Evarist v Tanzania (merits) (2018) 2 AfCLR 402

Application 027/2015, *Minani Evarist v United Republic of Tanzania*

Judgment, 21 September 2018. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Court held, in case where free legal representation had not been provided in relation to a serious crime, that the State had violated the right to a fair trial and ordered compensation.

Jurisdiction (national process, 20, 35)

Admissibility (exhaustion of local remedies, extraordinary remedy, 34; submission within reasonable time, 45)

Fair trial (defence, free legal representation, 69, 70)

Equal protection (allegation needs to be substantiated, 75)

Reparations (release, 81; compensation, 84, 85)

Separate Opinion: BEN ACHOUR

Reparations (proportionality, release, 14-18)

Joint Dissenting Opinion: KIOKO, MATUSSE, CHIZUMILA and ANUKAM

Costs (each party to bear its own costs, 6, 11)

I. The Parties

1. The Applicant, Mr Minani Evarist, is a national of the United Republic of Tanzania, currently serving a thirty (30) years' prison term for the crime of rape at Butimba Central Prison in Mwanza.

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

II. Subject of the Application

A. Facts of the Matter

3. According to the records, in Criminal Case No. 155/2005 before the District Court of Ngara, the Applicant was convicted and sentenced on 30 March 2006, to 30 years imprisonment for having committed the crime of rape of a fifteen (15) year old girl, an offence punishable under Sections 130(1) and (2)(e) and Section 131(1) of the Tanzanian Penal Code, as Revised in 2002.

4. The Applicant filed Criminal Appeal No. 43/2006 before the High Court of Tanzania at Bukoba (hereinafter referred to as 'the High Court"); and Criminal Appeal No. 124/2009 before the Court of Appeal of Tanzania at Mwanza (hereinafter referred to as 'the Court of Appeal").

5. The High Court and the Court of Appeal upheld the sentence on 29 March 2007 and 16 February 2012, respectively; and the Applicant filed an Application for review before the Court of Appeal on 19 August 2014. The Applicant alleges that this Application is still pending at the time of filing of the Application.

B. Alleged violations

6. The Applicant alleges that:

i. The Court of Appeal of Tanzania "...handed down erroneously its judgment against the Applicant on 16/02/2012; and then caused him severe harm when it did not schedule for a hearing his review request, whereas other applications lodged after his had been registered and scheduled for hearing."

ii. The Court of Appeal "…had not considered all the grounds of his defence and clustered them into three grounds. This legal proceeding was detrimental to the Applicant insofar as it violated his fundamental right to have his cause heard by a court of law as provided for in Article 3(2) of the Charter."

iii. As the Respondent State did not afford him legal representation during his trial, he "...was deprived of his right to have his cause heard, which had a prejudicial effect on him. He alleges that this procedure constitutes a violation of the Applicant's fundamental rights as set out in Article 7(1)(c) and (d), of the Charter, and of Sections 1 and 107(2)(b) of the Tanzanian Constitution of 1997"

(hereinafter referred to as "the Tanzanian Constitution").

7. In summary, the Applicant alleges the violation of Articles 3(2) and 7(1)(c) and (d) of the Charter.

III. Summary of the procedure before the court

8. The Application was filed on 10 October 2015 and served on the Respondent State by a notice dated 23 December 2015, directing the Respondent State to file the list of its representatives within thirty (30) days and to file its Response to the Application within sixty (60) days of receipt of the notice, in accordance with Rules 35(2)(a) and 35(4)(a) of the Rules of Court (hereinafter referred to as "the Rules").

9. The Respondent State filed the names and addresses of its representatives on 22 February 2016.

10. On 31 March 2016, the Application was transmitted to the Chairperson of the African Union Commission and through him to the Executive Council of the African Union and to the State Parties to the Protocol, in accordance with Rule 35(3) of the Rules.

11. The Respondent State submitted its Response on 22 May 2017, which was served on the Applicant by a notice dated 30 May 2017.

12. On 28 June 2017, the Applicant filed the Reply to the Response and this was served on the Respondent State by a notice dated 17 July 2017.

13. The Court decided to close the written pleadings with effect from 9 October 2017, pursuant to Rule 59(1) of the Rules and the Registry duly informed the Parties by a notice dated 9 October 2017.

14. On 6 April 2018, the Parties were informed that the Court would not hold a public hearing indicating that written submissions and the evidence on file were sufficient to determine the matter.

IV. Prayers of the Parties

15. The Applicant prays the Court to:

"i. Render justice by annulling the guilty verdict and the sentence meted out to him and order his release;

ii. Grant him reparations for the violation of his rights; and

iii. Order such other measures or remedies that the Court may deem fit to grant."

16. The Respondent State prays the Court to rule that:

"i. the Court has no jurisdiction to hear the matter and that the Application is inadmissible;

ii. the Respondent State "has not violated Articles 3(2), 7(1), 7(1)(c) and 7(1)(d) of the Charter";

iii. the Respondent State "should not pay reparations to the Applicant";

iv. the Application should be dismissed as being baseless; and

v. the costs be borne by the Applicant."

V. Jurisdiction

17. In accordance with Rule 39(1) of its Rules, "The Court shall conduct preliminary examination of its jurisdiction...".

