

Bunyerere v Tanzania (merits and reparations) (2019) 3 AfCLR 702

Application 031/2015, *Dismas Bunyerere v United Republic of Tanzania*
Judgment, 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced to thirty (30) years imprisonment for armed robbery. He alleged that the acts he was accused of constituted theft and not armed robbery, that evidence had been disregarded in the trial and that his right to equality before the law and non-discrimination had been violated. The Court held that no rights had been violated in the case and dismissed the claim for reparations.

Jurisdiction (material, 24, 25)

Admissibility (exhaustion of local remedies, constitutional review, 37; submission within reasonable time, 47, 48)

Fair trial (evaluation of evidence, 59, 60; legality, 66, 67, 74)

Separate Opinion: BENSAOULA

Admissibility (submission within reasonable time, 6, 7)

I. The Parties

1. Dismas Bunyerere (hereinafter referred to as “the Applicant”), is a national of Tanzania currently serving a sentence of thirty (30) years imprisonment following conviction for armed robbery.
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 prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations (NGOs).

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that, on 22 September 2005, the Applicant was arrested at Rubaragazi village following an attack that he and five (5) other persons perpetrated around Rubaragazi Island on 7 September 2005 on Magongo William and Faida Charles who were fishing on a boat belonging to Gregory John Kazembe. They robbed the two (2) aforementioned fishermen of an out-boat engine, a fuel tank, a fuel line, an engine switch and forty seven (47) fishing nets.
4. The Applicant was charged on 26 September 2006, with the offence of armed robbery before the District Court of Sengerema at Sengerema in Mwanza, in Criminal Case No. 288 of 2005. On 14 November 2006, that Court convicted the Applicant and sentenced him to thirty (30) years imprisonment.
5. On 7 February 2007, the Applicant filed Criminal Appeal No. 52 of 2007 at the High Court of Tanzania at Mwanza. On 4 February 2009, this appeal was struck out for lack of a proper notice of appeal. By the same decision striking out the Appeal, the Court allowed the Applicant to seek leave to file his notice of appeal out of time, which he subsequently did through Miscellaneous Criminal Application No. 88 of 2009 filed at the High Court of Tanzania at Mwanza. The High Court granted the leave sought by an Order of 6 September 2010 and thereafter, on 27 September 2010, the Applicant filed Criminal Appeal 70 of 2010 at the High Court of Tanzania at Mwanza. On 8 December 2010, the High Court of Tanzania at Mwanza, dismissed the appeal.
6. On 21 December 2010, the Applicant filed an appeal which was subsequently registered as Criminal Appeal 102 of 2011 at the Court of Appeal of Tanzania at Mwanza. On 29 July 2013, the Court of Appeal dismissed the appeal and upheld his conviction and sentence. On 13 September 2013, the Applicant filed Criminal Application 16 of 2013 for Review of the Court of Appeal's judgment of 29 July 2013. This Application for review was pending at the time of filing of the Application.
7. The Applicant filed the present Application on 5 December 2015.

B. Alleged violations

8. The Applicant alleges that the Respondent State has violated his rights under Article 2 of the Charter on the right to non-discrimination

and Article 3 on the right to equality before the law and to equal protection of the law. He alleges that these violations occurred when the Court of Appeal:

- i. Disregarded the fundamental evidence tendered by the prosecution relating to his identification at the scene of the incident and the cautioned statement that he made.
 - ii. Upheld his conviction and sentence without altering the offence he was charged with, from armed robbery to theft, and that it consequently ought to have changed his sentence and considered the Applicant's mitigation and plea for his leniency.
 - iii. Delivered a judgment that was contrary to the laws of Tanzania especially the Criminal Procedure Act."
9. The Applicant alleges that the violation of his rights should be remedied pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules.

III. Summary of procedure before the Court

10. The Application was filed on 8 December 2015 and served on the Respondent State on 25 January 2016.
11. The Parties were notified of the pleadings on the merits and filed their submissions within the time stipulated by the Court. On 19 June 2017, the Parties were notified of the close of pleadings on the merits.
12. On 24 August 2018, the Registry requested the Applicant to file his submissions on reparations.
13. On 27 September 2018, the Applicant filed the submissions on reparations which were transmitted to the Respondent State on the same date for the response thereto within thirty (30) days.
14. The Court extended twice, by the letters dated 20 December 2018 and 15 February 2019, *suo motu* the time for the Respondent State to file submissions on reparations. On each extension, the Respondent State was given thirty (30) days to file these submissions but they failed to do so.
15. On 12 June 2019, the Parties were informed that Pleadings on reparations were closed.

