Isiaga v Tanzania (merits) (2018) 2 AfCLR 218

Application 032/2015, *Kijiji Isiaga v United Republic of Tanzania*

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

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant had been convicted and sentenced for inflicting bodily harm and aggravated robbery. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court held that the manner in which the domestic courts evaluated the evidence did not disclose any manifest error in violation of the African Charter. The Court also held that the failure to provide the Applicant with free legal representation violated the African Charter but that the Applicant had not shown compelling circumstances for the Court to grant his request for release.

Jurisdiction (alleged violations of the Charter, 33-35)

Admissibility (exhaustion of local remedies, extraordinary remedy, 47; submission within reasonable time, 54-56)

Fair trial (evidence, margin of appreciation, 65, 73; defence, free legal assistance, 79, 80)

Reparations (release, 96)

I. The Parties

1. The Applicant, Mr Kijiji Isaiga, is a national of the United Republic of Tanzania. He is currently serving a term of thirty (30) years' imprisonment at the Ukonga Central Prison in Dar es Salaam, United Republic of Tanzania, following his conviction for the crimes of inflicting bodily harm and aggravated robbery.

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 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 required under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations on 29 March 2010. The Respondent State also became a Party to the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR") on 11 June 1976.

II. Subject of the Application

3. The Application relates to violations allegedly arising from a domestic procedure at the end of which the Applicant was sentenced to thirty (30) years' imprisonment with twelve strokes of the cane for inflicting bodily harm and aggravated robbery.

A. Facts of the matter

4. According to the file and the judgments of domestic Courts, on 4 April 2004, at around 8.00 pm in the village of Kihongera, District of Tarime, in the Mara Region, three individuals armed with a gun and machete burst into the residence of Ms Rhobi Wambura, who was with her two children, Rhobi Chacha and Chacha Boniface.

5. The individuals ordered Ms Rhobi and the children to lie face down, stating that they had come to claim the pension benefits paid to them from the estate of her late husband and the father of the two children. When the family refused to comply, two of the attackers injured the children using a machete, while the third assailant who was keeping guard fired a warning shot.

6. Ms Rhobi took the two assailants who had attacked the children into her bedroom and handed to them one million Tanzanian Shillings (about 450 United States Dollars). After counting the money under the glare of a lantern, the assailants took two bags full of clothes and fled.

7. Following Ms Rhobi's and her children's distress calls, many people, including one, Mr Yusuf Bwiru, came to their rescue. Mr Bwiru subsequently stated in his testimony that he found Ms Rhobi and her children crying and calling the names of their neighbour Mr Bihari Nyankongo, his nephew (the Applicant) and another individual not identified, as the attackers. The victims maintained their accusation before Mr Anthony Michack, the Commander of the local civil defence group and later at the Police Station, where they had been taken.

8. The Police investigation, which opened on 6 April 2004, led to the recovery of an unused bullet and a cartridge from the scene of the attack and subsequently to the arrest of Mr Nyankongo. The latter allegedly admitted to having been involved in the attack, returned the stolen clothing to Ms Rhobi and her children, denounced his accomplices and provided information on their whereabouts. Consequently, on 7 April 2004, the Applicant was arrested in his village.

9. Charged with crimes of inflicting bodily harm and armed robbery contrary to Sections 228 (i), 285 and 286 of the Tanzanian Penal Code in Criminal Case No. 213 of 2004 in the District Court of Tarime, the Applicant was convicted and sentenced to thirty (30) years in prison and twelve (12) strokes of the cane.

10. Following the Applicant's appeal, the conviction and sentence were subsequently confirmed by the High Court of Tanzania sitting in Mwanza on 5 August 2005, in Criminal Case No. 445 of 2005, and by the Court of Appeal of Tanzania on 19 September 2012, in Criminal Appeal No. 192 of 2010.