A. Objections to material jurisdiction

18. The Respondent State objects to the Court's jurisdiction to adjudicate on the matters raised by the Applicant arguing that, in praying the Court to re-examine the matters of fact and law examined by its judicial bodies, set aside their rulings and order the release of the convicted individual, the Applicant is in effect asking the Court to sit as an appellate body, whereas this is not within its powers as set out in Article 3(1) of the Protocol and Rule 26 of the Rules. To this end, the Respondent State makes reference to the Court's Decision in Application No. 001/2013: *Ernest Francis Mtingwi v Republic of Malawi*.

19. The Applicant rebuts the Respondent State's allegation and asserts that the Court shall have jurisdiction as long as there is a violation of the provisions of the Charter or of any other relevant human rights instruments, which bestows on the Court the power to review decisions rendered by domestic courts, review evidence and set aside the sentence and acquit the victim of human rights violations.

20. In response to the objection to its material jurisdiction, this Court reiterates its position as affirmed in *Ernest Mtingwi v Republic of Malawi*[1] that it is not an appeal court with respect to decisions rendered by national courts. However, as the Court underscored in its Judgment of 20 November 2015 in *Alex Thomas v United Republic of Tanzania*, and reaffirmed in its Judgment of 3 June, 2016 in *Mohamed Abubakari v United Republic of Tanzania*, that this situation does not preclude it from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is

1 Application No. 001/2013. Decision of 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi* (hereinafter referred to as "*Ernest Francis Mtingwi v Malawi* Decision"), para 14.

a Party.[2] Indeed, this falls within the very scope of the powers of the Court as provided for under Article 3(1) of the Protocol.

21. Accordingly, the Court dismisses this objection and holds that it has material jurisdiction.

B. Other aspects of jurisdiction

22. The Court notes that its personal, temporal and territorial jurisdiction has not been contested by the Respondent State, and nothing in the pleadings indicates that the Court lacks jurisdiction. The Court thus 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 enabled the Applicants to access the Court in terms of Article 5(3) of the Protocol;
>
> ii. it has temporal jurisdiction on the basis that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers an unfair process;
>
> iii. it has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State."

23. From the foregoing, the Court concludes that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

24. 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".

25. Pursuant to Article 39(1) of the Rules, "the Court shall conduct preliminary examination of (…) the admissibility of the application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules."

26. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article

2 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania (*hereinafter referred to as "*Alex Thomas v Tanzania* Judgment*"),* para 130 and Application No.007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania (*hereinafter referred to as "*Mohamed Abubakari v Tanzania* Judgment*"),* para 29.

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 be based exclusively on news disseminated through the mass media;

5. Be filed after exhausting local remedies, if any, unless it is obvious that the procedure in unduly prolonged;

6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and

7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility in contention between the Parties

27. While some of the above conditions are not in contention between the Parties, the Court notes that the Respondent State raised two objections: one relating to the exhaustion of local remedies and the other, regarding the timeframe for filing the Application before the Court.

i. Objection based on the alleged failure to exhaust local remedies

28. The Respondent State argues that "[t]he exhaustion of domestic remedies is a fundamental principle of international law and that the Applicant should have used all domestic remedies before submitting the case to an international body such as the African Court on Human and Peoples' Rights".

29. To buttress its assertions, the Respondent State relies on the African Commission on Human and Peoples' Rights' (hereinafter referred to as "the Commission") jurisprudence in Communication No. 333/20 –*SAHRINGON and Others v Tanzania* and Communication No. 275/03, *Article 19 v Eritrea*.

30. The Respondent State contends that the alleged violation of the provisions of Articles 1 and 107A(2)(b) of the Tanzanian Constitution,

1977 should have been challenged in a constitutional petition,[3] as provided by Article 30(3) of the Tanzanian Constitution and in the Basic Rights and Duties Enforcement Act, Revised Edition, 2002.

31. The Respondent State also claims that the right to legal aid is provided under the Legal Aid Act (Criminal Proceedings), Revised Edition, 2002, but the Applicant never requested for it before the domestic courts.

32. The Applicant refutes the Respondent State's assertion that the Application is inadmissible, arguing that he could not file a constitutional petition since the violation had been committed by the Court of Appeal; nor could he file such a petition before a single High Court Judge against a ruling by the highest court in Tanzania made up of a panel of three Judges.

33. The Court notes that the Applicant filed an appeal and had access to the highest court of the Respondent State, namely, the Court of Appeal, to adjudicate on the various allegations, especially those relating to violations of the right to a fair trial.

34. Concerning the filing of a constitutional petition for violation of the Applicant's rights, the Court has already established that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust prior to seizing this Court.[4]

35. With regard to the allegation that the Applicant did not raise the issue of legal aid during domestic proceedings but chose to bring it before this Court for the first time, the Court, in accordance with the Judgment rendered in *Alex Thomas v United Republic of Tanzania*, is of the view that the violation occurred in the course of the domestic judicial proceedings that led to the Applicant's conviction and sentence to thirty (30) years' imprisonment; that the allegation forms part of the "bundle of rights and guarantees" relating to the right to a fair trial which was the basis of the Applicant's appeals. The domestic judicial authorities thus had ample opportunity to address the allegation even without the Applicant having raised it explicitly. It would therefore be unreasonable to require the Applicant to file a new application before the domestic courts to seek redress for these claims.[5]

36. Accordingly, the Court finds that the Applicant has exhausted the local remedies as envisaged under Article 56(5) of the Charter and

3 Petition to the High Court against violations of the fundamental rights and duties provided for in Articles 12 to 29 of the Constitution.