IV. Prayers of the Parties

16. The Applicant prays the Court to:
 - i. Grant this application and alter the sentence subsequent set the Applicant free from the custody by considering the period he spent imprisonment (sic).

- ii. Resolve the complaint and restore justice where it was overlooked and quash both conviction and sentence imposed upon him;
 - iii. Grant any other order(s) or relief(s) that may deem fit to grant in the circumstance of the complaint.”
17. The Applicant reiterated his prayers in the Reply and on reparations, the Applicant prays that:

- “i. the Respondent shall have to compensate the applicant the sum of Tsh 3,000,000/= (three millions) per years he spent in prison as a prisoner since 2006 upto 2018 which is almost 12 years times (x) 3,000,000/= to 36,000,000/= Tsh (thirty six million Tshs)
- ii. The applicant’s first priority is to be free (released) from prison and any other reliefs and remedies the court may deem fit and just to grant in the circumstance at hand.
- iii. The court may determine the reparation as to its accord via international reparation standard and considering the third worlders development and incomes per year (sic).”

18. The Respondent State prays that the Court grant the following orders:

- “i. That the Court is not vested with jurisdiction to adjudicate over this Application.
- ii. That the Application has not met the admissibility requirements stipulated under Rules 40(5) and 40(6) of the Rules of the Court or Article 56 of the Charter and Article 6(2) of the Protocol.
- iii. That the Application be declared inadmissible.
- iv. That the Government of Tanzania did not violate Articles 2, 3(1) and 3(2) of the Charter
- v. That the Application be dismissed in accordance to Rule 38 of the Rules of court.
- vi. That the Applicant’s prayers be dismissed
- vii. That the costs of this Application be borne by the Applicant.”

V. Jurisdiction of the Court

19. 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.”

20. The Court further observes that in terms of Rule 39(1) of the

Rules: “The Court shall conduct preliminary examination of its jurisdiction ...”.

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

A. Objection to material jurisdiction

22. The Respondent State argues that the Application does not comply with the provisions of Article 3(1) of the Protocol and Rules 26 and 40(2) of the Rules as the Applicant is calling for the Court to sit as an appellate court and reconsider matters of evidence determined by the Court of Appeal of Tanzania, the highest Court in the Respondent State. The Respondent State refers to the Court’s decision in *Ernest Francis Mtingwi v Republic of Malawi* that it does not have appellate jurisdiction to consider appeals on cases already decided on by domestic and regional courts.
23. The Applicant contends that his Application is within the jurisdiction of the Court as the alleged violations are based on rights protected by the Charter. The Applicant states that the Application is before the Court to vet the errors in the proceedings at the domestic courts and therefore the Court has jurisdiction to examine all contents of the domestic court’s judgments and to quash his conviction and set aside the sentence.

24. The Court has consistently held that it has material jurisdiction as long as the Applicant alleges violations of human rights protected under the Charter or other human rights instrument to which the Respondent State is a party.¹
25. The Court further reiterates its well established jurisprudence that, while it is not an appellate body with respect to decisions of national courts,² nevertheless, “this does not preclude it from

1 *Peter Joseph Chacha v United Republic of Tanzania* (2014) (admissibility), 1 AfCLR 398, para 114.

2 *Ernest Francis Mtingwi v Republic of Malawi* (admissibility), (2013) 1 AfCLR 190, para 14; See also Application 025/2016, Judgment of 28 March 2019 (Merits and Reparations). *Kenedy Ivan v United Republic of Tanzania*, (*Kenedy Ivan v Tanzania* (Merits and Reparations)) para 26; Application 053/2016, Judgment of 28

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.”¹

26. In the instant case, the Court finds that the Applicant alleges that his rights under Articles 2 and 3 of the Charter have been violated.
27. Accordingly, the Respondent State’s objection in this regard is dismissed and the Court therefore holds that it has material jurisdiction.

B. Other aspects of jurisdiction

28. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on record indicates that it does not have jurisdiction. The Court therefore holds that:
 - i. it has personal jurisdiction given that the Respondent State is a party to the Protocol and has deposited the Declaration required under Article 34(6) thereof, which enables individuals to institute cases directly before it, in terms of Article 5(3) of the Protocol.

