Makungu v Tanzania (merits) (2018) 2 AfCLR 550

Application 006/2016, *Mgosi Mwita Makungu v Republic of Tanzania*

Judgment, 7 December 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 Applicant had been convicted and sentenced for robbery with violence and armed robbery. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court held that the Applicant had been prevented from appealing his conviction and sentence by not being provided with certified true copies of the records of proceedings and judgments in the case. The Court held that there were exceptional and compelling circumstances to order the release of the Applicant who had served 20 years of a 30-year prison sentence.

Admissibility (exhaustion of local remedies, available remedies, 44, extraordinary remedy, 46)

Fair trial (appeal, access to record of proceedings and judgment, 58, 65)

Reparations (release as an exceptional remedy, 84-86)

Separate Opinion: TCHIKAYA

Fair trial (evidence, 6, 13 ,14)

I. The Parties

1. The Applicant, Mr Mgosi Mwita Makungu, a national of the United Republic of Tanzania, was convicted of the offences of robbery with violence and armed robbery and is currently serving a total of thirty (30) years imprisonment for the two convictions.

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, on 29 March 2010 the Respondent State deposited the Declaration as prescribed under Article 34(6) of the Protocol.

II. Subject of the Application

A. Facts of the matter

3. The claim arises from the Respondent State's alleged failure to provide the Applicant with certified true copies of the records of proceedings and judgments of Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 heard at the District Court of Bunda. In Criminal Case No. 278 of 1995, he was charged with the offence of robbery with violence and convicted and sentenced to fifteen (15) years imprisonment on 15 April 1996. The judgment in Criminal Case No. 244 of 1995, where the Applicant was charged with the offence of armed robbery, was delivered on 18 June 1996, convicting him and sentencing him to fifteen (15) years imprisonment.

4. The Applicant indicated his intention to appeal the convictions and sentencing in both cases, by filing notices of appeal on 16 April 1996 with respect to Criminal Case No. 278 of 1995 and on 22 June 1996 with respect to Criminal Case No. 244 of 1995 within the time prescribed by law.

5. The Applicant asserts that, in order to pursue the appeals against these judgments of the District Court of Bunda, he requested for the certified true copies of records of proceedings and judgments in both cases, through numerous requests to the concerned judicial authorities but this has been to no avail. He further alleges that as at the time of filing the Application before this Court, twenty (20) years have elapsed since his conviction and sentencing and he has been unable to file his appeal.

6. The Applicant filed this Application praying the Court to find the Respondent State in violation of some provisions of the Charter. The Applicant appended a request for Provisional Measures to his Application, for the Court to order the Respondent State to provide him with the certified true copies of the records of proceedings and judgments in the two afore-mentioned cases, failure to which it should order his release.

B. Alleged violations

7. In his Application**,** the Applicant alleges that the Respondent State's omission to give him certified true copies of the records of proceedings and judgments in Criminal Cases No. 244 of 1995 and No. 278 of 1995 heard at the District Court of Bunda contravenes his rights that are provided in the Respondent State's Constitution. He claims:

"That the administrative omission of the respondent has all along been, and it is more likely so to prevail if not judicially attacked, contravening the rights and equality before the law as provided for by Article 13(1) of the constitution of the United Republic of Tanzania amongst many others of the constitution".

Specific provisions of the Constitution of Tanzania 1977, which are violated, so the basis of this application: -

That, the basis of this application (violations) is basically pagged (sic) on Article 13(1),3, 4, 6(a) and 26(1), 2 of the constitution of the united Republic of Tanzania, 1977."

8. In the Reply to the Respondent State's Response, the Applicant claims that the Respondent State's failure to provide him with certified true copies of the record of proceedings and judgments is proof of discrimination against him and a violation of his right to equal protection of the law and equal protection of the law as well as to his fair trial rights provided by Articles 2, 3(1) and (2) and Article 7 of the African Charter.

III. Summary of procedure before the Court

9. The Application to which was appended a request for Provisional Measures, was filed on 29 January 2016 and served on the Respondent State on 23 February 2016.

10. The Application together with the request for Provisional Measures was transmitted to the State Parties to the Protocol, the Chairperson of the African Union Commission, the African Commission on Human and Peoples' Rights and the Executive Council of the African Union through the Chairperson of the African Union Commission, on 12 April 2016.

11. On 28 March 2016, on the direction of the Court, the Registry requested Pan African Lawyers' Union (PALU) to provide the Applicant with legal assistance. On 21 April 2016, PALU informed the Registry that it would represent the Applicant.