B. Alleged violations

11. In his Application, the Applicant alleges that the local Courts based their decisions on contestable evidence, in particular, the testimonies and exhibits that were improperly obtained and used. In this regard, the Applicant alleges that the visual identification relied upon by the domestic courts was flawed for the following reasons:

"i. The witnesses did not say where the lamp was located and the direction of its lighting between them and the robbers.

ii. The witnesses had not mentioned the distance between them and the robbers during the crime scene.

iii. The witnesses did not define their condition after the sudden attack and how they were controlled and ability to follow the robbers' orders and instructions. If the witnesses had known well their robbers and named them immediately after the incident, why the Applicant was arrested at his home after two days without escaping the same area.

iv. If the Applicant and his co-accused were very famous to the witnesses, how they were decided to take more time for counting the money at the scene.

v. That, the Court of Appeal was required to caution itself about contradiction of facts of the prosecution evidence. When PW3 had claimed that PW1 did not announce to any one of them the bringing of the stolen money at their home, but firstly was narrated that PW1 had been with money for a month. Furthermore, while PW2 claimed that they raised an alarm which brought in their neighbour to be at the scene, he said about which made him to go there is only burst of the gun."

12. The Applicant submits that he was never in possession of the properties which were alleged to have been stolen and tendered in the Trial Court as exhibits. He maintains that the Court of Appeal "… grossly misdirected itself to apply the doctrine of recent possession against the Applicant while the exhibits alleged in the trial were said to be possessed by the co-accused". The Applicant asserts that the Court

exclusively relied on the absence of a rival claim over the exhibits to dismiss his appeal.

III. Summary of the procedure before the Court

13. The Application was filed on 8 December 2015.

14. By a notice dated 25 January 2016, and pursuant to Rule 35(2)(a) of the Rules of the Court (hereinafter referred to as "the Rules"), the Registry served the Application on the Respondent State, requesting the latter to submit within thirty (30) days of receipt, the names and addresses of its representatives, pursuant to Rule 35(4)(a) of the Rules and respond to the Application within six (60) days of receipt of the notice pursuant to Rule 37 of the Rules.

15. By a notice dated 11 February 2016, in accordance with Rule 35(3) of the Rules of the Court, the Application was transmitted to the Executive Council of the African Union, State Parties to the Protocol and other entities through, the Chairperson of the African Union Commission.

16. By a letter dated 24 March 2016, the Respondent State requested for an extension of time to file the Response to the Application.

17. By a letter dated 8 June 2016, the Registry informed the Respondent State that the Court had granted the request and requested it to file its Response within thirty (30) days from the receipt of the letter.

18. Having failed to file the Response to the Application, within this additional extension of time, by a letter dated 19 October 2016, the Court *suo motu,* decided to grant the Respondent State an additional thirty (30) days from receipt thereof, for the filing of the Response. By the same letter, the Parties' attention was drawn to Rule 55 of the Rules, concerning judgment in default.

19. On 11 January 2017, the Applicant requested the Court to issue a judgment in default.

20. At its 44th Ordinary Session held from 6 to 24 March 2017, the Court decided that it would, in the interest of justice, render a judgment in default if the Respondent State does not file its Response within forty-five (45) days of receipt of the letter. By a letter dated 20 March 2017, the Registry notified the Respondent State of the decision of the Court.

21. The Respondent State filed the Response to the Application on 12 April 2017.

22. This was transmitted to the Applicant by a notice dated 18 April 2017, granting thirty (30) days from the date of receipt, for the filing of the Reply to the Response.

23. The Applicant filed the Reply on 23 May 2017.

24. By a letter dated 16 June 2017, the Registry notified the Parties that the written procedure was closed with effect from 14 June 2017.

IV. Prayers of the Parties

25. In his Application, the Applicant prays the Court to:

"i. restore justice where it is overlooked, and quash both the conviction and sentence imposed upon him, and set him at liberty;

ii. ii) grant reparation pursuant to Article 27(1) of the Protocol;

iii. iii) grant any other order(s) sought that may deem fit in the circumstances of the complaints."

