


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**

**HOJA MWENDESHA**

**V.**

**UNITED REPUBLIC OF TANZANIA**

**APPLICATION NO. 032/2016**

**JUDGMENT**

**13 JUNE 2023**



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**The Court composed of:** Blaise TCHIKAYA, Vice President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENS AOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO, Dennis D. ADJEI – Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (herein referred to as "the Protocol") and Rule 9(2) of the Rules of Court<sup>1</sup> (herein referred to as "the Rules"), Justice Imani D. ABOUD, President of the Court and a Tanzanian national, did not hear the Application.

In the Matter of:

Hoja MWENDESHA

*Self-represented*

Versus

UNITED REPUBLIC OF TANZANIA

*Represented by:*

- i. Dr Boniphace Naliya LUHENDE, Solicitor General, Office of the Solicitor General;
- ii. Ms Sarah Duncan MWAIPOPO, Deputy Solicitor General;
- iii. Mr Moussa MBURA, Director, Civil Litigation, Principal State Attorney, Office of the Solicitor General;
- iv. Mr Hangi M. CHANGA, Deputy Director, Human Rights and Electoral Disputes, Office of the Solicitor General;
- v. Ms Vivian METHOD, State Attorney, Office of the Solicitor General;
- vi. Ms Jacqueline KINYASI, State Attorney, Office of the Solicitor General; and

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<sup>1</sup> Formerly Rule 8(2) Rules of Court, 2 June 2010.

- vii. Ms. Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs, East Africa Cooperation.

After deliberation,

*Renders this Judgment:*

## **I. THE PARTIES**

1. Hoja Mwendesha (hereinafter referred to as “the Applicant”) is a Tanzanian national and a farmer who, at the time of filing the Application, was serving a thirty (30) year-sentence at Msalato Prison in Dodoma, having been convicted of the offence of rape of a thirteen (13) year-old minor. He challenges the violation of his rights in connection with the proceedings before domestic courts.
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, on 29 March 2010, the Respondent State deposited the Declaration provided for under Article 34(6) of the Protocol by virtue of 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 African Union Commission an instrument of withdrawal of the said Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect one year after its filing, that is, on 22 November 2020.<sup>2</sup>

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<sup>2</sup> *Ingabire Victoire Umuhoya v. Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540, § 67; *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, §§ 35-39.

## **II. SUBJECT OF THE APPLICATION**

### **A. The Facts of the matter**

3. It emerges from the records that the Applicant was convicted of the offence of raping and impregnating a thirteen (13)-year-old school girl and subsequently sentenced to thirty (30) years' imprisonment by the Misungwi District Court.
4. Dissatisfied with this decision, the Applicant filed a first appeal before the High Court sitting at Mwanza, which upheld the decision on 28 March 2014. He then filed a second appeal before the Court of Appeal of Tanzania, sitting at Mwanza, which dismissed it on 30 November 2015.

### **B. Alleged violations**

5. The Applicant alleges the violation of the following rights:
  - i. The right to equality before the law and to equal protection of the law under Article 3(1) and (2) of the Charter;
  - ii. The right to respect for the inherent dignity of the human being and the prohibition of slavery, torture, cruel, inhuman or degrading treatment or punishment, under Article 5 of the Charter; and
  - iii. The right to a fair trial, guaranteed under Article 7(1)(c) of the Charter.

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

6. On 8 June 2016, the Registry received the Application, which was notified to the Respondent State on 26 July 2016, and subsequently, to the other entities provided for in Article 42(4) of the Rules, on 8 September 2016.
7. The Parties filed their pleadings within the time-limit stipulated by the Court.

8. Pleadings were closed on 16 December 2020 and the Parties duly notified. On 9 January 2023, pleadings were reopened to allow the Applicant to submit his Reply to the Respondent State's response on the merits.
9. On 31 March 2023, pleadings were closed and the Parties were duly notified.

#### **IV. PRAYERS OF THE PARTIES**

10. The Applicant prays the Court as follows:

- i. Declare the Application admissible; and
- ii. Rule on all the issues that were not taken into consideration on account of the facts not having been clarified, resulting in the Applicant suffering injustice.