4 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 – 62; *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 66 – 70; Application No.011/2015. Judgment of 28/9/20l7, *Christopher Jonas v United Republic of Tanzania (*hereinafter referred to as "*Christopher Jonas v Tanzania* Judgment*"*, para 44.

5 *Alex Thomas v Tanzania* Judgment*, op cit*, paras. 60 – 65.

Rule 40(5) of the Rules. The Court therefore overrules this preliminary objection to the admissibility of the Application relating to the exhaustion of local remedies.

ii. Objection on the ground that the Application was not filed within a reasonable time

37. The Respondent State argues that, should the Court find that the Applicant has exhausted domestic remedies, it should still dismiss the Application because it was not filed within a reasonable time after local remedies were exhausted.

38. It further contends that, even though Article 40(6) of the Rules of Court is not specific on the issue of reasonable time, international human rights case law has established that six months would be a reasonable time limit within which the Applicant should have filed the Application, maintaining that such was the position of the Commission in Communication No. 308/05, *Michael Majuru v Zimbabwe*.

39. The Respondent State also maintains that three (3) years and six (6) months had elapsed between the decision of the Court of Appeal of Tanzania (16 February 2012) and the date this Court was seized (10 October 2015), and that this timeframe is not reasonable given that the Applicant had no difficulty in filing the Application earlier.

40. The Applicant refutes the Respondent State's allegations regarding the reasonableness of the timeframe for seizing the Court, arguing that there is no provision in the Rules for assessment of the reasonable time for filing applications before the Court. To this end, he cites the Court's decision in Application No. 013/2011: *Beneficiaries of Late Norbert Zongo and Others v Burkina Faso*, that the Court had established that the "reasonableness of a timeframe of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."

41. The Applicant then states that he was awaiting the decision of the Court of Appeal of Tanzania on his application for review of the decision of 16 February 2012, which took a long time.

42. The Court observes that the question at issue is whether the time that elapsed between the exhaustion of local remedies and filing of the case before it, is reasonable within the meaning of Rule 40(6) of the Rules.

43. The Court notes that the ordinary judicial remedies available in the Respondent State were exhausted on 16 February 2012, the date of the Court of Appeal decision and that the Application was filed before the Court on 10 October 2015. Between the Court of Appeal's decision and the filing of the Application at this Court, three (3) years, seven (7) months and twenty-four (24) days had elapsed.

44. In its Judgment in the Matter of the *Beneficiaries of late Norbert Zongo and Others v Burkina Faso*, the Court set out the principle that "... the reasonableness of the timeline for referrals to it depends on the circumstances of each case and must be assessed on case-by-case basis."[6]

45. The Court notes that the Applicant is lay, indigent and incarcerated person without counsel or legal assistance,[7] as well as his attempt to use extraordinary measures, that is, the application for review of the Court of Appeal's decision,[8] and holds that all these constitute sufficient grounds to justify the filing of the Application after three (3) years, seven (7) months and twenty-four (24) days following the Court of Appeal decision.

46. In view of the aforesaid, the Court dismisses this objection to admissibility relating to the filing of the Application within a reasonable time.

B. Conditions of admissibility that are not in contention between the Parties

47. The conditions regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence, 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.

48. The Court also notes that nothing on the record suggests that these conditions have not been met in the instant case. The Court therefore holds that the requirements under those provisions are fulfilled.

49. In light of the foregoing, the Court finds that the instant Application fulfils all admissibility conditions set out under Article 56 of the Charter and Rule 40 of the Rules, and accordingly, declares the

6 Application No. 013/2011. Ruling on preliminaries objections of 21/06/2013, *Beneficiaries of late Zongo and Others v Burkina Faso*, para 121. *See* also Application No. 005/2013*, Alex Thomas v Tanzania* Judgment*, op cit,* para 73; Application No. 007/2013, Judgment of 3/6/2013*, Mohamed Abubakari v Tanzania* Judgment*, op cit*, para 91; Application No. 011/2015. *Christopher Jonas v Tanzania* Judgment*, op cit,* para 52.

7 *Alex Thomas v Tanzania* Judgment, *op cit*, para 74.

8 Application No. 006/2015. Judgment of 23/3/2018, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania*, para 61.

same admissible.

VII. Merits

A. Alleged violations of the right to a fair trial

50. The Applicant alleges two violations, which fall within the ambit of the right to a fair trial, namely: the violation of the Applicant's right to have his cause heard by a court of law and the violation of the right to legal aid.

i. The alleged violation of the right to have his cause heard by a court of law

51. The Applicant alleges that the Court of Appeal failed to examine all of his arguments, since it grouped them into three clusters, although each of his grounds of appeal were invoked for different purposes. According to the Applicant, this affected the merits of each of his pleas and consequently violated "... his fundamental right to have his cause heard by a court of law, as provided for in Article 3(2) of the Charter". The Applicant also contends that there should have been a *voir dire* examination of the witnesses before they were allowed to testify.