12. The Respondent State was again, on 1 June 2016, notified of the Applicant's request for Provisional Measures on the provision of the certified true copies of records of proceedings and judgments of the District Court of Bunda, which was appended to the Application. The Respondent State was also directed to file the Response to the request for Provisional Measures within thirty (30) days of receipt of the notice.

13. On 12 May 2016, the Respondent State filed a request for extension of time to file the Response to the Application. The Court granted fifteen (15) days from receipt of a notice dated 15 June 2016,

for the filing of these documents.

14. On 28 June 2016, the Respondent State requested for another extension of time to file its Response to the Application. The Court granted this request by an additional fifteen (15) days, to run from the date of receipt of the notice dated 4 July 2016.

15. On 25 July 2016, the Respondent State filed the Response to the Applicant's request for Provisional Measures and in the interest of justice, the Court deemed it as properly filed. This was transmitted to the Applicant on 28 July 2016 directing that the Applicant should file the Reply thereto within thirty (30) days of receipt.

16. The Respondent State filed the Response to the Application on 27 July 2016 and in the interest of justice, the Court deemed it as properly filed. The Response was transmitted to the Applicant on 28 July 2016 directing him to file the Reply within thirty (30) days.

17. On 1 September 2016, the Applicant filed the Reply to the Respondent State's Response to the Application and the Reply to the request for Provisional Measures. These Replies were transmitted to the Respondent State for information on 7 September 2016.

18. The Parties were informed that pleadings were closed with effect from 19 December 2016.

19. On 30 January 2017, the Applicant filed a new request for Provisional Measures on the basis that he needs the certified true copies of the records of proceedings and judgments to file his appeal and that his continued inability to access them violates his rights under the Charter.

20. On 1 November, 2017 the Registry informed the Parties of the re-opening of pleadings in order to request the Respondent State to file the certified true copies of the records of proceedings and judgments for Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 from the District Court of Bunda within fifteen (15) days of receipt of the notice.

21. The Respondent State did not file the certified true copies of the records of proceedings and judgments as ordered.

22. On 23 March 2018, the Court dealt with the request for Provisional Measures and, having noted that the request is linked to the prayers on the merits of the Application and that granting it would predetermine the matter in that regard, dismissed the request.

23. On 9 April 2018, the Parties were informed of the close of the written procedure and that there would be no public hearing on the matter.

IV. Prayers of the Parties

24. The prayers of the Applicant, as submitted in the Application,

are:

"i. This Hon. Court on Human and People's (sic) Rights to declare the respondent (sic) administrative omission unconstitutional.

ii. Declaratory order to enable the Applicant to be immediately (with time limit) supplied with copies of proceeding(sic) and Judgment (sic), and if the opposes (fail to supply), order the immediate release of the Applicant from prison.

iii. Costs to follow the event, and

iv. Any other order(s)/relief(s) that would suit the current and future interest of justice in the circumstances of the case.

v. That, this Hon. Court be pleased to grant the Applicants(sic) prayer to be facilitated with free legal representation or legal assistance as governed by Rule 31 of the Rules of the court and Article 10(2) of the protocol on the court."

25. In the Reply to the Respondent State's Response, the Applicant also prays the Court to declare:

"That: Since the respondent state (The United Republic of Tanzania) has violated the Applicant's rights provide (sic) under Article 2, 3(1) and (2) and 7(1)(a) of the African Charter on Human and Peoples' Right be pleased to grant and declare orders of merits expressed in this (sic) grounds.

That: the application declared has merit and be granted with costs following the event."

26. In its Response, with regard to the admissibility of the Application, the Respondent State prays the Court to rule:

"i. That the Application has not met the admissibility requirements provided under Rule 40(5) of the Rules and Article 6(2) of the Protocol.

ii. That the Application is inadmissible and be duly dismissed."

27. The Respondent State also prays that the Court declare that it has not violated Articles 2, 3(1) and (2) and 7(1)(a) of the Charter, the Application lacks merit and it should be dismissed with costs.

V. Jurisdiction

28. The Respondent State has not raised an objection to the jurisdiction of the Court. In terms of Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of its jurisdiction."

29. With regard to its material jurisdiction, the Applicant has sought

reliefs based on allegations relating to the violation of his rights under Articles 13(1), 13(3), 13(6)(a), 26(1) and 26(2) of the Constitution of the Respondent State.

30. In accordance with Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules, the Court's material jurisdiction relates only to the application and interpretation of human rights instruments to which a State is a Party, rather than to the application and interpretation of the Respondent State's Constitution.