11. In his request for reparations, the Applicant further prays the Court to:

- i. Make an order of release under Article 27 of the Protocol after finding that the Respondent State violated Article 7(1)(c) of the Charter by failing to afford him free legal assistance both during trial and appeal proceedings; and
- ii. Consider and assess payment of reparations based on national annual per capita income of citizens, and this, over the period of the Applicant's detention.

12. The Respondent State prays the Court as follows:

- i. Find that the Honourable Court lacks jurisdiction to hear the Application;
- ii. Find that the Application does not meet the admissibility requirements under Rule 56(6), Article 6(2) of the Protocol and Rule 50(2)<sup>3</sup> of the Rules of Court;
- iii. Declare the Application inadmissible;

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<sup>3</sup> Rule 40(6) Rules of Court, 2 June 2010.

- iv. Dismiss the Application;
- v. Find that the Respondent State did not violate any of the rights of the Applicant guaranteed by Article 3(1) (2) of the Charter;
- vi. Find that the Respondent State did not violate any of the rights of the Applicant guaranteed by Article 5 of the Charter; and
- vii. Find that the Application is unfounded and consequently dismiss it.

## **V. JURISDICTION**

13. 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.

14. Pursuant to Rule 49(1) of the Rules, “the Court shall conduct preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules”.

15. Based on the above provisions, the Court must conduct an examination of its jurisdiction and rule on objections thereto, if any.

16. The Court notes that in the instant case, the Respondent State raises an objection based on lack of material jurisdiction. The Court will, therefore, consider the said objection (A) before examining other aspects of jurisdiction (B) if necessary.

### **A. Objection to material jurisdiction**

17. The Respondent State argues that this Court would be acting as a trial court and as an appellate court if it were to rule on questions of law that were

never raised in the Respondent State's Court of Appeal and on questions and evidence on which the said court has already ruled.

18. The Applicant did not respond to this objection.

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19. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.
20. The Court emphasises that its material jurisdiction is thus predicated on the Applicant's allegation of violations of human rights protected by the Charter or any other human rights instrument ratified by the Respondent State.<sup>4</sup> In the instant matter, the Applicant alleges violation of Articles 3(1)(2)(e), 5 and 7(1)(c) of the Charter.
21. The Court further recalls its constant jurisprudence that it is neither a trial court nor an appellate body with respect to decisions of national courts.<sup>5</sup> However, "this does not preclude it from examining 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 human rights instruments ratified by the State concerned".<sup>6</sup> The Court would therefore not be sitting either as a trial court or as an appellate court if it were to consider the Applicant's allegations. The Court therefore dismisses this objection and finds that it has jurisdiction to hear the instant Application.

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<sup>4</sup> *Diocles William v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 426, § 28; *Armand Guéhi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Kalebi Elisamehe v. United Republic of Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 265, § 18.

<sup>5</sup> *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) AfCLR 190, § 14.

<sup>6</sup> *Kennedy Ivan v. United Republic of Tanzania*, (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Guéhi v. Tanzania*, *supra*, § 33.



22. In view of the foregoing, the Court holds that it has material jurisdiction to examine this Application.

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

23. The Court notes that the Respondent State does not contest its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,<sup>7</sup> it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding to consider the Application.
24. As regards its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgement, that the Respondent State, on 21 November 2019, deposited with the Chairperson of the African Union Commission the instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol. The Court has held that the withdrawal has no retroactive effect, nor does it affect cases pending before the Court before the deposit of the instrument of withdrawal of the Declaration, nor does it affect new cases filed before the withdrawal takes effect one year after the deposit of the notice of withdrawal, that is, on 22 November 2020.<sup>8</sup> The instant Application was filed before the Respondent State deposited its notice of withdrawal, and is, therefore, not affected by the said withdrawal. The Court finds that it has personal jurisdiction to examine the instant Application.
25. The Court has temporal jurisdiction in respect of the Application insofar as the alleged violations were committed after the Respondent State became a party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair procedure.<sup>9</sup>

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<sup>7</sup> Rule 39(1), Rules of Court, 2 June 2010.

<sup>8</sup> *Cheusi v. Tanzania*, supra, §§ 33-39; see also *Umuhoza v. Rwanda*, supra, § 67.

<sup>9</sup> *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, § 77.