26. In its Response, the Respondent State prays the Court to declare that the Application is not within the purview of its jurisdiction, and that the Application does not fulfil the admissibility requirements specified under Rule 40(5) of the Rules on exhaustion of local remedies and Rule 50(6) on filing an application within a reasonable time.

27. On the merits, the Respondent State further prays the Court to find that**:**

"i. the government of the United Republic of Tanzania has not violated Articles 3 (1) and (2), Article 7(1) (c) of the Charter;

ii. the Court of Appeal considered all grounds of appeal and properly evaluated the evidence before it and rightfully upheld the conviction of the Applicant;

iii. the Court of Appeal properly ruled that the doctrine of recent possession and visual identification of the Applicant was proper and sufficient to land conviction;

iv. the Application be dismissed for lack of merit; and

v. no reparations be awarded in favour of the Applicant"

V. Jurisdiction

28. In accordance with Rule 39(1) of the Rules, the Court "shall conduct a preliminary examination of its jurisdiction …".

29. In the instant Application, the Court notes from the Respondent State's submission that the latter disputes only the Court's material jurisdiction. However, the Court shall satisfy itself that it also has personal, temporal and territorial jurisdiction to examine the Application.

A. Objection to the material jurisdiction of the Court

30. The Respondent State argues that the Court does not have jurisdiction to examine the Application as it requires the Court to adjudicate on issues involving the evaluation of evidence and quashing convictions and setting aside sentences imposed by domestic courts. According to the Respondent State, these are matters duly decided by the highest court of Tanzania and entertaining these issues would require this Court to sit as an appellate court to the Court of Appeal of Tanzania.

31. The Applicant submits that the Court has jurisdiction to consider his Application because it concerns issues of application of the provisions of the Charter, the Protocol and the Rules.

32. Pursuant to Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules, the material jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned."

33. Going by these provisions, the Court exercises its jurisdiction over an Application as long as the subject matter of the Application involves alleged violations of rights protected by the Charter or any other international human rights instruments ratified by a Respondent State.[1]

34. The Court is obviously not an appellate court to uphold or reverse the judgments of domestic courts based merely on the way they examined evidence to arrive at a particular conclusion.[2] It is also well-established in the jurisprudence of the Court that where allegations of violations of human rights relate to the manner in which domestic courts examine evidence, the Court has jurisdiction to assess whether such examination is consistent with international human rights standards.[3]

35. In the instant Application, the Court notes that the Applicant raises issues relating to alleged violations of human rights protected by the Charter. The Court further notes that the Applicant's allegations essentially relate to the way in which the domestic courts of the Respondent State evaluated the evidence. However, this does not

1 Application No. 003/2014. Ruling on Admissibility 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania*, para 114.

2 Application No. 001/201. Judgment on Merits, 15/03/2015, *Ernest Francis Mtingwi v The Republic of Malawi,* para 14.

3 Application No. 005/2013. *Judgment on Merits 20/11/2015, Alex Thomas v United Republic of Tanzania,* (hereinafter referred to as "the Alex Thomas Judgment"), para 130, Application No. 007/2013. Judgment on Merits, 20/05/2016, *Mohamed Abubakari v United Republic of Tanzania*. (hereinafter referred to as, "Mohamed Abubakari judgment"), para 26.

preclude the Court from making a determination on the allegations. The Respondent State's objection that the instant Application would require this Court to sit as an appeal court and re-examine the evidence on the basis of which the Applicant was convicted by the national courts is thus dismissed.

36. The Court therefore finds that it has material jurisdiction to examine the Application.

B. Other aspects of jurisdiction

37. The Court notes that other aspects of its jurisdiction have not been contested by the Respondent State and nothing on the record indicates that the Court does not have jurisdiction. The Court thus holds:

> "i. that it has *personal jurisdiction* given that the Respondent State is a Party to the Protocol and deposited the Declaration required under Article 34(6) thereof which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol;
>
> ii. that it has *temporal jurisdiction* on the basis that the alleged violations are continuous in nature, in that the Applicant remains convicted and is serving a sentence of thirty (30) years' imprisonment on grounds which he believes are marred by irregularities[4]; and
>
> iii. that it has *territorial jurisdiction* given that the facts of the matter occurred on the territory of a State Party to the Protocol, that is, the Respondent State.