March 2019 (Merits). *Oscar Josiah v United Republic of Tanzania* (*Oscar Josiah v Tanzania* (Merits)), para 25; Application 001/2015, Judgment of 7 December 2018 (Merits and Reparations) *Armand Guehi v United Republic of Tanzania*. (*Armand Guehi v Tanzania* (Merits and Reparations)) para 33; Application 024/2015. Judgment of 7 December 2018 (Merits and Reparations) *Werema Wangoko Werema and Another v United Republic of Tanzania* (*Werema Wangoko Werema and Another v Tanzania* (Merits and Reparations)) para 29; Application 027/2015, Judgment of 21 September 2018 (Merits and Reparations). *Minani Evarist v United Republic of Tanzania*. (*Minani Evarist v Tanzania* (Merits and Reparations)) para 18; Application 016/2016, Judgment of 21 September 2018 (Merits and Reparations). *Diocles William v United Republic of Tanzania* (*Diocles William v Tanzania* (Merits and Reparations)) para 28; Application 002/2016, Judgment of 11 May 2018 (Merits). *George Maili Kemboge v United Republic of Tanzania*. (*George Maili Kemboge v Tanzania* (Merits)) para 19; Application 005/2015. Judgment of 11 May 2018 (Merits) *Thobias Mang’ara Mango and Another v United Republic of Tanzania*. (*Thobias Mango and Another v Tanzania* (Merits)) para 31; Application 006/2015. Judgment of 23 March 2018, (Merits) *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (*Nguza Viking and Johnson Nguza v Tanzania* (Merits)) para 35; Application 032/2015. Judgment of 21 March 2018, (Merits) *Kijiji Isiaga v United Republic of Tanzania* (*Kijiji Isiaga v Tanzania* (Merits)) para 34; Application. 011/2015. Judgment of 28 September 2017, (Merits) *Christopher Jonas v United Republic of Tanzania* (*Christopher Jonas v Tanzania* (Merits)) para 28; *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599 para 25.

- 1 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465 para 130; See also *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599 para 29; *Christopher Jonas v Tanzania* (Merits), para 28, Application 003/2014, Judgment of 24 November 2017 (Merits), *Ingabire Victoire Umuhoza v Republic of Rwanda* (*Ingabire Umuhoza v Rwanda* (Merits)), para 52.

- ii. it has temporal jurisdiction in view of the fact that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers as irregularities²; and
- iii. it has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State.

29. From the foregoing, the Court holds that it has jurisdiction.

VI. Admissibility

30. 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 39(1) of the Rules, “the Court shall conduct preliminary examination of its jurisdiction and the admissibility of the Application in accordance with articles 50 and 56 of the Charter and Rule 40 of the Rules”.

31. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides that:

“Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, 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 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;
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”.

2 *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) (2013) 1 AfCLR 197 paras 71-77.

A. Conditions of admissibility in contention between the Parties

32. The Respondent State submits that the Application does not comply with two admissibility requirements. First, on Rule 40(5) of the Rules relating to exhaustion of local remedies and second, on Rule 40(6) of the Rules on the need for applications to be filed within a reasonable time.

i. Objection relating to exhaustion of local remedies

33. The Respondent State alleges that this Application fails to comply with the requirement of Rule 40(5) of the Rules because the Applicant did not exhaust local remedies. Citing the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") in *SAHRINGON and others v Tanzania and Article 19 v Eritrea*, the Respondent State argues that the Applicant ought to have complied with the requirement of exhaustion of local remedies that applies to any international adjudication. The Respondent State avers that the Applicant ought to have instituted a constitutional petition in the High Court of Tanzania pursuant to the Basic Rights and Duties Enforcement Act, to remedy the complaints of violations of fair trial rights that allegedly occurred during the hearing of his appeal at the Court of Appeal of Tanzania.
34. The Applicant avers that local remedies were exhausted and that he sought redress at the High Court and the Court of Appeal before seizing this Court. The Applicant also states that his application for review of the Court of Appeal's judgment of 29 July 2013 was yet to be heard by the time he filed the Application before this Court.