31. The Court notes however, that the rights provided for under the afore-mentioned provisions of the Respondent State's Constitution correspond to the rights set out in Articles 2, 3(1) and (2) and 7(1)(a) of the Charter on the right to non-discrimination, the right to equality before the law and equal protection of the law and the right to appeal to competent national organs against acts violating rights.

32. With regard to the other aspects of its jurisdiction, the Court holds that:

> "i. It has personal jurisdiction over the Parties because the Respondent State deposited the Declaration pursuant to Article 34(6) of the Protocol on 29 March 2010 and this Declaration enabled the Applicant to file the present Application in accordance with Article 5(3) of the Protocol.
>
> ii. It has temporal jurisdiction because the alleged violations are continuous in nature.[1]
>
> iii. It has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State."

33. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility

34. 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".

35. Rule 40 of the Rules which in substance restates Article 56 of the Charter sets outs the requirements for the admissibility of applications as follows:

1 Application No. 013/2011, Judgment of 28/03/2014, *Norbert Zongo and Others v Burkina Faso* (hereinafter referred to as "*Norbert Zongo v Burkina Faso* Judgment"), para 50; Application No. 006/2015. Judgment of 23/03/2018, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (hereinafter referred to as "*Nguza Viking v Tanzania* Judgment"), para 38.

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. Comply with the Constitutive Act of the Union and the Charter;
3. Not contain any disparaging or insulting language;
4. Not 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."

36. While some of the above conditions are not in contention between the Parties, the Respondent State has raised an objection regarding the exhaustion of local remedies.

A. Condition of admissibility in contention between the Parties

37. The Respondent State contends that the Application does not meet the admissibility conditions stipulated under Articles 56(5) of the Charter, Article 6 of the Protocol and Rules 40(5) of the Rules on exhaustion of local remedies.

38. The Respondent State argues that the Applicant has not made use of the local remedy provided for under the Constitution of the United Republic of Tanzania. In this regard, the Respondent State submits that its Basic Rights and Duties Enforcement Act, which was enacted for the enforcement of the rights and duties provided for under Part III of its Constitution, provides for a procedure for enforcement of constitutional rights such as those the Applicant alleges were violated. The Respondent State avers that the Applicant however failed to pursue this remedy before seizing the Court.

39. The Applicant states that he has been unsuccessful in his attempts to ensure that his basic rights as provided for under Articles 12 to 29, under Part III of the Constitution of the United Republic of Tanzania are respected, because of the unaffordable costs of filing

constitutional petitions at the High Court of Tanzania.

40. The Applicant further contends that the Respondent State's failure to issue him with the certified true copies of the records of proceedings and judgments of the District Court of Bunda made it impossible for him to exhaust local remedies because he could not appeal the decisions in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 without them. The Applicant maintains that the Respondent State has failed to protect and uphold his right to appeal on time.

41. The Court notes that the requirement of exhaustion of local remedies must be complied with before an Application is filed at this Court. However, this condition may be exceptionally dispensed with if local remedies are not available, they are ineffective, insufficient or the domestic procedures to pursue them are unduly prolonged. Furthermore, the remedies to be exhausted must be ordinary judicial remedies.[2]

42. The Court notes that, in the instant case, the Applicant attempted to use the available remedies, by filing a notice of appeal dated 16 April 1996 in respect of Criminal Case No. 278 of 1995 and a notice of appeal dated 22 June 1996 in respect of Criminal Case No. 244 of 1995. Thereafter, he requested for the certified true copies of the records of proceedings and judgments in respect of these cases in order to file the actual appeals. The Applicant followed up with the Magistrate in Charge of the District Court of Bunda and the District Registrar and Presiding Judge of the High Court at Mwanza, in this regard, without any success. He also sought the intervention of the Respondent State's Commission on Human Rights and Good Governance but all his efforts were futile.

43. Having failed to get the records of proceedings and judgments for the two criminal cases, the Applicant filed Miscellaneous Criminal Application No. 6 of 2014 at the High Court at Mwanza on the basis of the right to equality before the law provided for in the Respondent State's Constitution, seeking to be allowed to file the appeals without the certified true copies of the records of proceedings and of judgments. This application was dismissed on 21 September 2015 for lack of merit. In the *obiter dictum*, the High Court observed that the Deputy Registrar of the High Court should ensure that all efforts are made to provide the

2 *Alex Thomas v Tanzania* Judgment *op cit*, para 64; Application No.003/2015. Judgment of 28/09/2017, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania (*hereinafter referred to as *"Kennedy Onyachi and Another v Tanzania* Judgment"*)*, para 56; *Nguza Viking v Tanzania* Judgment *op cit*, para 52; Application No. 032/2015. Judgment of 21/03/2018, *Kijiji Isiaga v United Republic of Tanzania* (hereinafter referred to as "*Kijiji Isiaga v Tanzania* Judgment"), para 45.

