his appeal at the Court of Appeal, that is; that the High Court erred in law and facts in finding that he was correctly identified at the scene of the crime. Therefore, it argues that, the Applicant did not utilize the remedy of the Court of Appeal to address the other grievances that he raises before this Court.

35. The Respondent State citing the decision of the African Commission on Human and Peoples' Rights of *Southern African Human rights NGO Network and others v Tanzania* submits that the exhaustion of local remedies is an essential

[9] Rule 50(2)(e) of the Rules of Court, 25 September 2020.
[10] Rule 50(2)(f) of the Rules of Court, 25 September 2020.

principle in international law and that the principle requires a complainant to "utilise all legal remedies" in the domestic courts before seizing the International body like the Court.

36. Referring to *Article 19 v Eritrea* filed before the Commission, the Respondent State submits that the onus is on the applicant to demonstrate that he took all the steps to exhaust the domestic remedies and not merely to cast aspersions on the effectiveness of those remedies. It submits that, "in this regard, it cannot be said that the Applicant has exhausted legal remedies in light of the fact that he never took his grievances to the Court of Appeal for redress. The Respondent further states that these remedies were never prolonged and (*sic*) always accessible to the Applicant."

37. The Applicant submits that his Application should be found admissible **"**according to Articles 5(3) and 6(1) and (2) of the Protocol.**"**

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38. The Court notes that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are not available, they are ineffective, insufficient or the procedure to pursue them is unduly prolonged.[11]The rule aims at providing States with the opportunity to remedy the human rights violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations.[12]

39. In the instant case, the Court notes from the record that the Applicant filed an appeal against his conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 18 June

[11] *Zongo and Others v. Burkina Faso* (preliminary objections) *op. cit.* § 84.
[12] *African Commission on Human and Peoples' Rights v. Kenya* (merits) (26 May 2017), 2 AfCLR 9 §§ 93-94; *Dismas Bunyerere v. United Republic of Tanzania,* ACtHPR, Application No. 031/2015, Judgment of 28 November 2019 (merits and reparations) § 35.

2010, the Court of Appeal upheld the judgment of the High Court. The Respondent State thus had the opportunity to redress the alleged violations but failed to do so. It is therefore clear that the Applicant has exhausted all the available domestic remedies.

40. For these reasons, the Court dismisses the objection that the Applicant has not exhausted local remedies.

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

41. The Respondent State submits that the Applicant has not complied with the requirement under Rule 40(6)[13] of the Rules, that an application must be filed before the Court within a reasonable time after the exhaustion of local remedies. It asserts that the Applicant's case at the Court of Appeal was concluded on 13 September 2012, and it took "three (3) years and four (4) months" for the Applicant to seize this Court. The Respondent State also contends that the Court of Appeal dismissed the Applicant's Application to file for review out of time on 13 February 2015, that is "one (1) year and two (2) months" before the Applicant seized the Court and that this was also unreasonable delay on the part of the Applicant.

42. Noting that Rule 40(6)[14] of the Rules does not prescribe the time limit within which individuals are required to file an application, the Respondent State draws this Court's attention to the fact that the African Commission has held a period of six (6) months to be the reasonable time[15].

43. The Respondent State argues that the Applicant filed his Application **"**more than six (6) months**"** after the Court of Appeal decision of 13 September 2012. Thus, the Application is improper and should be dismissed.

[13] Rule 50(2)(f) of the Rules of Court, 25 September 2020.
[14] Rule 50(2)(f) of the Rules of Court, 25 September 2020.
[15] ACHPR, *Michael Majuru v. Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

44. The Applicant submits that reasonable time has not been defined and that it should be assessed on a case-to-case basis according to the Court's jurisprudence in *Zongo v Burkina Faso*.

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45. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 50(2)(f) of the Rules, which in substance restates Article 56(6) of the Charter, only requires: "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."