26. The Court finally finds that its territorial jurisdiction is also established in respect of the present Application insofar as the alleged violations were committed in the territory of the Respondent State.
27. In light of the foregoing, the Court has jurisdiction to hear this Application.

## **VI. ADMISSIBILITY**

28. Under Article 6(2) of the Protocol, “[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
29. 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.”
30. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a) Indicate their authors even if the latter request anonymity;
- b) Are compatible with the Constitutive Act of the African Union and with the Charter;
- c) Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
- d) Are not based exclusively on news disseminated through the mass media;
- e) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- f) Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter; and

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

31. The Court notes that the Respondent State raises two objections. The first objection is based on non-exhaustion of local remedies while the second one is on the ground that the Application was not filed within reasonable time. The Court will first consider these objections (A) before examining other admissibility requirements (B), if necessary.

#### **A. Objections to the admissibility of the Application**

32. The Court notes that the Respondent State raises two objections on admissibility; the first is based on non-exhaustion of local remedies (i), and the second one, on the failure to file the Application within reasonable time (ii).

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

33. The Respondent State submits that the Applicant raised a number of claims before this Court which, although raised as grounds of appeal before the High Court, were not pursued as grounds of appeal before the Court of Appeal. The said claims are: the Court did not inquire as to why the victim did not report the crime to the police earlier, the victim's age was not proven by any document, the Court of Appeal should have considered that the sworn statement had to be corroborated by the testimony of the Applicant who claimed to be its author, and finally, the provisions of the Tanzanian Evidence Act (Cap 6 RE 2002), in particular, Section 127(7), which allows for conviction based on the testimony of the victim only if the Court is satisfied that the statement is true. The Respondent State contends that the Applicant had a remedy available to bring the said specific allegations before the Court of Appeal in Criminal Appeal No. 201 of 2014, but chose not to do so.

34. The Applicant did not respond to this objection.

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35. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. As regards the remedies to be exhausted, the Court has held in its previous judgments that they must be ordinary.<sup>10</sup>

36. As regards the Respondent State, the Court has in a number of its judgements also held that Applicants are not obliged to bring a constitutional challenge before the Court for violation of fundamental rights, as the Court has ruled that the said remedy is an extraordinary remedy.<sup>11</sup> In line with the Court's decision, the Applicant is deemed to have exhausted local remedies once the he has pursued his case through the judicial system, up to the Court of Appeal, which is the highest court of the country.<sup>12</sup>

37. The Court notes that in the instant case, the Applicant's appeal was decided by the Court of Appeal's judgement of 30 November 2015. As the constitutional challenge in the Respondent State's judicial system is considered by this Court as an extraordinary remedy that the Applicant is not bound to exercise, the Court considers that local remedies were exhausted in the instant matter.

38. In view of the foregoing, the Court holds that the Applicant exhausted the local remedies provided for in Article 56(5) of the Charter and Rule 50(2)(e)

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<sup>10</sup> *Laurent Munyandikiwa v. Republic of Rwanda*, ACtHPR, Application No. 023/2015, Judgment of 2 December 2021, § 74; *Alex Thomas v. United Republic of Tanzania* (merits), (20 November 2015) 1 AfCLR 465, § 64.

<sup>11</sup> *Gozbert Henrico v. United Republic of Tanzania*, ACtHPR, Application No. 056/2016, Judgment of 10 January 2022, § 61; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 46; *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Thomas v. Tanzania* (merits), § 63-65.

<sup>12</sup> *Hamis Shaban aka Hamis Ustadh v. United Republic of Tanzania*, ACtHPR, Application No. 026/2015, Judgment of 2 December 2021, § 51; *Abubakari v. Tanzania* (merits), § 76.

of the Rules. The Court, therefore, dismisses the objection based on non-exhaustion of local remedies raised by the Respondent State.

**ii. Objection based on the fact that the Application was not filed within reasonable time**

39. The Respondent State submits that the Application is time-barred.

40. The Respondent State further submits that although Rule 50(2)(f) of the Rules does not prescribe the time-limit within which individuals are required to file applications, one can take a cue from other similar regional mechanisms such as the African Union and its organs, where a period of six (6) months has been considered a reasonable time-limit.