35. The Court notes that pursuant to Rule 40(5) of the Rules an application filed before the Court shall meet the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies reinforces the primacy of domestic courts in the protection of human rights *vis-à-vis* this Court and, as such, aims at providing States the opportunity to deal with 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.³

36. In its established jurisprudence, the Court has consistently held that an Applicant is only required to exhaust ordinary judicial remedies.⁴ Furthermore, in several cases involving the Respondent State, the Court has repeatedly stated that the remedies of constitutional petition and application for review of a judgment of the Court of Appeal in the Tanzanian judicial system are extraordinary remedies that an Applicant is not required to exhaust prior to seizing this Court.⁵
37. 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 29 July 2013, the Court of Appeal upheld the judgment of the High Court, which had earlier upheld the judgment of the District Court of Sengerema. In addition to pursuing the ordinary judicial remedies, the Applicant also, attempted to use the review procedure at the Court of Appeal. The Respondent State therefore had the opportunity to redress his violations.
38. It is thus clear that the Applicant has exhausted all the available domestic remedies.
39. For this reason, the Court dismisses the objection that the Applicant has not exhausted local remedies.

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

40. The Respondent State argues that in the event that the Court finds that the Applicant exhausted local remedies, the Court should find that the Application was not filed within a reasonable time pursuant to Rule 40(6) of the Rules.
41. The Respondent State avers that the period from 29 July 2013, when the Court of Appeal of Tanzania dismissed the Applicant's appeal to 8 December 2015 when the Applicant filed his Application

3 Application 006/2012. Judgment of 26 May 2017 (Merits), *African Commission on Human and Peoples' Rights v Republic of Kenya*, paras 93-94.

4 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465 para 64; *Wilfred Onyango Nganyi and others v Tanzania* (merits) (2016) 1 AfCLR 507 para 95.

5 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465, para 65; *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599, paras 66-70; *Christopher Jonas v Tanzania* (Merits), para 44.

before this Court, is two (2) years and five (5) months.

42. The Respondent State relies on the Commission's decision in *Majuru v Zimbabwe*, in stating that the established international human rights jurisprudence considers six (6) months as reasonable time for filing an Application after the exhaustion of local remedies. The Respondent State argues that filing the Application after a period of two (2) years is very far from being considered reasonable. The Respondent State further contends that the Applicant being in prison does not bar his access to the Court.
43. The Applicant contends that his Application complies with Rule 40 (6) of the Rules because he appealed to both the High Court and the Court of Appeal of Tanzania, which is the highest court in the Respondent State. The Applicant also argues that the delay in his filing the Application was because he filed an application for review at the Court of Appeal of Tanzania.

44. 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 40 (6) of the Rules, which in substance restates Article 56(6) of the Charter, simply mentions "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."
45. The Court recalls its jurisprudence in *Norbert Zongo and others v Burkina Faso* in which it held "...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."⁶
46. The record before this Court shows that local remedies were exhausted on 29 July 2013 when the Court of Appeal of Tanzania delivered its judgment while the Application was filed on 8 December 2015, that is, two (2) years, four (4) months and ten (10) days after local remedies were exhausted. The Court has to determine whether this period can be considered reasonable in

6 See *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* (merits) (2014) 1 AfCLR 219 para 121.

terms of Rule 40 (6) of the Rules and Article 56(6) of the Charter.

47. The Court notes that the Applicant is in prison and this resulted in restriction of his movements and his access to information about the existence of the Court.⁷ He chose to use the review procedure of the Court of Appeal,⁸ by filing an application for review on 13 September 2013, even though, it is not a remedy required to be exhausted before filing an Application before this Court. He had an expectation that this review would have been determined within a reasonable time. The Court further notes that the application for review was pending by the time he filed the Application. The Court is of the view that the Applicant should not be penalised for the time he spent awaiting the determination of his application for review of the Court of Appeal's judgment.
48. Consequently, the Court finds that the time taken by the Applicant to seize it, that is, two (2) years, four (4) months and ten (10) days after the exhaustion of local remedies is reasonable.
49. The objection raised in this regard is therefore dismissed.

B. Conditions of admissibility not in contention between the Parties

50. The conditions in respect of the identity of the Applicant, incompatibility with the Constitutive Act of the African Union and the Charter, the language used in the Application, the nature of the evidence adduced and the principle that an application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments 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. The Court notes that nothing on record indicates that any of these conditions have not been fulfilled in this case.
51. In light of the foregoing, the Court finds that this Application meets all the admissibility conditions set out in Article 56 of the Charter and Rule 40 of the Rules and declares the Application admissible.