46. In the instant case, the Court observes that the judgment of the Court of Appeal was delivered on 18 June 2010. The Court notes that about five (5) years, six (6) months and twenty-four (24) days elapsed between 18 June 2010 and 13 January 2016 when the Applicant filed the Application before this Court. The issue for determination is whether the five (5) years, six (6) months and twenty-four (24) days that the Applicant took to file the Application before the Court is reasonable.

47. The Court recalls that: "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[16] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance[17], indigence, illiteracy, lack of awareness of the existence of

[16] *Zongo and others v. Burkina Faso* (merits), *op. cit.* § 92; See also *Thomas v. Tanzania (*merits) *op.cit* § 73**;**

[17] *Thomas v. Tanzania* (merits) *op.cit*, § 73; *Christopher Jonas v. Tanzania* (merits) (28 September 2017), 2 AfCLR 101 § 54; *Ramadhani v. Tanzania* (merits) (11 May 2018), 2 AfCLR 344 § 83.

the Court, intimidation and fear of reprisal[18] and the use of extra-ordinary remedies.[19]

48. From the record, the Applicant is a death-row inmate, incarcerated, restricted in his movements and with limited access to information. Further, the Applicant tried to use the review procedure twice, with the last attempt being on 8 June 2015, that is, seven (7) months and five (5) days before seizing the Court. The Court has held that an Applicant using a review procedure even though an extra-ordinary remedy should not be penalised for exercising it.[20]

49. The Court notes that the above mentioned circumstances delayed the Applicant in filing his claim before this Court. Taking into account the applications for review filed by the Applicant, the time taken to seize the Court would no longer be considered to be five (5) years and six (6) months, but rather seven (7) months and five (5) days. The Court thus finds that the seven (7) months and five (5) days taken to file the Application before this Court is reasonable.

50. Accordingly, the Court dismisses the objection of the Respondent State and holds that the Application was filed within a reasonable time.

[18] *Association Pour le progress et la Defense des droit des Femme Maliennes and the Institute for Human Rights and Development in Africa v. Mali* (merits) (11 May 2018), 2 AfCLR 380 § 54.
[19] *Armand Guehi v. Tanzania* (merits and reparations) *op.cit* § 56; *Werema Wangoko v. Tanzania* (merits) (7 December 2018), 2 AfCLR 520 § 49; *Alfred Agbesi Woyome v. Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits) § § 83-86.
[20] *Werema Wangoko v. Tanzania* (merits) § 49; *Alfred Agbesi Woyome v. Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits) § § 83-86.

B. Other conditions of admissibility

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

52. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

53. The Application is in compliance with the Constitutive Act of the African Union and the Charter because it raises alleged violations of human rights in fulfilment of Rule 50(2)(b) of the Rules.

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

55. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment with Rule 50(2)(d) of the Rules.

56. Further, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.

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

VII. MERITS

58. The Applicant avers the violations of Article 3(1) and (2), 7(1)(c) and (d) of the Charter in relation to the following allegations:
    i. Court of Appeal's dismissal of the Application for leave to file for review;
    ii. The denial of the right to free legal representation;
    iii. Assessment of evidence in the Court of Appeal.

A. Allegation relating to the application for leave to file for review

59. The Applicant argues that the Court of Appeal erred in rejecting his application for leave to file his review application out of time as he had communicated to the Court of Appeal that he was unwell and thereby unable to comply with the time limits. According to the Applicant, this violated his right under Article 7(1)(d) of the Charter.

60. The Respondent State submits that the Applicant did not give good reasons as to why his application for leave to file out of time should be granted. It avers that the Court of Appeal dismissed the Application in accordance with Rule 66 of its Rules, because the application for leave did not demonstrate a prospect of success.

* * *

61. Article 7(1)(a) of the Charter provides:

> Every individual shall have the right to have his cause heard. This comprises:
>
> a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force…

62. The Court notes that the Applicant erroneously relied on Article 7(1)(d) of the Charter, as his allegation is properly suited to Article 7(1)(a) of the Charter, that is, the right to have his cause heard. The Court will thus consider this allegation in light of Article 7(1)(a) of the Charter.