41. The Applicant did not respond to this objection.

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42. The question to be decided is whether the time taken by the Applicant to bring his Application before the Court is reasonable within the meaning of Article 56(6) of the Charter read together with Rule 50(2)(f) of the Rules.

43. The Court notes that Article 56(6) of the Charter and Rule 50(2)(f) of the Rules provide that Applications must be filed "... within 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". These provisions do not set a time-limit within which the matter must be referred to the Court.

44. In the present case, the Court notes that local remedies were exhausted on 30 November 2015, when the Court of Appeal sitting in Mwanza delivered its judgment dismissing the Applicant's appeal. As the present Application was filed on 8 June 2016, the Applicant therefore seized this Court six (6) months and eight (8) days after having exhausted local remedies.

45. In view of these circumstances, the Court finds that the period of six (6) months and eight (8) days constitutes reasonable time to bring the case before it within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
46. Consequently, the Court dismisses the objection to the admissibility of the Application.

## **B. Other admissibility requirements**

47. No objections have been raised in respect of the admissibility requirements under Rule 50(2)(a), (b), (c), (d), and (g) of the Rules. Nevertheless, the Court is still required to ensure that these requirements have been fulfilled.
48. The Court notes that the Applicant is clearly identified by name in line with Rule 50(2)(a) of the Rules.
49. The Court notes that the Applicant's requests seek to protect his rights as guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is the promotion and protection of human and peoples' rights. Furthermore, the Application does not contain any complaint or request that is incompatible with any provision of the said Act. Accordingly, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and therefore holds that it meets the requirement of Rule 50(2)(b) of the Rules.
50. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.
51. Furthermore, 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. It therefore complies with Rule 50(2)(g) of the Rules.

52. In light of the foregoing, the Court holds that the instant Application fulfils all admissibility requirements set out under Article 56 of the Charter and Rule 50(2) of the Rules, and accordingly, declares it admissible.

## **VII. MERITS**

53. The Applicant alleges that the Respondent State violated his rights to i) equality before the law and equal protection of the law; ii) respect for his dignity; and iii) free legal assistance.

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

54. The Applicant alleges that the Court of Appeal upheld the his conviction, despite the absence of the essential elements of the case, in violation of Article 3(1) and (2) of the Charter. He further contends that the said court did not ascertain why the victim did not report the crime earlier, which casts doubt on his credibility.
55. The Applicant contends that the Court of Appeal failed to observe that the prosecution's evidence had to be corroborated by other evidence, as the trial court was not convinced that the victim was conscious of the duty to be truthful, in addition to the fact that the witness's age was not proven by any other document.
56. The Applicant further submits that the trial court's conviction was based exclusively on the testimony of prosecution witnesses. According to the Applicant, the trial court did so because it considered that it was not for the Applicant to prove his innocence but for the prosecution to prove its

allegations beyond reasonable doubt. The Applicant further contends that the Court of Appeal should have considered that the evidence had to be corroborated by his witness.

57. The Respondent State submits that this allegation was never raised before the Court of Appeal. It further submits that the said court examined the credibility of the victim and noted that the high court was satisfied that the victim understood the nature of an oath and was a credible witness.
58. The Respondent State further contends that the trial court confirmed that the witness exhibited sufficient aptitude to give evidence. It notes that the victim's age was never in contention and was not the subject of any claims during the trial, either in the court of first instance or in the Court of Appeal. Furthermore, the Applicant never raised his concern about corroborating prosecution evidence as a ground for appeal before the Court of Appeal.
59. The Respondent State contends that the trial court found that the prosecution's evidence proved the facts beyond reasonable doubt. It avers that Court of Appeal considered that the appeal lacked merit and that there were no substantial grounds for appeal.