Applicant with the records and judgments to facilitate the filing of his appeals but the instruction in the said *obiter dictum* was not followed.

44. Consequently, despite the Applicant having filed the notices of appeal indicating his intention to appeal, he could not pursue his appeals for lack of the certified true copies of the records of proceedings and judgments. In this regard, the Court recalls its position that, for remedies to be considered available, it is not enough that they should be established in the domestic system but also that individuals should be able to use them without any hindrance.[3]

45. Accordingly, in the instant case, the Court concludes that the Applicant was impeded from pursuing the local remedies as a result of the Respondent State's failure to provide him with the certified true copies of the records of proceedings and judgments.

46. With regard to the Respondent State's contention that the Applicant could have filed a constitutional petition regarding the violation of his rights, the Court has already stated 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] Notwithstanding this, the Applicant filed a petition under the procedure provided in the Respondent State's Constitution for the enforcement of fundamental rights, seeking to be allowed to file his appeal without the records of proceedings and the judgments but this was dismissed for lack of merit.

47. The Court thus finds that though local remedies were available, the Applicant, was unable to utilise them due to the Respondent State's omission and failure to provide him with the necessary documents.

48. The Court therefore dismisses the Respondent State's objection to the admissibility of the Application for lack of exhaustion of local remedies.

B. Conditions of admissibility not in contention between the Parties

49. The Court notes that following its finding that local remedies were not available to the Applicant to exhaust, the issue of compliance with Article 56(6) of the Charter as restated in Rule 40(6) of the Rules

3 *Norbert Zongo v Burkina Faso* Judgment, *op cit*, para 68; Application No. 001/2014. Judgment of 18/11/2016, *Action Pour La Protection Des Droits De L'Homme v Cote d'Ivoire,* paras 94 - 106.

4 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 - 62; Application No.007/2013. Judgment of 03/06/2016, *Mohamed Abubakari v United Republic of Tanzania (*hereinafter referred to as "*Mohamed Abubakari v Tanzania* Judgment") paras 66 - 70; Application No.011/2015. Judgment of 28/09/2017, *Christopher Jonas v United Republic of Tanzania,* para 44.

on the filing of an application within a reasonable time following the exhaustion of local remedies becomes moot.

50. The Court notes that there is no contention regarding the compliance with the conditions set out in Article 56, Sub-Articles (1), (2), (3), (4) and (7) of the Charter on, the identity of Applicant, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case, respectively.

51. The Court further notes that nothing on the record indicates that these conditions have not been met and therefore holds that the Application meets the requirements set out under those provisions.

52. In light of the foregoing, the Court finds that the instant Application fulfils all the admissibility requirements in terms of Article 56 of the Charter as restated in Rule 40 of the Rules, and accordingly declares the Application admissible.

VII. Merits

53. The Applicant alleges the violation of the right to appeal, the right to equality before the law and equal protection of the law and the right to non-discrimination, provided for under Articles 7(1)(a), 3(1) and 3(2) and 2 of the Charter, respectively.

A. Alleged violation of the right to appeal

54. The Applicant claims that his right to have his cause heard, including the right to appeal, was violated when the Respondent State failed to supply him with certified true copies of the records of proceedings and judgments of the two cases in which he was convicted by the District Court of Bunda. The Applicant alleges that it is due to this failure that for more than twenty (20) years, he has been unable to file appeal**s** against the decisions of the District Court of Bunda. The Applicant maintains that this failure is a violation of his right under Article 7(1)(a) of the Charter.

55. The Respondent State refutes this allegation. It maintains that the Applicant has the option of instituting a constitutional petition for the enforcement of his basic rights and the remedies sought can be issued by the High Court of Tanzania.

56. The Court observes that the right to appeal is a fundamental element of the right to a fair trial protected under Article 7(1)(a) of the Charter, which provides that:

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts

> of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;"

57. This right to appeal requires that individuals are provided with an opportunity to access competent organs, to appeal decisions or acts violating their rights. It entails that States should establish mechanisms for such appeals and take necessary action that facilitates the exercise of this right by individuals, including providing them with the judgments or decisions that they wish to appeal from.