52. The Respondent State rebuts the Applicant's allegation, and submits that all his arguments were duly examined by the Court of Appeal, which held that of the three arguments submitted only the third was relevant, which states that "... the prosecution has not been able to gather evidence beyond reasonable doubt ..."

53. The Court notes that the Applicant's allegation does not relate to Article 3(2) of the Charter, as he asserts**,** which provides that "Every individual shall be entitled to equal protection of the law", but rather to Article 7(1), which stipulates that: "Every individual shall have the right to have his cause heard..."

54. The Court observes that the question that arises here is whether the pleas raised in the appeal were duly examined by the Court of Appeal in conformity with the abovementioned Article 7(1) of the Charter. On this point, the Court has consistently ruled that the examination of particulars of evidence is a matter that should be left for the domestic courts, considering the fact that it is not an appellate court. The Court may, however, evaluate the relevant procedures before the national courts to determine whether they conform to the standards prescribed by the Charter or all other human rights instruments ratified

by the State concerned.[9]

55. The Court notes that in the appeal before the Court of Appeal, the Applicant raised two issues, namely: the lack of conclusive evidence on the age of fifteen (15) attributed to the victim and the fact that the crime has not been proven beyond reasonable doubt.

56. The Court notes that the Court of Appeal held that the only important matter was whether the material act of rape (penetration) had been committed by the Applicant, and following examination of the same, it concluded that the Applicant committed the act and confirmed the conviction.

57. The Court notes that the Applicant has not provided sufficient evidence to substantiate his claim as to the age of the victim, and has not demonstrated how the *voir dire* examination would have impacted the decision to convict him. This Court has held in the past that "… general statements to the effect that a right has been violated are not enough. More substantiation is required".[10]

58. The Court further notes that nothing suggests that the Court of Appeal's assessment of the evidence was manifestly erroneous. Therefore, the Court holds that the alleged violation has not been proven and accordingly dismisses it.

ii. Alleged violation of the right to legal aid

59. The Applicant submits that "... he was not afforded legal representation, he was deprived of his right to have his cause heard", which had a prejudicial effect on him and that … "such a position constitutes a violation of his fundamental rights as set forth in Article 7(1)(c) and (d) of the Charter, and also in Articles 1 and 107A(2)(b) of the Tanzanian Constitution."

60. He challenges the Respondent State's arguments, admits that he **"…** never asked for legal aid**"**, and that domestic law provisions on legal aid "… does not provide for a procedure or directives on how to seek legal aid."

61. The Respondent State refutes the Applicant's allegations that its domestic law does not provide for a procedure as to how to seek legal aid, and requests proof in that regard. It contends that legal aid is provided in Section 310 of the Tanzanian Criminal Procedure Act,

9 *Ernest Francis Mtingwi v Tanzania* Decision, *op cit* para 14; *Alex Thomas v Tanzania* Judgment, *op cit* para 130; *Mohamed Abubakari v Tanzania* Judgment, *op cit,* paras 25 and 26, Application No. 032/2015. *Kijiji Isiaga v United Republic of Tanzania*, Application No. 032/2015. Judgment, 21/3/2018 (hereinafter referred to as "*Kijiji Isiaga v Tanzania* Judgment") para 63.

10 *Alex Thomas v Tanzania* Judgment, *op cit*, para 140.

Section 3 of the Legal Aid Act and Rule 31(1) of the Court of Appeal Rules, 2009.

62. It further contends that, at any rate, the competent judicial authority applies for legal aid on behalf of the defendant, where required, provided the following conditions have been met: the defendant must be indigent and unable to pay lawyer's fees; and whether the interests of justice so demand.

63. The Respondent State further prays the Court to take into account the fact that legal aid is progressively being made available and that it is mandatory in cases of murder and homicide. It submits that while legal aid is granted by all its courts, there are however constraints that may impede the mandatory nature of the automatic provision of legal aid in all cases, especially the inadequate number of lawyers to meet this need across the country, as well as the constraint of shortage of financial and other resources.

64. The Respondent State further submits that the right to be represented by a Counsel of one's choice is guaranteed to all those who can afford it. As regards legal aid, however, the Respondent avers that it is neither easy nor practical to provide the defendant with a *pro bono* lawyer of his own choice. It, therefore, prays the Court to take into account the fact that legal aid is not an absolute right and that States exercise their discretionary powers in providing the said aid, depending on their capacity to do so; and this is how the extant legal aid system in the country operates.

65. In conclusion, the Respondent State indicates that the process of review of its legal aid system is ongoing, and that the outcome will be communicated to the Court in due course.

66. The Court notes that Article 7(1)(c) of the Charter provides

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

67. The Court notes that even though this Article guarantees the right to defence, including the right to be assisted by counsel of one's choice, the Charter does not expressly provide for the right to free legal assistance.