38. From the foregoing, the Court finds that it has jurisdiction to consider this Application.

VI. Admissibility of the Application

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

40. 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 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

4 See Application No. 013/2011. Ruling on Preliminary Objections, 21/06/2013, *Zongo and Others v Burkina Faso*, (hereinafter referred to as, "*Zongo and Others judgment*"), paras 71 to 77.

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter ;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility that are in contention between the Parties

41. The Respondent State has raised two objections to the admissibility of the Application relating to the requirements of exhaustion of local remedies and the filing of the Application within a reasonable time after the exhaustion of local remedies.

i. Objection relating to non-exhaustion of local remedies

42. The Respondent State contends that rather than filing this Application before this Court, the Applicant had two options that he could have used to get redress for his grievances at domestic level. According to the Respondent State, the Applicant could have either sought a review of the Court of Appeal's judgment on his appeal, or he could have filed a constitutional petition pursuant to the Basic Rights and Duties Enforcement Act [Cap. 3 RE 2002], relating to the alleged violations of his rights.

43. In his Reply, the Applicant asserts that his Application has been filed after exhaustion of local remedies, that is, after the dismissal of his appeal by the Court of Appeal of Tanzania, the highest court in the Respondent State.

44. The Court notes that an application filed before it shall always comply with the requirement of exhaustion of available local remedies, unless it is demonstrated that the remedies are ineffective, insufficient,

or the domestic procedures to pursue them are unduly prolonged.[5] In the Matter of *African Commission on Human and Peoples' Rights v Republic of Kenya*, the Court observed that the rule of exhaustion of domestic remedies "maintains and reinforces the primacy of the domestic system in the protection of human rights vis-à-vis the Court".[6] It follows that in principle, the Court does not have a first instance jurisdiction over a matter which was not raised at the domestic level.

45. In its established jurisprudence, the Court has also consistently held that an Applicant is only required to exhaust ordinary judicial remedies.[7]

46. Concerning the filing of the constitutional petition on the alleged violation of the Applicant's rights, in the Matter of *Alex Thomas v United Republic of Tanzania*, this Court has held that this remedy in the Tanzanian judicial system is an extraordinary remedy which the Applicant was not required to exhaust prior to filing his Application before it.[8]

47. With regard to the application for review of the Court of Appeal's judgment, this Court similarly held in the above-mentioned case that, in the Tanzanian judicial system, this is an extraordinary remedy that the Applicant was not required to exhaust before he seized the Court. [9]

48. In the instant case, the Court notes from the records that the Applicant went through the required criminal trial process up to the Court of Appeal, which is the highest Court in the Respondent State, before bringing his Application to this Court. The Court therefore finds that the Applicant has exhausted the local remedies available in the Respondent State's judicial system.

49. Accordingly, the Court dismisses the objection that the Applicant did not exhaust local remedies.

5 Application. No 004/2013. Judgment on Merits, 5/12/2014, *Lohé Issa Konaté v Burkina Faso*, para 77 (*hereinafter* referred to as, *Lohé Issa Konaté v Burkina Faso Judgment*), see also Peter Chacha judgment, para 40.

6 Application No. 006/2012. Judgment on Merits, 26/05/2017, *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 93 (hereinafter referred to as, "*African Commission on Human and Peoples' Rights v Republic of Kenya*").

7 *Alex Thomas* Judgment, para 64. See also Application No. 006/2013, Judgment on merits 18/03/2016, *Wilfred Onyango Nganyi and 9 Others v United Republic of Tanzania*, para 95**.**

8 *Alex Thomas* Judgment, para 65.