63. The Court observes that the Respondent State is mandated to ensure that its municipal courts are accessible to individuals and that due process is observed in all its proceedings. Notwithstanding this mandate, individuals are also required to abide by rules of procedure and the laws enacted by the Respondent State.

64. The Court reiterates its jurisprudence that:

> …domestic courts enjoy a wide margin of discretion in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[21]

65. In the instant case, the Applicant alleges that the Court of Appeal erroneously dismissed his application to file for review out of time. Nevertheless, he did not substantiate this allegation or demonstrate with evidence the alleged violation of his right owing to the error of the Court of Appeal. He has simply asserted that he was sick.

66. Further, the Court observes from the record that the Court of Appeal dismissed his application to file for review out of time because the application did not demonstrate prospect of success in accordance with Rule 66(1) of its Court of Appeal Rules.[22]

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[21] *Kijiji Isiaga v. Tanzania*, (merits) (21 March 2018), 2 AfCLR 218 § 65; *Majid Goa v. United Republic of Tanzania*, ACtHPR, Application No.025/2015, Judgment of 26 September 2019 (merits and reparations) § 86.

[22] Rule 66(1)(a-e), "The Court may review its judgment or order, but no application for review will be entertained except on the following grounds: namely, that: (a) The decision was based on a manifest error

67. The Court finds that the manner in which the Court of Appeal dismissed the Applicant's application to file an application for review out of time, does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation and finds that the Respondent State has not violated Article 7(1)(a) of the Charter.

B. Allegation related to the right to free legal assistance

68. The Applicant contends that he was not provided with a free legal representative of his choice during the proceedings in the national courts because the Respondent State chose all the lawyers that represented him. He therefore claims that this is a violation of Article 7(1)(c) of the Charter.

69. The Respondent State submits that the Applicant was represented by "Advocates Bantulaki, Muna and Kitwala in the High Court and Advocate Deya Paul Outa at the Court of Appeal", therefore he was duly represented throughout the national courts' proceedings.

70. Consequently, the Respondent State submits that the allegation herein is "frivolous, lacks merit and should be duly dismissed."

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

on the face of the record resulting in miscarriage of justice or (b) a party was wrongly deprived of an opportunity to be heard; or (c) the Court's decision is a nullity; or (d) The Court has no jurisdiction to entertain the case; or (e) The judgment was procured illegally or by fraud or perjury." The Court of Appeal's Ruling - "no good cause has been shown, the application is hereby dismissed"

72. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR)[23], and determined that the right to defence includes the right to be provided with free legal assistance.[24]

73. The Court notes, in line with the jurisprudence of the European Court of Human Rights, that the right to be defended by counsel of one's choice is not absolute when the counsel is provided through a free legal assistance scheme.[25] In this circumstance, the important consideration is whether the accused was given effective legal representation rather than whether he or she was allowed to be represented by a lawyer of their own choosing.[26]

74. Therefore, the duty of the Respondent State is to provide adequate representation to an accused and intervene only when the representation is not adequate. [27]

75. The Court notes from the record, that the Applicant was represented throughout the proceedings in the national courts by advocates provided for by the Respondent State at its own expense. The Court further notes that there is nothing on the record to the effect that the Applicant was not adequately represented or that he raised this issue in the proceedings at the national courts. Moreover, the Applicant did not substantiate his claim herein.

76. Consequently, the Court finds that the Respondent State has not violated Article 7(1)(c) of the Charter by failing to provide free legal assistance.

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[23] The Respondent State became a State Party to ICCPR on on 11 June 1976.
[24] *Thomas v. Tanzania* (merits) *op.cit* § 114; *Isiaga v. Tanzania* (merits) *op.cit* § 72; *Kennedy Onyachi and Njoka v. Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 104.
[25] ECHR, *Croissant v. Germany* (1993) App No.13611/89 § 29, *Kamasinski v. Austria* (1989) App No. 9783/82, § 65.
[26] ECHR, *Lagerblom v. Sweden* (2003) App no 26891/95, §§ 54 - 56.
[27] ECHR, *Kamasinski v. Austria* (1989) App No. 9783/82, § 65.