68. However, in its judgment in the *Alex Thomas v United Republic of Tanzania*, this Court held that free legal aid is a right intrinsic to the right to a fair trial, particularly, the right to defence guaranteed in Article 7(1)(c) of the Charter. In its previous jurisprudence, the Court also held that an individual charged with a criminal offence is automatically entitled to the right of free legal aid, even if the individual has not requested for it, whenever the interests of justice so require, in particular, if he/she

is indigent, if the offence is serious and if the penalty provided by the law is severe.[11]

69. In the instant case, the contention that the Applicant was not afforded free legal aid throughout his trial is not in dispute. Given that the Applicant was convicted of a serious crime, that is, rape, carrying a severe punishment of thirty (30) years, there is no doubt that the interests of justice would warrant free legal aid provided that the Applicant did not have the means to pay for the services of a lawyer. In this regard, the Respondent State does not contest the indigence of the Applicant nor does it argue that he was financially capable of hiring Counsel. It is clear in the circumstances that the Applicant should have been provided with free legal aid. The fact that he did not request for it does not exonerate the Respondent State from its responsibility to provide him with free legal aid.

70. As regards the allegations concerning the margin of discretion that the Respondent State should be given in the implementation of the right to legal aid, the non-absolute nature of the right to legal aid and the lack of financial means to offer legal aid to all persons charged with crimes, the Court holds that these allegations are no longer relevant in this instant case, given that the conditions for the compulsory grant of legal aid are all fulfilled.

71. The Court therefore finds that the Respondent State has violated Articles 7(1) (c) of the Charter.

B. Alleged violation of the right to equal protection of the law

72. The Applicant submits that, although he filed his application for review before the Court of Appeal and provided all the materials and evidence to corroborate the same, the application was not scheduled for hearing, whereas other applications filed subsequently were registered, set down for hearing and determined.

73. The Respondent State merely refutes this claim and calls on the Applicant to provide proof thereof.

74. The Court notes that the situation described by the Applicant as a violation of his right to equal protection of the law relates to Article 3(2) of the Charter, which stipulates that: “Every individual shall be entitled to equal protection of the law.”

75. However, the Court notes that the Applicant has made general allegations without sufficient evidence to substantiate them. Relying

11 *Ibid* para. 123, see also *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 138 and 139.

on its jurisprudence cited in paragraph 57 of this Judgment, the Court therefore holds that the alleged violation has not been proven, and accordingly dismisses the same.

VIII. Remedies sought

76. The Applicant prays the Court to restore justice by setting aside his conviction and sentence; ordering his release from prison; awarding him compensation for the violation of his fundamental rights and, making such other orders as it may deem fit.
77. In its Response, the Respondent State prays the Court to dismiss the Application and the Applicant's prayers in their entirety on the grounds that they are baseless.
78. 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."
79. In this respect, Rule 63 of the Rules provides that "The Court shall rule on the request for the reparation … by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision".
80. The Court notes its finding in paragraph 69 above that the Respondent State has violated the Applicant's rights to be provided with legal aid. In this regard, the Court recalls its position on State responsibility in *Reverend Christopher R Mtikila v United Republic of Tanzania*, that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation."[12]
81. As regards the Applicant's prayer to annul his conviction and sentence and order his release, the Court reiterates its decision that it is not an appellate Court for the reasons that it does not operate within the same judicial system as national courts; and that it does not apply "the same law as the Tanzanian national courts, that is, Tanzanian law".[13]
82. The Court also recalls its decision in *Alex Thomas v United Republic of Tanzania* where it stated that "an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances"[14]. This would be the case, for example, if an Applicant sufficiently demonstrates or the Court itself establishes from

12 Application No. 011/2011. Ruling of 13/6/2014, *Reverend Christopher R Mtikila v United Republic of Tanzania*, *op cit*, para 27.

13 *Mohamed Abubakari v Tanzania* Judgment, para. 28.

14 *Alex Thomas v Tanzania* Judgment, *op. cit.,* para 157.

its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice. In such circumstances, the Court has pursuant to Article 27(1) of the Protocol the powers to order "all appropriate measures", including the release of the Applicant.

83. The Court observes, however, that such a finding does not preclude the Respondent State from adopting such measures should it deem appropriate.

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

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

IX. Costs

86. In its Response, the Respondent prays the Court to rule that the costs of the proceedings be borne by the Applicant.

87. The Applicant has made no specific requests on this issue.

88. The Court notes in this regard that Rule 30 of its Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs."

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

X. Operative part

90. For these reasons,
The Court,
Unanimously,

On jurisdiction:
i. *Dismisses* the objection to the jurisdiction of the Court;
ii. *Declares* that it has jurisdiction.

On admissibility:
iii. *Dismisses* the objection to the admissibility of the Application;
iv. *Declares* the Application admissible.

On the merits:
v. *Finds* that the alleged violation of the Applicant's right to be

heard under Article 7(1) has not been established;
vi. *Finds* that the alleged violation of the Applicant's right to equal protection of the law, provided for in Article 3(2) of the Charter, has not been established;
vii. *Declares* that the Respondent State has violated the Applicant's right to defence under Article 7(1)(c) of the Charter for failure to provide him free legal assistance.
viii. *Dismisses* the Applicant's prayer for the Court to annul his conviction and sentence and to order his release from prison;

On reparations
ix. *Awards* the Applicant an amount of Three Hundred Thousand Tanzania Shillings (TZS 300,000) as fair compensation;
x. *Orders* the Respondent State to pay the Applicant the said sum and report to the Court thereon within six (6) months from the date of notification of this Judgment; and
By a majority of Six (6) for, and Four (4) against, Justices Ben KIOKO, Ângelo V MATUSSE, Tujilane R. CHIZUMILA and Stella I ANUKAM dissenting:

On costs
xi. *Orders* the Respondent State to pay the costs.