9 *Ibid*. See also *Mohamed Abubakari* judgment, paras 66-68.

ii. Objection relating to not filing of the Application within a reasonable time

50. The Respondent State contends that, should the Court find that the Applicant has exhausted local remedies, it should reject the Application since the Applicant did not file his Application within a reasonable time after exhausting local remedies, in accordance with the Rules**.** In this regard, the Respondent State asserts that even though Rule 40(6) of the Rules is not specific on the question of reasonable time, international human rights jurisprudence has established six months period as a reasonable time.

51. In his Reply, the Applicant argues that he first learnt of the Court's existence in 2015 and considering that he is a layman and is not represented by a lawyer, his Application should be considered as having been filed within a reasonable time.

52. The Court notes that Article 56(6) of the Charter does not indicate a precise timeline in which an Application shall be filed before the Court. Rule 40(6) of the Rules refers to 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 of the matter."

53. In the Matter of *Norbert Zongo and Others v Burkina Faso*, the Court stated that "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."[10] Accordingly, the Court, taking the circumstances of each case into account, specifies the date from which the time should be computed and then determines whether an application has been filed within a reasonable time from such date.

54. In the instant case, the Court notes that the judgment of the Court of Appeal in Criminal Appeal No. 182 of 2010 was delivered on 19 December 2012. The Application was filed before this Court on 8 December 2015, that is, two (2) years and eleven (11) months) after the judgment of the Court of Appeal. The key issue here is whether this time can be considered as reasonable in light of the particular circumstances of the Applicant.

55. The Respondent State does not dispute that the Applicant is a lay, indigent and incarcerated person without the benefit of legal education or assistance.[11] These circumstances make it plausible that the Applicant may not have been aware of the Court's existence and how to access it.

10 *Zongo and Other*s judgment, para 92.

11 See *Alex Thomas* judgment, para 74.

56. In view of these circumstances, the Court is of the opinion that the filing of this Application two (2) years and eleven (11) months after the exhaustion of local remedies is a reasonable time and therefore, dismisses the Respondent State's objection in this regard.

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

57. The conditions of admissibility 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.

58. The Court also notes that nothing in the record before it indicates that these requirements have not been fulfilled. Consequently, the Court holds that these admissibility requirements have been fully met in the instant case.

59. In view of the foregoing, the Court finds that the instant Application fulfils all the admissibility requirements specified in Article 56 of the Charter and Rule 40 of the Rules, and accordingly declares the same admissible.

VII. The merits

A. Allegations relating to violation of the right to a fair trial

i. Allegation relating to evidence relied on to identify the Applicant

60. The Applicant submits that the visual identification relied upon by the domestic courts to convict him was erroneous. He avers that the victims who testified as witnesses did not indicate the distance between them and the attackers at the time of the commission of the crime; that they did not mention the location and direction of light of the lamp and that they failed to explain their condition and how they were able to comply with the assailants' order after the sudden attack.

61. The Applicant further adds that even though the victims claimed to have known the attackers, he was arrested after two days of the commission of the crime despite his presence in the area. He submits that the victims' testimony that the attackers took time to count the money in front of them does not pass the test of common sense, as the robbers would not do that in front of victims while being aware that the victims know them. Finally, the Applicant argues that Mr Yusuf Bwiru, the prosecution witness who arrived at the scene of the crime did not claim to have seen the robbers but just heard their names from the victims.

62. On its part, the Respondent State reiterates that the Court is not empowered to evaluate the evidence of the Trial Court but rather consider if duly established procedures laid down by the laws of the land were adhered to, otherwise, the Court would vest itself with appellate powers which are not granted to it by the Charter, the Protocol and the Rules.

63. The Respondent State argues that, the Applicant's allegations require the Court to assess the manner in which its domestic courts evaluated evidence. In this regard, the Respondent State submits that during the course of the Applicant's trial, five prosecution witnesses testified and five exhibits were tendered and the Applicant entered his defence after he was given adequate time to prepare it. According to the Respondent State, it is after carefully examining all the evidence, including that of visual identification, that the Trial Court convicted the Applicant and the High Court and the Court of Appeal sustained the conviction.