7 See *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465 para 74, *Kenedy Ivan v Tanzania* (Merits and Reparations) para 56.

8 *Werema Wangoko Werema and Another v Tanzania* (Merits and Reparations) para 49, *Armand Guehi v Tanzania* (Merits and Reparations) para 56.

VII. Merits

52. The Applicant alleges that his rights guaranteed in the Charter under Article 2 on the right not to be discriminated against and Article 3 on the right to equality before the law and to equal protection of the law were violated.
53. In so far as the allegations of violations of Articles 2 and 3 of the Charter are linked to the allegation of violation of Article 7 of the Charter, the Court will first consider the latter allegation.⁹

A. Allegations of violations relating to Article 7 of the Charter

54. The Applicant alleges violation of his rights relating to an alleged manifest error in the judgment of the Court of Appeal based on his improper identification. He also alleges that the Court of Appeal upheld his conviction and sentence based on the evidence of possession of stolen properties and that it failed to 'alter the offence to theft'.

i. Allegation relating to the manifest error in the judgment of the Court of Appeal based on Applicant's identification

55. The Applicant alleges that the Court of Appeal 'disregarded fundamental evidence of prosecution side regarding identification of the Applicant in the scene of incident and cautioned statement of the Applicant to confusion.' Hence the Court of Appeal based its judgment based on a manifest error of fact on the Applicant's identification.
56. The Respondent State argues that the issue of the Applicant's identification was one of the Applicant's grounds of appeal in the Court of Appeal which was considered and determined in his favour by the Court disregarding the Applicant's identification and his cautioned statement.

9 *Peter Joseph Chacha v United Republic of Tanzania* (2014) (admissibility), 1 AfCLR 398, para 122.

- 57.** Article 7(1) of the Charter provides that:
“Every individual shall have the right to have his cause heard. This comprises:
- a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c. The right to defence, including the right to be defended by counsel of his choice;
 - d. The right to be tried within a reasonable time by an impartial court or tribunal.”
- 58.** 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.”¹⁰
- 59.** The Court notes from the record that the domestic courts examined the evidence tendered by the prosecution and determined that the Applicant’s identification by the witnesses was at most, hearsay and that the cautioned statement of the Applicant was not taken lawfully. The domestic courts therefore disregarded the evidence relating to the Applicant’s identification and his cautioned statement, since these did not comply with the requirements set down in jurisprudence. The Court further notes that the issue was determined in favour of the accused, who is the Applicant before this Court.
- 60.** The Court finds that the manner in which the domestic courts evaluated the evidence relating to the Applicant’s identification and the disregarding of his cautioned statement does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation.

ii. Allegation relating to the Applicant’s conviction and sentence

- 61.** The Applicant alleges that, in view of the prosecution’s evidence on the stolen properties, the Court of Appeal ought to have altered his offence from armed robbery to theft and convicted him of this

10 Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania* para 65.

lesser charge which carried a lesser sentence, rather than uphold his conviction for armed robbery and sentence of thirty (30) years' imprisonment.

62. The Applicant adds that the doctrine of recent possession was not properly invoked by the prosecution because the domestic courts did not consider the fact that the Applicant, as a canoe fisherman, could possess the same material that it was alleged he robbed the Complainant, Prosecution Witness 1 (PW1), of. He states that the prosecution failed to provide substantial proof of PW1's ownership of the property in dispute.
63. The Respondent State avers that the Applicant's conviction was based on the doctrine of recent possession which the Court of Appeal found to be in line with its jurisprudence in *Paulo Maduka & 4 others v the Republic of Tanzania*, that: "the presumption of guilt can only arise where there is cogent proof that the stolen things possessed by the accused is the one that was stolen during the commission of the offence charged...". The Respondent State argues that the said Court found this doctrine to have been properly invoked and applied by the trial court. The Respondent State further adds that it was the Applicant who led the Police to the place where the stolen goods were stored and that the owner of the alleged stolen properties identified the goods as being his property.

64. Article 7(2) of the Charter provides 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 on the offender."
65. The Court notes from the record that, during the investigation phase, it was the Applicant who led the police to his house where the stolen goods were found and their rightful owner, Gregory John Kazembe, identified these goods as his property.
66. The Court equally notes that the Court of Appeal examined all the pleadings by the Applicant regarding the issue of the doctrine of recent possession and decided to uphold the District Magistrate's and High Court's decisions that the Applicant's conviction for armed robbery and sentence of thirty (30) years' imprisonment

should stand.