Separate Opinion: BEN ACHOUR

1. I voted for the entire Judgment in the Matter of *Minani Evarist v United Republic of Tanzania* captioned above, and I agree with all the reasoning of the Court as well as the entire operative part. However, I have reservations regarding the reasons developed in paragraph 81 of the Judgment.
2. The Court's refusal to order the Applicant's release, in my opinion, reposes on questionable reasons. Indeed, the Court states in paragraph 81 that "the Court reiterates its decision that it is not an appellate Court". This is more than obvious in as much as we are in the presence of a continental court whose "jurisdiction … shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter ... Protocol, and any other relevant Human

Rights instrument ratified by the States concerned".[1] And the Court justifies this assertion by adding that *"*for the simple reason that it does not belong to the same judicial system as the national courts, it does not apply the same law as the Tanzanian courts; that is, Tanzanian law, and it does not examine the detail of the issues of fact and law that national courts are entitled to deal with". Here again, the justification does not tally with what the Court will say to argue the reasons for its refusal to order release. The latter in fact reposes on the reasons outlined in paragraph 82, which for the first time in the jurisprudence of the African Court, gives a list, albeit not exhaustive, of *"exceptional or compelling circumstances"* which could lead the Court to pronounce a release, reasons unrelated to the fact that the African Court is not a Tanzanian appellate court. By adopting this line of argument, it could be said that the Court forever closes the possibility of it ordering the release of an Applicant in detention or in arbitrary imprisonment.

3. This notwithstanding, I agree with the Court's decision to reject the prayer for release. Indeed, and in this case, the Court rightly took into account only one complaint against the Respondent State, namely, the violation of Article 7(1)(c) on the Applicant's right to defence with the use of legal aid.[2]

4. This violation is certainly as important as any violation of a human right. There is indeed no violation of human rights that is not important. But the consequences of violation are variable when the issue comes to that of reparation.

1 Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

2 Article 3 of the Protocol to the Afric *of the individual that are protected within the rule of law and democracies. Fundamental rights are also called fundamental freedoms, and are inherent in the very notion of individual*" https://droit-finances.commentcamarche.com/faq/23746-droits-fondamentaux-definition. In the context of the European Union, the notion of fundamental right has been enshrined in *The Charter of Fundamental Rights of the European Union* which was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the Nice European Council on 7 December 2000. See L. Burgorgue-Larsen, et al (eds.), 'Treaty Establishing a Constitution for Europe. Part II. The Charter of Fundamental Rights of the European Union'– (2005) *Article Commentary* p 837.

5. The violation established by the Court in this case does not concern a fundamental or intangible human right.[3] Moreover, there has not been a cascade of violations in this case. The only violation established by the Court was not decisive in terms of the lawfulness of the proceedings against the Applicant for the crime of rape of a 10-year-old girl. The Court expressly says so in paragraph 84.

6. According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[4] restitution as a form of reparation seeks to restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred, and includes: "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property".[5]

7. The Permanent Court of International Justice has pointed out that "It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law",[6] a position reiterated by the European Court of Human Rights which held that "a judgment in which the Court finds a violation entails for the Respondent State the legal obligation to put an end to the violation and to erase the consequences so as to restore as much as possible the situation that existed before the

3 In international human rights law, intangible rights are those excluded by Article 4 of the International Covenant on Civil and Political Rights (ICCPR) from any derogation, namely:
• Right not to be discriminated against based solely on race, color, sex, language, religion or social origin (Article 4 (1) ICCPR)
• Right to life (Art 6. ICCPR)
• Right not to be subjected to torture or to cruel, inhuman or degrading treatment (Article 7 ICCPR)
• Right not to be held in slavery or servitude (Articles 8 (1) and 2 ICCPR)
• Right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 11 ICCPR)
• Right not to apply criminal law retroactively (Article 15 ICCPR)
• Right to be recognized as a person everywhere before the law (Article 16 ICCPR)
• Freedom of thought, conscience and religion (Article 18 ICCPR).

4 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; 60/147 Resolution adopted by the General Assembly on 16 December 2005.

5 Principle 19.

6 CPJI, 13 September 1928, *Matter of the Factory at Charzòw (Claim for Indemnity)*, Série A – No. 77.

violation".[7] Further, the august Court adds that: *"*The essential principle, which stems from the very notion of an unlawful act and which seems to emerge from international practice, in particular from the jurisprudence of arbitral tribunals, is that reparation must as far as possible erase all the consequences of the unlawful act and restore the state that would presumably have existed if the act had not been committed. Restitution in kind, or, if it is not possible, payment of an amount corresponding to the value of restitution in kind; allowance, if any, for damages for losses suffered which are not covered by the refund in kind or the payment which takes the place of it".[8]

8. For its part, the African Commission recognized the importance of restitution, and has held that a State in violation of the rights set forth in the African Charter must *"*take measures to ensure that victims of human rights abuses are given effective remedies, including restitution and compensation."[9] A restitution order should specify precisely which rights of the victim should be restored so as to indicate to the State the best way to correct the violation and put the victim in the situation prior to the commission of the violation, as far as possible

9. In its basic principles and guidelines, the United Nations refers to a variety of violations that require specific forms of restitution, including restoration of the right to a fair trial, restoration of freedom, restoration of citizenship and return to one's place of residence, etc.