64. According to the Respondent State, the domestic courts convicted the Applicant after a thorough and appropriate examination of all evidence. The Respondent State maintains that, the Court should defer to the finding of the domestic courts in circumstances where duly established procedures laid down by the laws of the land were adhered to.

65. The Court underscores that domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.

66. However, the fact that an allegation raises questions relating to the manner in which evidence was examined by domestic courts does not preclude the Court from determining whether the domestic procedures fulfilled international human rights standards. In its judgment in the matter of *Mohamed Abubakari v Tanzania*, the Court held that:

> "As regards, in particular, the evidence relied on in convicting the Applicant,

> the Court holds that, it was indeed not incumbent on it to decide on their value for the purposes of reviewing the said conviction. It is however of the opinion that, nothing prevents it from examining such evidence as part of the evidence laid before it so as to ascertain in general, whether consideration of the said evidence by the national Judge was in conformity with the requirements of fair trial within the meaning of Article 7 of the Charter in particular."[12]

67. In this regard, the Court observes that "a fair trial requires that the imposition of a sentence in a criminal offence, and in particular, a heavy prison sentence, should be based on strong and credible evidence".[13]

68. The Court also notes that when visual identification is used as evidence to convict a person, all circumstances of possible mistakes should be ruled out and the identity of the suspect should be established with certitude. This is also the accepted principle in the Tanzanian jurisprudence.[14] This demands that visual identification should be corroborated by other circumstantial evidence and must be part of a coherent and consistent account of the scene of the crime.

69. In the instant case, the record before this Court shows that the domestic courts convicted the Applicant on the basis of evidence of visual identification tendered by three Prosecution Witnesses, who were victims of the crimes. These witnesses knew the Applicant before the commission of the crimes, since he used to come to his uncle's house, who was the Applicant's co-accused. The national courts thoroughly assessed the circumstances in which the crime was committed to eliminate possible mistaken identity and found that the Applicant and his co-accused were positively identified as having committed the alleged crimes.

70. The Court also observes that in addition to the victims' testimony on the Applicant's and his co-accused's identity, the national courts also considered the testimony of other Prosecution Witnesses, namely, that of Mr Yusuf Bwiru and Commander Anthony Michack. The national courts also relied on exhibits collected from the scene of the crime and recovered from the co-accused. Mr Yusuf Bwiru arrived at the scene of the crime immediately after the attackers left and found the victims terrified and crying for help and all of them named the Applicant and his co-accused as attackers.

12 *Mohamed Abubakari* judgment, paras 26 and 173.

13 *Ibid*, para 174.

14 In the *Matter of Waziri Amani v United Republic of Tanzania*, the Court of Appeal declared that "no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight", *ibid*, par 175.

71. The Court further notes from the record that during the trial, the Applicant did not contest the use of the exhibits as evidence. In their statement to the Regional Commander, Mr Anthony Michack, the victims also gave a consistent account of the crime and the identity of the robbers. The Applicant did not invoke any apparent reason as to why the victims could lie nor did he offer a counter evidence to refute the testimony proffered by prosecution witnesses. The evidence secured from the victims' visual identification forms part of a consistent account of the scene of the crime and the identity of the Applicant.

72. The Applicant's allegations that the victims did not state the distance between the intruders and them, that he was arrested only after two days, that the intruders would not count the money in front of the victims knowing that the latter knew them and that the victims did not state the direction and location of the lamp are all details that concern particularities, the assessment of which should be left to the domestic courts.

73. In view of the above, the Court is of the opinion that the manner in which the domestic courts evaluated the facts or evidence does not disclose any manifest error or resulted in a miscarriage of justice to the Applicant and hence, requires the Court's deference. The Court therefore dismisses the allegation of the Applicant that the evidence of visual identification relied upon by the Court of Appeal was erroneous.

ii. The allegation on failure to provide legal assistance

74. The Applicant contends that the Respondent State has violated Article 7(1)(c) of the Charter. The Applicant further submits that with "the inequality of arms in the Respondent State's prosecution system, whereby there is, on the one hand, the State Prosecution backed by professional lawyers; and on the other, the Applicant who was, an indigent, layman, not represented by a lawyer, it can hardly be said that the Applicant has been afforded equal protection of the law and the right to a fair trial".