C. Allegation relating to the manner of the evaluation of evidence in the Court of Appeal

77. The Applicant contends that the decision of the Court of Appeal was based on the visual evidence of relatives who were serving their own interest and that there were no “independent witnesses” who testified. He also submits that he was arrested as a result of “mere suspicion” because they had been prior complaints about him at the police station.

78. He avers that the Court of Appeal did not abide by the rules of documentary evidence; notably, giving him an opportunity to object to the evidence that was tendered in. Further, that this evidence was not supported by oral evidence of its “maker”. He claims that these “errors” violated his rights under Article 3(1) and (2) of the Charter.

79. According to the Respondent State, the Court of Appeal not only considered the conditions of identification but also the credibility of the witnesses. It further submits that the evidence presented in the High Court was **“**water-tight**”** and left no doubt that it was the Applicant who murdered the deceased.

80. The Respondent State contends that the Applicant was represented by legal counsel at the trial at the High Court and his counsel did not object to the tendering in of the exhibits which was in compliance with the Criminal Procedure Act.

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81. The Court notes that the Applicant has relied on Article 3(1) and (2) in his allegation herein. Nevertheless, the allegations raised by the Applicant concern, the right to a fair trial and especially the right to defence. Therefore, the Court will consider this allegation in the light of Article 7(1) of the Charter.

82. Article 7(1) of the Charter provides: "Every individual shall have the right to have his cause heard…"

83. The Court reiterates its position according to which, it held that:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence, and as an international court, this court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[28]

84. In the instant case, the record before this Court shows that the national courts convicted the Applicant on the basis of visual identification evidence tendered by three (3) prosecution witnesses who were at the scene of the crime. The Court notes that the witnesses being related, cannot on its own put doubt on the credibility of their testimonies especially since the Applicant was represented by counsel who had the opportunity to challenge their credibility. The Court further notes, that the national courts assessed the circumstances in which the crime was committed, in order to eliminate possible errors as to the identity of the perpetrator and found that the Applicant was guilty.

85. As regards the documentary evidence tendered, the Court notes that the Applicant was represented by counsel and he did not object to the said exhibits. Further, the record shows that the national courts followed the procedures according to its laws in assessing the probative value of the said evidence.

86. The Court finds that the manner in which the domestic courts evaluated the evidence relating to the Applicant's identification does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation.

[28] *Isiaga v. Tanzania* (merits) *op.cit.* § 65.

VIII. REPARATIONS

87. The Applicant prays that the Court grant him reparations for the violations he suffered including quashing his conviction and sentence and ordering his release.

88. The Respondent State prays the Court to deny the Applicant's request for reparations.

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89. Article 27(1) of the Protocol provides that:

> if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

90. In the instant case, no violation has been established and thus the issue of reparations does not arise. The court, therefore, dismisses the Applicant's prayer for reparations.

IX. COSTS

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

92. Pursuant to Rule 32(2) of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

93. In light of the foregoing, the Court rules that each party shall bear its own costs.

X. OPERATIVE PART

94. For these reasons:

The COURT
Unanimously,

On jurisdiction

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

On admissibility

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

On merits

v. *Finds* that Respondent State has not violated Article 7(1) of the Charter as regards the manner of evaluation of evidence;
vi. *Finds* that the Respondent State has not violated Article 7(1)(a) of the Charter as regards the application for leave to file for review;
vii. *Finds* that the Respondent State has not violated Article 7(1)(c) of the Charter as the Applicant was provided with free legal assistance.

On reparations

viii. *Dismisses,* the prayer for reparations

On costs

ix. *Orders* each party to bear its own 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.

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the separate opinion of Justice Blaise TCHIKAYA is attached to this Judgment.

Done at Arusha, this Twenty-Sixth day of February in the Year Two Thousand and Twenty One in English and French, the English text being authoritative.