67. The Court finds that the manner in which the domestic courts determined the issue of the doctrine of recent possession does not disclose any manifest error or miscarriage of justice to the Applicant as regards his conviction for the offence of armed robbery and sentence of thirty years' imprisonment. The Court therefore dismisses this allegation.

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

68. The Applicant alleges that the Respondent's State's failure to apply Section 300 (2) of the Criminal Procedure Act of 2002 (CPA) to alter the offence he was charged with, that is, armed robbery, to a minor one, after their satisfaction that his conviction was under the evidence of possession of stolen properties, constituted a violation of his right to equal treatment before the law and equal protection of the law.
69. The Applicant maintains that the Court of Appeal is governed by the Appellate Jurisdiction Act, the Court of Appeal Rules of 2009 and since, these Rules refer to 'any other written law', the Court of Appeal is also governed by the CPA .
70. The Applicant contends that the failure of the Court of Appeal to consider his application for review is a breach of his rights enshrined in the Constitution of the Respondent State and the Charter.
71. The Respondent State argues pursuant to Article 4 of the CPA, that Act does not apply in Court of Appeal proceedings and that that it is applicable in the trial and determination of offences under the Penal Code and all other offences except where the law provides otherwise. In this regard the Respondent cited Article 4 of the CPA.¹¹ The Respondent State further argues that the proceedings before the Court of Appeal Court are governed by the Appellate Jurisdiction Act of 2002 and the Court of Appeal Rules.
72. The Respondent State avers that the Court of Appeal considered all the Applicant's grounds of appeal. The Respondent State also states that the Applicant's appeals were heard and determined by

11 Article 4 of the Criminal Procedure Act (CPA) of 2002 provides as follows: "(1) All offences under the Penal Code shall be inquired into, tried and otherwise dealt with according to the provisions of the Act (2) All offences under any other law shall be inquired into, tried and otherwise dealt with according to the provisions of this Act except where other law provides differently for the regulation of the manner or place of investigation into; trial or dealing in any other way with those offences.

the appellate courts and he was duly accorded his right to equality before the law as guaranteed under the Charter.

73. Article 3 of the Charter stipulates that “(1) Every individual shall be equal before the law” and that “(2) Every individual shall be entitled to equal protection of the law.”
74. With respect to the right to equality before the law, this Court has found, in paragraphs 66 and 67 above that, the Court of Appeal’s assessment of the evidence relating to the doctrine of recent possession was not done in a manner that infringed on the Applicant’s rights. The Court also finds that the Court of Appeal’s assessment was neither manifestly erroneous, nor did it occasion a miscarriage of justice to the Applicant. Furthermore, the Court has found no evidence on record and the Applicant has not demonstrated how he was treated differently, as compared to other persons who were in a situation similar to his,¹² resulting in unequal protection of the law or inequality before the law contrary to Article 3 of the Charter.
75. The Court therefore dismisses this allegation and holds that the Respondent State has not violated Article 3 of the Charter.

C. Alleged violation of the right not to be discriminated against

76. The Applicant claims that the treatment of his matters by the Court of Appeal violated his rights under Article 2 of the Charter.
77. The Respondent State has not responded to this allegation.

78. Article 2 of the Charter provides that “Every individual shall be

12 Application 006/2016. Judgment of 7 December 2018 (Merits), *Mgosi Mwita Makungu v United Republic of Tanzania*, para 66.

entitled to the enjoyment of the rights and freedom recognized and guaranteed in present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social original fortunate, birth or any status” .

- 79.** The Court notes that the right to non-discrimination as enshrined under Article 2 of the Charter proscribes any differential treatment to individuals found in the same situation on the basis of unjustified grounds. In the instant Application, the Applicant makes a general allegation that he was discriminated against by the Respondent State. He neither explains the circumstances of his differential treatment nor provides evidence to substantiate his allegation. In this regard, the Court recalls its established jurisprudence that “general statements to the effect that a right has been violated are not enough. More substantiation is required.”¹³
- 80.** The Court therefore dismisses this allegation and holds that the Respondent State has not violated Article 2 of the Charter.