75. The Respondent State denies this and argues that the Applicant was afforded the right to be heard and defend himself in the presence of his co-accused and witnesses, he was given the opportunity to cross examine all witnesses who testified against him and that he had the right to appeal. The Respondent State admits that the Applicant was not represented by a lawyer during the trial, but argues that the Applicant did not ask for legal assistance as per its Legal Aid Act No. 21 of 1969.

76. In terms of Article 7(1)(c):

> "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."

77. Even though Article 7(1)(c) of the Charter guarantees the right to defence, including the right to be assisted by counsel of one's choice, the Court notes that the Charter does not expressly prescribe the right to free legal assistance.

78. In its judgment in the Matter of *Alex Thomas v The United Republic of Tanzania*, this Court however stated 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.[15] 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 without the individual having requested for it, where the interests of justice so require, in particular, if he is indigent, the offence is serious and the penalty provided by the law is severe.[16]

79. In the instant case, it is not in dispute that the Applicant was not afforded free legal aid throughout his trial. Given that the Applicant was convicted of serious crimes, that is, armed robbery and unlawful wounding, carrying a severe punishment of 30 years and 12 months imprisonment, respectively, there is no doubt that the interest of justice would warrant free legal aid provided that the Applicant did not have the required means to recruit his own legal counsel. In this regard, the Respondent State does not contest the indigence of the Applicant nor does it argue that he was financially capable of getting a legal counsel. In these circumstances, it is evident that the Applicant should have been given free legal aid. The fact that he did not request for it is irrelevant and does not shun the responsibility of the Respondent State to offer free legal aid.

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

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

81. The Applicant asserts that the Court of Appeal, while examining his appeal, did not consider all the relevant facts and arguments that he submitted relating to the evidence used to convict him. By doing so, the Applicant argues that the Respondent State violated his fundamental right under Articles 3(1) and (2) of the Charter, which requires every individual to be entitled to equal protection of the law.

15 *Alex Thomas* judgment, para 114.

16 *Ibid*, para. 123, see also *Mohamed Abubakari* judgment, paras 138-139.

82. The Respondent State on the other hand contends that Article 13(6) of its Constitution provides a similar provision as Article 3 of the Charter, which guarantees the right to equal protection of the law. According to the Respondent State, the Applicant was not discriminated against during his trial and was treated fairly in accordance with the law, he was given the right to be heard and defend himself in the presence of his accusers and the opportunity to cross examine all witnesses; and he had also the right to appeal.

83. The Court notes that Article 3 of the Charter guarantees the right to equality and equal protection of the law in the following terms:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law"

84. The Court notes that the right to equal protection of the law requires that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[17] The Court notes that this right is recognised and guaranteed in the Constitution of the Respondent State. The relevant provisions (Articles 12 and 13) of the Constitution enshrine the right in similar form and content as the Charter, including by prohibiting discrimination.

85. The right to equality before the law requires that "all persons shall be equal before the courts and tribunals"[18] In the instant Application, the Court observes that the Court of Appeal examined all grounds of the Applicant's appeal and found that it did not have merit. In the interest of justice, the Applicant was even allowed to file his notice of appeal out of the deadline specified by the domestic law and his appeal was duly considered.[19] In this regard, this Court has not found that the Applicant was treated unfairly or subjected to discriminatory treatment in the course of the domestic proceedings.

86. The Applicant has therefore not adequately substantiated that his right to equality before the law or his right to equal protection of the law was contravened and, thus, the Court dismisses his allegation that the Respondent State violated Articles 3 (1) and (2) of the Charter.

C. Alleged violation of the right to non-discrimination

87. The Applicant submits that the Court of Appeal, by failing to

17 Article 26, ICCPR.

18 Article 14(1), *ibid*. See also UN Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para 3.

19 Miscellaneous Criminal Cause No. 49 of 2009.

properly evaluate the evidence obtained during his trial, has violated his right under Article 2 of the Charter. On its part, the Respondent State insists that the Court of Appeal did properly address the Applicant's appeal and convicted him only after assessing a set of facts and corroborating evidence.