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60. Article 3 of the Charter provides that "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law".
61. The Court recalls that in line with its consistent case-law, equal protection of the law presupposes that the law protects all persons without distinction.<sup>13</sup> It follows that, in order to establish a violation of this right, it is necessary to

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<sup>13</sup> *Harold Mbalanda Munthali v. Republic of Malawi*, ACtHPR, Application No. 022/2017, Judgment of 23 June 2022 (merits and reparations), § 81; *Action pour la Protection des Droits de l'Homme v. Republic of Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668, § 146.



prove that the applicant was treated differently from other persons who were in a similar situation as him.<sup>14</sup>

62. The Court considers that, in the context of the alleged violation of the right to a fair trial, it is incumbent on the Applicant to prove that the manner in which the competent domestic court examined the evidence reveals an apparent or manifest error that resulted in a miscarriage of justice to the detriment of the Applicant as opposed to other parties in similar situations.<sup>15</sup>
63. The Court notes that in the present case, and as it emerges from the records, there is no provision in the applicable domestic law that provides for different treatment of litigants in similar situations.
64. Moreover, the domestic courts examined the Applicant's allegations. In particular, there is no evidence in the decision of the Court of Appeal that it omitted any of the elements put forward by the parties, or that it erred, as the Applicant alleges. In any event, the Court of Appeal heard five (5) witnesses during the Applicant's trial.
65. Accordingly, the Court finds that Applicant has failed to substantiate the allegation that his right to equality before the law or his right to equal protection of the law was violated. Accordingly, the Court dismisses the allegation that the Respondent State violated Article 3(1) and (2) of the Charter.

## **B. Alleged violation of the right to dignity**

66. The Applicant also alleges that the Respondent State violated his right to respect for the dignity inherent in a human being and to the recognition of his legal status.

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<sup>14</sup> *Oscar Josiah v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 83, § 73; *Makungu v. Tanzania*, *supra*, § 70.

<sup>15</sup> *Josiah v. Tanzania*, *supra*, § 73.

67. The Respondent State contests this allegation on the ground that the Applicant does not demonstrate how he was degraded, tortured or deprived of his dignity. It further submits that throughout his trial, legal procedures were followed in accordance with the laws of the land, as the Applicant had the opportunity to appear before the Tribunal and exercised his right to appeal.

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68. The Court notes that under Article 5 of the Charter:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

69. The Court recalls that, in line with its jurisprudence, in order to make a general assessment as to whether the right to respect for dignity has been violated, it took into account three main factors. The first is that Article 5 of the Charter does not contain any restrictive clause. The prohibition of the violation of dignity through cruel, inhuman or degrading treatment is therefore absolute. The second factor is that the said prohibition is interpreted to provide the broadest possible protection against physical or psychological abuse. Finally, personal suffering and infringement of dignity can take many forms and their assessment depends on the circumstances of each case.<sup>16</sup> Moreover, as the Court has consistently held, the burden of proof is on the Applicant to prove his allegations.

70. The Court recalls that the Applicant bears the onus to prove his allegations. In the present case, the Applicant does not provide any evidence of his allegations of violation of his right to dignity and his right not to be subjected

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<sup>16</sup> *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 88.

to degrading treatment or torture. In any event, there is no evidence on record that the Applicant suffered such violations.

- 71. In the absence of such evidence, the Court considers the allegations to be unfounded and therefore dismisses them.
- 72. In view of the foregoing, the Court considers that the Respondent State did not violate the Applicant's rights protected by Article 5 of the Charter.

### **C. Alleged violation of the right to free legal assistance**

- 73. The Applicant alleges that he was not afforded legal aid in the proceedings against him before the domestic courts, and that the Respondent State thereby violated Article 7(1)(c) of the Charter.
- 74. The Respondent State did not respond to this prayer.

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- 75. Under Article 7(1)(c) of the Charter, the right to have one's case heard includes "the right to a defence, including the right to be assisted by counsel of one's own choosing".
- 76. The Court has previously 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),<sup>17</sup> and determined that the right to defence includes the right to be provided with free legal assistance.<sup>18</sup>
- 77. The Court has also held that anyone charged with a serious offence, punishable by a severe sentence, is entitled to have legal representation

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<sup>17</sup> The Respondent State became a State Party to the ICCPR on 11 June 1976.