VIII. Reparations

- 81.** The Applicant prays that the Court should resolve the complaint and restore justice where it was overlooked, quash both conviction and sentence imposed upon him and order his release. In addition, the Applicant prays that the Court order that the Respondent State pay compensation of Tanzania Shillings Thirty Six Million (TZS 36,000,000) and grant any other order it may deem fit.
- 82.** The Respondent State avers that the Applicant’s prayers should be dismissed but it did not file submissions in response to the Applicant’s claim on reparations.
- 83.** Article 27(1) of the Protocol stipulates that: “If the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”
- 84.** The Court having found that the Respondent State has not violated any of the rights as alleged by the Applicant, dismisses the Applicant’s prayers that the Court should quash the conviction and sentence imposed upon him, order his release and pay him compensation.

13 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465 para 140.

IX. Costs

- 85. The Applicant made no submissions on costs.
- 86. The Respondent State prays that the costs of the Application be borne by the Applicant.
- 87. The Court notes that Rule 30 of the Rules of Court provides that “unless otherwise decided by the Court, each Party shall bear its own costs”.
- 88. The Court therefore decides that each Party shall bear its own costs.

X. Operative part

- 89. For these reasons:

The Court

Unanimously,

On Jurisdiction

- i. *Dismisses* the objection on material jurisdiction of the Court;
- ii. *Declares* that it has jurisdiction.

On Admissibility

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

On the Merits

- v. *Finds* that the Respondent State has not violated the Applicant’s right not to be discriminated against under Article 2 of the Charter;
- vi. *Finds* that the Respondent State has not violated the Applicant’s right to equality before the law and equal protection of the law under Article 3 of the Charter;
- vii. *Finds* that the Respondent State has not violated the Applicant’s right to a fair trial under Article 7 of the Charter.

On Reparations

- viii. *Dismisses* the Applicant’s prayers for reparations.

On Costs

- ix. Orders that each Party shall bear its own costs.

Separate Opinion: BENSAOULA

1. I concur with the opinion of the majority of the Judges as regards admissibility of the Application, jurisdiction of the Court and the Operative Part.
2. However, in my thinking, the manner in which the Court treated admissibility with regard to the objection raised by the Respondent State on the filing of the Application within a reasonable time, runs counter to the provisions of Article 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules.
3. Under Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 6, it is clearly stated that applications must be “submitted 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”.
4. It is clear from the aforesaid that the legislator laid down two (2) options as to how to determine the starting point of reasonable period:
 - i. the date of exhaustion of local remedies: in the instant case, this date was set by the Court at 29/07/2013 – date of the judgment of the Court of Appeal. Between this date and that of referral of the matter to the Court, there was a time lapse of two (2) years, four (4) months and ten (10) days.
 - ii. the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter: it is noteworthy in this regard that although the Court took into account the date of exhaustion of local remedies to determine the reasonableness of the time limit,¹ it nevertheless noted certain facts that occurred between the date local remedies were exhausted and that of referral of the matter to the Court, such as the application for review.² The Court also noted that the Applicant was incarcerated, which would have restricted his movement and access to information.
5. This reasoning on the part of the Court runs counter to the very logic of the exception made by the legislator as to the second prerogative conferred on this Court to set a date as being the commencement of the time limit within which it shall be seized with a matter.
6. Indeed, whereas with regard to local remedies, the Court has held that Applicants are obliged to exercise only the ordinary remedies, there would be no contradiction with this position had the Court,

1 Para 47 of the Judgment.

2 Para 48 of the Judgment.

based on the fact that the Applicant filed for extraordinary remedy which is application for review in the present case, retained the date of the remedy or the date of the decision as being the commencement of the time limit within which it shall be seized with the matter, instead of determining the reasonable period relying on the review remedy as a fact.

7. The Court ought to have justified this option in the following manner: “Notwithstanding the fact that it has considered that the local remedies have been exhausted as evidenced by the Court of Appeal Judgment of 29 July 2013, the Court, in the spirit of fairness and justice, would take as element of assessment, the date on which the application for review was filed, that is 13 September 2013”, which would have given a more reasonable time as it is shorter.
8. By ignoring the aforesaid date and simply citing³elements to justify reasonable time such as the Applicant being in prison, resulting in restriction of his movements and his access to information, allegations he never made, as well as his ignorance of the existence of the Court, especially as it is apparent from the judgment under reference that he defended himself before this Court and did not need a counsel, the Court failed to correctly apply Rule 40(6) of the Rules.