10. In the event that the violations found by the Court do not require a full restitution measure, such as release or re-opening of proceedings, it goes without saying that the appropriate compensation is pecuniary compensation; and this is the solution chosen by the Court in the instant case.

11. Article 27(1) of the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") states 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". It is clear from that Article that the Court has full discretion to determine measures of reparation such that can *"remedy the situation".*

12. Compared with similar Articles of the European Convention (Article 41) and the Inter-American Convention (Article 63 paragraph

7 CEDH, *Papamichalopoulos and Others v Greece*, Application No. 14556/89, Judgment of 31 October 1995, para 34.

8 Page 47.

9 African Commission: Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE), Sudan, Operative Part para 229(4).

1), the afore-cited Article 27 of the Protocol is rather generous and is very similar to Article 61 of the Inter-American Convention.[10] As we indicated earlier, Article 41 of the European Convention does not confer on the European Court of Human Rights the possibility of pronouncing "just satisfaction" save where the domestic law allows for the erasure of the consequences of a violation and, even in such a case, only '' if it is necessary '' to do so. In other words, the award of just satisfaction does not flow automatically from the finding by the European Court of Human Rights that there has been a violation of a right guaranteed by the European Convention on Human Rights. For this reason, the European Court very rarely pronounced an Applicant's release. In contrast, Article 63(1) of the Inter-American Convention is quite liberal in as much as it states that: "When it recognizes that a right or freedom protected by this Convention has been violated, the Court shall order that the party injured be granted the enjoyment of the rights or freedoms infringed. It will also order, where appropriate, the reparation of the consequences of the measure or the situation which gave rise to the violation of the said rights and the payment of fair compensation to the injured party."

13. Even if the Protocol does not speak, like the Inter-American Convention, of the possibility for the Court "to order that the injured party be guaranteed the enjoyment of the right or freedom violated", Article 27 speaks of "appropriate measures to remedy the violation", which amounts to the same thing.

14. It is generally accepted in doctrine[11] and in jurisprudence that release or re-opening of proceedings is necessary only where the Court is of the view that there is no proportionality between the full reparation sought and the violation found, especially if it concerns only one aspect of the right to a fair trial which could not, in view of the elements on file, vitiate the whole of the trial at its various stages. But in the event of a series of substantial violations, the condition of *"exceptional or compelling circumstances"* is met and the full restitution order should be made in the form of an order for release or resumption of the trial in accordance with the norms and international standards of fair trial.

15. The violation of the Applicant's right to legal aid, in addition to not fundamentally vitiating the outcome of the trial, is not, in my opinion, an "exceptional or compelling circumstance" which could have led to the Court to order restitution such as release of the Applicant or

10 See in this sense H Tigroudja, "The Reparation of Human Rights Violations: The Practice of Regional and Universal Bodies". *Audiovisual Library of International Law*, http://legal.un.org/avl/ls/Tigroudja_HR.html#

11 D Shelton *Remedies in international human rights law* (2009).

resumption of the trial.

16. In my opinion, there are *"*exceptional or compelling circumstances" if, and only if, the violation affects a fundamental human right or if there is a cascade of violations, which would have had irreparable consequences which would have substantially vitiated the outcome of the trial. In the remedies ordered by the Court, there must always be proportionality between the seriousness of the human rights abuses, the nature, the magnitude and scope of the remedies. The Court took the welcome initiative in the present judgment to offer some examples of "exceptional or compelling circumstances". For the Court, and I fully agree, "this would be the case, for example, if the Applicant sufficiently demonstrates or the Court itself establishes, from these circumstances that the arrest or conviction of the Applicant is based fully on arbitrary considerations and that his continued imprisonment would result in a denial of justice" (para 82).

17. In my opinion, the crucial criterion for determining the nature and magnitude of reparation measures is the proportionality between the violations found, and the remedy or measures determined. The more serious the violations, or more numerous the violations, the more the reparation must come closer to full restitution such as an order for release or the reopening of proceedings, etc.

18. In the instant case, the violation as indicated did not "affect the outcome [of] the trial". Reparation for the violation of Article 7(1)(c) of the Charter established by the Court can, in my opinion, only be resolved by pecuniary compensation, and this is what the Court has done for the first time, by awarding the Applicant a lump sum compensation, the amount of which was absolute and depended on the material on file and the gravity of the criminal offense, as estimated by the Court.

19. For all these reasons, I was in agreement with certain nuances in the solution advocated by this Judgment. I remain convinced that the Court, by virtue of Article 27(1) of the Protocol, has the full latitude to determine the nature of *"appropriate measures capable of remedying the situation".*

Dissenting Opinion: KIOKO, CHIZUMILA and ANUKAM

1. We agree substantially with the findings of the majority on the merits of this Application but there is one particular issue relating to costs under paragraph 89 of the judgment where we differ in our

position from the majority. In the said paragraph, on the issue of costs, the majority has decided that "the Respondent State shall bear the costs". In our considered opinion, this decision of the majority requiring the Respondent State to bear all the costs in the instant case is not correct for the reasons we outline below.