<sup>18</sup> *Thomas v. Tanzania* (merits), *supra*, § 114; *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 78; *Kennedy Owino Onyachi and Charles John Mwanini v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, §§ 104 and 106.

without charge and without having to apply for it.<sup>19</sup> Furthermore, the obligation to provide free legal aid to indigent persons facing serious charges that carry a heavy penalty applies both at trial and on appeal.<sup>20</sup>

78. The Court observes that although the Applicant was charged with rape, which is a serious offence carrying a minimum sentence of thirty (30) years' imprisonment, a penalty that is quite severe, there is nothing on record to indicate that he was informed of his right to legal assistance, or that, if he could not afford such assistance, it would have been provided free of charge. The Court further notes that the Respondent State does not dispute that the Applicant is indigent.
79. The interests of justice impose the obligation to afford the Applicant free legal assistance throughout the proceedings at first instance and on appeal.
80. The Court therefore finds that the Respondent State violated Article 7(1)(c) of the Charter, read in conjunction with Article 14(3)(d) of the ICCPR, by failing to afford the Applicant free legal assistance in the proceedings before domestic courts.

## VIII. REPARATIONS

81. The Applicant prays the Court to grant him reparations for the violations he suffered, to vacate the conviction and sentence against him, and to order his release.
82. The Respondent State prays the Court to dismiss the Applicant's request for reparations.

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<sup>19</sup> *Thomas v. Tanzania, ibid*, § 123; *Isiaga v. Tanzania, ibid*, § 78; *Owino and Another v. Tanzania, ibid*, §§ 104 and 106.

<sup>20</sup> *Thomas v. Tanzania, ibid*; *Isiaga v. Tanzania, ibid*; *Onyachi and Another v. Tanzania, supra*, § 111.

83. The Court notes that Article 27(1) of the Protocol stipulates that:

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

84. In line with its constant jurisprudence, the Court considers that, in order for reparations to be awarded, it must first be established that the Respondent State is internationally responsible for the wrongful act. Secondly, a causal link must be established between the wrongful act and the alleged harm. Furthermore, and where it is granted, reparation should redress the full damage suffered.

85. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers, in particular with regard to material damage.<sup>21</sup> With regard to moral damages, the Court has held that the requirement of proof is not strict<sup>22</sup> since it is presumed that there is prejudice caused when violations are established.<sup>23</sup>

86. The Court also recalls that the measures that a State may take to remedy a violation of human rights can include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.<sup>24</sup>

87. In instant case, the Applicant seeks both pecuniary (A) and non-pecuniary (B) reparations.

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<sup>21</sup> *Kennedy Gihana and Others v. Republic of Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139. See also *Reverend Christopher R. Mtikila v. Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016), 1 AfCLR 346, § 15(d); and *Elisamehe v. Tanzania*, *supra*, § 97.

<sup>22</sup> *Beneficiaries of the late Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, § 55; see also *Elisamehe v. Tanzania*, *supra*, § 97.

<sup>23</sup> *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, § 136; *Guehi v. Tanzania*, *supra*, § 55; *Rashidi v. Tanzania*, *supra*, § 119; *Zongo and Others v. Burkina Faso* (reparations), *supra*, § 55 and *Elisamehe v. Tanzania*, *supra*, § 97.

<sup>24</sup> *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparation) (7 December 2018) 2 AfCLR 202, § 20; *Elisamehe v. Tanzania*, *supra*, § 96.

## **A. Pecuniary Reparations**

88. The Applicant seeks pecuniary reparation for the material damage which, according to him, resulted from the violations he suffered owing to the Respondent State's actions. He prays the Court to consider and assess payment of reparations based on national annual per capita income of citizens over the period of the Applicant's detention.
89. The Respondent State prays the Court to dismiss the Applicant's claims for reparation, including the payment of fair compensation or reparation under Article 27 of the Protocol. It also prays that the Applicant continues serving his sentence.

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90. The Court recalls that the only conclusion it has reached is that the Respondent State violated the Applicant's right to free legal assistance by failing to afford him counsel during the proceedings before domestic courts.
91. The Court notes that the violation found has caused the Applicant moral prejudice and therefore, in the exercise of its judicial discretion, awards the Applicant the sum of Three Hundred Thousand (300,000) Tanzanian shillings as fair compensation.<sup>25</sup>

## **B. Non-Pecuniary Reparations**

92. The Applicant prays the Court to set aside his sentence and order his release.
93. The Respondent State prays the Court to dismiss all of the Applicant's claims and to find that the Applicant continues to serve his sentence.