88. It emerges from Article 2 of the Charter that**:**

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."

89. The principle of non-discrimination strictly forbids any differential treatment among persons existing in similar contexts on the basis of one or more of the prohibited grounds listed under Article 2 above. [20]

90. In the instant case, the Applicant simply asserts that the Court of Appeal violated his right to freedom from discrimination. The Applicant does not indicate the kind of discriminatory treatment that he was subjected to in comparison to persons who were in the same situation as he was, nor does he specify the ground(s) prohibited under Article 2 of the Charter on which basis he was discriminated. The mere allegation that the Court of Appeal did not properly examine the evidence supporting his conviction is not sufficient to find a violation of his right not to be discriminated. The Applicant should have furnished evidence substantiating his contention.

91. In view of the foregoing, the Court finds that the Applicant is not a victim of any discriminatory practice that contravenes the right to freedom from discrimination guaranteed under Article 2 of the Charter.

VIII. Remedies sought

92. In his Application, the Applicant prayed the Court to, among other things, quash his conviction and set him free, grant other reparations and order such other measures or remedies as it may deem fit.

93. On the other hand, the Respondent State prayed the Court to deny the request for reparations and all other reliefs sought by the Applicant.

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

20 See *African Commission on Human and Peoples' Rights v Republic of Kenya* judgment, para 138

95. As regards the Applicant's request that the Court quash the decision of the national courts, the Court reiterates its decision in the matter of *Ernest Francis Mtingwi v Republic of Malawi*,[21] that it is not an appeal court to quash or reverse the decision of domestic courts, therefore, it does not grant the request.

96. Concerning the Applicant's request for an order of his release, the Court recalls its decision in *Alex Thomas v Tanzania*[22] where it stated that "an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances". In the instant case, the Applicant has not provided proof of such circumstances. Consequently, the Court does not grant the prayer, without prejudice to the Respondent applying such measure *proprio motu*.

97. With respect to other forms of reparation, Rule 63 of the Rules of Court provides that "the Court shall rule on the request for reparation… by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

98. In the instant case, the Court notes that none of the Parties made detailed submissions concerning the other forms of reparation. It will therefore make a ruling on this question at a later stage in the procedure after having heard the Parties.

IX. Costs

99. In their submissions, the Applicant and the Respondent State did not make any statements concerning costs.

100. The Court notes that Rule 30 of the Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs".

101. The Court shall decide on the issue of costs when making a ruling on other forms of reparation.

X. Operative part

102. For these reasons:

The Court

Unanimously,

On Jurisdiction:

i. *Dismisses* the objection to the material jurisdiction of the Court.

ii. *Declares* that it has jurisdiction.

On Admissibility:

21 See above note 2.

22 *Alex Thomas* judgment, para 157.

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

On Merits:
v. *Holds* that the Respondent State has not violated Articles 2 and 3(1) and (2) of the Charter relating to freedom from discrimination and the right to equality and equal protection of the law, respectively.
vi. *Holds* that the Respondent State has not violated the right to defence of the Applicant in examining the evidence in accordance with Article 7(1) of the Charter;
vii. *Holds* that the Respondent State has violated the Applicant's right to a fair trial by failing to provide free legal aid, contrary to Article 7(1)(c) of the Charter
viii. *Does* not grant the Applicant's prayer for the Court to order his release from prison, without prejudice to the Respondent applying such measure *proprio motu.*
ix. *Orders* the Respondent State to take all necessary measures to remedy the violations, and inform the Court, within six (6) months from the date of this judgment, of the measures taken.
x. *Reserves* its ruling on the prayers for other forms of reparation and on costs.
xi. *Grants***,** in accordance with Rule 63 of the Rules, the Applicant to file written submissions on the request for reparations within thirty (30) days hereof, and the Respondent State to reply thereto within thirty (30) days.