2. At the outset, we wish to point out that international human rights litigation is mostly but not exclusively between an individual and a State and due to the nature of the proceedings and the unequal capacity of the Parties, it is not always the rule that the loser party bears costs, which may be the norm in other forms of litigation. In particular, in circumstances where the loser party is the individual, he or she shall not in principle be penalized for exercising his/her right to be heard by being required to bear the entire costs of the litigation.

3. The only exception to this principle would be if the State sufficiently demonstrates that the individual abused his/her rights or acted in bad faith by filing frivolous claims while having been fully aware/ knowing that he was not entitled to make such claims. Even when the bad faith of the individual is sufficiently vindicated, the financial capacity of the individual and the amount of costs that the State incurred should guide the determination of whether the former shall bear the costs. It therefore rests on the discretion of a Court to assess and identify, having regard to the specific contexts of each case, the party which shall incur the costs.

4. In the instant case, it is evident from the facts on record that the Respondent State has prayed the Court to order that the Applicant shall bear the costs. However, the Applicant has neither prayed for costs nor did he provide any supporting documents showing expenses in relation to his Application, if any.

5. On the other hand, the Court has, in our view rightly, found that the Respondent State has violated the right to defence of the Applicant by failing to provide him legal assistance during his trial contrary to Article 7(1)(c) of the Charter (See paragraph 71 of the Judgment). From this finding, it is clear that the Respondent State is the losing party and in accordance with the general default principle, that a losing party meets the costs of the suit, it would ordinarily be the case that it shall be the Respondent State to bear the costs.

6. However, Rule 30 of the Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs". According to this rule, the default principle for the Court is thus that each party bears its cost unless the Court decides otherwise. In the past, the Court has applied this rule on many occasions and held in majority of cases that each party covers its own costs, even where the Respondent State was found to be in breach of the Charter and other relevant human rights instruments. This has been the case also where neither of the

Parties has filed submissions on costs.[1] This reinforces the fact that costs are not damages for the violations of human rights as such, but a compensation or reimbursement of expenses incurred by a party for the litigation.

7. The opinion of the majority in the instant case is therefore a clear departure from the Court's established position. While we do not have problems with this shift in approach, we nevertheless believe that the departure should have been necessitated by some cogent reasons or, at the minimum, supported by adequate justification, which the majority did not provide. Regrettably in another judgment, in the Matter of *Dicoles William v United Republic of Tanzania,* delivered on the same day with similar facts relating to costs, the Court contradicted itself by deciding that each party shall bear its own costs, in spite of the fact that in that matter, as in the instant Application, the Applicant neither claimed costs nor provided any supporting documentation, and only the Respondent State prayed the Court to order the Applicant to bear the costs, the majority in this case agreed that each party bears its own costs.[2]

8. Consequently, we are of the view that the position of the Court in the instant case reveals an unjustified inconsistency in its decisions with respect to similar cases that the Court has concluded so far.

9. Furthermore, according to the established jurisprudence of other human rights courts, a party is entitled to a refund of costs and expenses only in so far as it is demonstrated that such costs or expenses have been actually and necessarily incurred and are reasonable as to quantum.[3] This requires that the Applicant should substantiate his claims with evidence showing that he incurred the said costs or expenses and were indeed necessary for pursuing his Application.

10. This is not the case in the instant Application. As we indicated earlier, the Applicant has not made any submissions or prayed for costs, or provided documents indicating that he incurred any costs. While ordering the Respondent State to bear the costs, the majority

1 See Application No. 010/2015. Judgment 11/05/ 2018. *Amiri Ramadhani v United Republic of Tanzania*, para 90, Application No. 046/2016, Judgment of 11/05/2018. *APDF & IHRDA v Republic of Mali,* para 134, Application No. 011/2015, judgment 28/09/2017. *Christopher Jonas v United Republic of Tanzania*, para 98, Application No. 032/2015 – *Kijiji Isiaga v United Republic of Tanzania*. Judgment of 21/03/2018 para 101.

2 Application No. 016/2016. Judgment of 21/09/2018. *Diocles William v United Republic of Tanzania*, paras 107-110.

3 Applications 68762/14 and 71200/14. Judgment of 20/09/2018. Case of *Aliyev v Azerbaijan*, para. 236, Series C No. 352. Judgment of 13/03/2018, Case of *Carvajal Carvajal et al v Colombia* Merits, Reparations and Costs. Inter-American Court of Human Rights, para 230.

also did not specify or reckon the necessary and reasonable costs that the Respondent State is expected to bear. Nor did the Court, as it has done in some other cases,[4] indicate in the instant case that it will in a future separate proceeding, determine the exact amount of such costs that the Applicant is entitled to get reimbursement. It is thus not clear what the majority envisaged as costs that should be borne by the Respondent State, since the Applicant is self-represented, and the Court does not charge any fees.

11. We therefore conclude that the majority should, for purpose of maintaining consistency, have followed the Court's established position that, in the absence of submissions or claims on costs from one or both Parties, each party shall bear its own costs. Alternatively, the majority should have provided reasons to justify their departure from the court's established position.

4 In some previous cases, the Court has deferred the issue of costs to a later stage to consider it together with other forms of reparations. See Application No. 012/2015. Judgment of 22 /03/2018. *Anudo Ochieng Anudo v United Republic of Tanzania*, para 131.