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<sup>25</sup> *Stephen John Rutakikirwa v. United Republic of Tanzania*, ACtHPR, Application No. 013/2016, Judgment of 24 March 2022 (merits and reparations), § 85; *Anaclet Paulo v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 107; *Minani Evarist v. Tanzania* (merits and reparations) (28 November 2018) 2 AfCLR 402, § 85.

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94. The Court recalls that in the instant case, it has found that the Respondent State violated the Applicant's right to a fair trial by failing to afford him free legal assistance. Without understating the gravity of this violation, the Court notes that it did not find that such a violation has any bearing on the Applicant's guilt or his conviction.<sup>26</sup>
95. Furthermore, the Court finds that nothing in the nature of the violation in the instant case reveals any circumstances that would make the continued detention of the Applicant a denial of justice or an arbitrary decision. Neither has the Applicant demonstrated the existence of further exceptional and compelling circumstances that could warrant an order for his release.<sup>27</sup>
96. In view of the foregoing, the Court dismisses the Applicant's request for an order quashing his conviction and for his release.

## IX. COSTS

97. The Parties did not submit on costs.

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98. Pursuant to Rule 32(2) of the Rules of Court "unless otherwise decided by the Court, each party shall bear its own costs".<sup>28</sup>

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<sup>26</sup> *Thomas v. Tanzania*, *supra*, § 157; *Makungu v. Tanzania*, *supra*, § 84; *Isiaga v. Tanzania*, *supra*, §96, *Guéhi v. Tanzania*, *supra*, § 164.

<sup>27</sup> *Jibu Amir a.k.a. Mussa and Said Ally a.k.a. Mangaya v. United Republic of Tanzania* (merits and reparations) (28 November 2019), 3 AfCLR 629, § 97; *Elisamehe v. Tanzania*, *supra*, §112; and *Evarist v. Tanzania*, *supra*, § 82.

<sup>28</sup> Formerly Rule 30, Rules of Court, 2 June 2010.

99. The Court considers that there is no reason in the circumstances to depart from the above provisions. Consequently, it orders that each party bear its own costs of the proceedings.

## **X. OPERATIVE PART**

100. For these reasons,

### **THE COURT**

*Unanimously,*

#### *On jurisdiction*

- i. *Dismisses* the objection raised by the Respondent State;
- ii. *Declares* that it has jurisdiction.

#### *On admissibility*

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

#### *On merits*

- v. *Finds* that the Respondent State did not violate the Applicant's right to equality before the law and equal protection of the law protected by Article 3(1) and (2) of the Charter respectively;
- vi. *Finds* that the Respondent State did not violate the Applicant's right to dignity protected Article 5 of the Charter;
- vii. *Finds* that the Respondent State violated the Applicant's right to a fair trial guaranteed under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR in relation to the failure to afford the Applicant free legal assistance.



*On reparation*

*Pecuniary reparations*

- viii. *Grants* the Applicant's request for pecuniary reparation for damage resulting from the violation of his right to free legal assistance, and awards him the sum of Three Hundred Thousand (300,000) Tanzanian shillings;
- ix. *Orders* the Respondent State to pay the sum awarded under (viii) above, free from tax, as fair compensation within six (6) months from the date of notification of this Judgement, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

*Non-pecuniary reparations*

- x. *Dismisses* the Applicant's request to have his conviction and sentence quashed and to be released.

*On implementation and reporting*

- xi. *Orders* the Respondent State to submit to the Court, within six (6) months from the date of notification of this Judgement, a report on the status of implementation of the orders set forth herein and, thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*On costs*

- xii. *Orders* each Party to bear its own costs.


**Signed:**


Blaise TCHIKAYA, Vice-President;





Ben KIOKO, Judge;





Rafaâ BEN ACHOUR, Judge; 


Suzanne MENGUE, Judge; 


Tujilane R. CHIZUMILA, Judge; 


Chafika BENSAOULA, Judge; 

Stella I. ANUKAM Judge; 

Dumisa B. NTSEBEZA, Judge; 

Modibo SACKO, Judge; 

Dennis A. ADJEI, Judge; 

And Robert ENO, Registrar. 

Done at Arusha, this Thirteenth Day of the month of June in the year Two Thousand and Twenty-three, in English and French, the English text being authoritative.