58. In the instant Application the Court notes that the Applicant has made numerous attempts to request for the certified true copies of the record of proceedings and judgments from the Respondent State to no avail. In the absence of the said documents, the Applicant was not able to appeal his convictions and sentences in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995, to the High Court and subsequently to the Court of Appeal.

59. The record before this Court shows that on 29 November 2000, the Applicant wrote to District Registrar of the High Court at Mwanza, enquiring on the status of his notice of appeal in respect of Criminal Case No. 278 of 1995. The Court notes that in response to the Applicant's letter dated 16 January 2004, the District Registrar of the High Court at Mwanza wrote to the Applicant on 9 February 2004 informing him that the Court is yet to receive the records of proceedings for his cases from the District Court of Bunda.

60. The record also indicates that the Magistrate in Charge of the District Court at Mwanza, under whose administration the District Court of Bunda falls, wrote to the Applicant on 13 October, 2010 informing him that the records of proceedings for the two criminal cases had not been returned from the High Court where it had been sent through a letter dated 7 November, 2003 and therefore the Applicant should follow up with the High Court at Mwanza to get these records.

61. There is evidence that the Applicant sought the intervention of the Respondent State's Commission on Human Rights and Good Governance in this regard, on Criminal Case No.244 of 1995, through his letter dated 28 December 2011. By its letter dated 3 July 2013, the Commission advised the Applicant that by a letter dated 11 May 2012, the District Registrar of the High Court at Mwanza informed the Commission that despite a lengthy follow-up on the matter, the records of proceedings of the Applicant's cases heard at the District Court of Bunda could not be traced.

62. Besides, the record before this Court further attests to the fact that the Applicant wrote to the Presiding Judge of the High Court at Mwanza to follow up on the records of proceedings, particularly by his letters dated, 14 October 2005, 18 March 2005, 28 June 2005, 2 September 2005, 4 December 2005, 8 January 2006, 2 April 2007, 24

July 2007, 10 September 2007, 7 December 2007, 9 March 2008, 15 June 2008, 30 September 2008, 29 December 2008, 12 April 2009, 24 August 2009, 6 December 2009, 7 April 2010, 2 September 2010, 14 January 2011, 15 August 2011, 18 December 2011, 12 September 2014, 24 January 2015 and 9 April 2015.

63. In his letter dated 28 March 2015 addressed to the Presiding Judge of the High Court at Mwanza the Applicant indicates that his appeals were never mentioned because the records of proceedings and judgment were still being sought, yet the Magistrate in Charge of the District Court of Bunda had advised him that he was waiting for the records to be returned from the High Court where they had been sent.

64. Finally, the Applicant filed a petition at the High Court seeking leave to file his appeal without the records of proceedings but this petition was dismissed because, according to that court, allowing it would have been inappropriate since it would have meant that the appellate Court would have considered the appeal without having the records and judgments of the trial Court that were to be appealed.

65. The Court therefore finds that by failing to provide the Applicant with certified true copies of the records of proceedings and judgments in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 heard at the District Court of Bunda, the Respondent State has violated the Applicant's right to appeal as provided under Article 7(1)(a) of the Charter.

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

66. The Applicant alleges that failure of the Respondent State to provide him with the record of proceedings and the judgments constitutes an administrative omission and a violation of his right to equality before the law and equal protection of the law as provided for in Article 3(1) and 3(2) of the Charter.

67. The Respondent State disputes this and reiterates that the Applicant had the opportunity to file a constitutional petition which was a remedy that was readily available to him just as it is available to everyone and ensuring equality before the law and equal protection of the law.

68. The Court notes that Article 3 of the Charter guarantees the right to equality before the law 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."

69. In the context of judicial procedures, the right to equality before the law and equal protection of the law requires that everyone should

be treated equally before courts and tribunals. The Applicant has made a general claim that the denial of the opportunity to file an appeal at either the High Court or the Court of Appeal due to the Respondent State's failure to provide him with the certified true copies of the records of proceedings and judgments of the District Court of Bunda has resulted in a violation of this right.

70. The Court reiterates that the Applicant bears the burden of proving this claim,[5] but he has failed to show how his right to equality before the law and equal protection of the law has been violated. The Court has stated that general claims are not enough to establish that the Respondent State has violated a right.[6]

71. The Court therefore finds that the Respondent State has not violated the Applicant's right to equality before the law and equal protection of the law provided under Article 3(1) and (2) of the Charter.

C. Alleged violation of the right to non-discrimination

72. The Applicant submits that by failing to provide him with certified true copies of the record of proceedings and judgments, the Respondent State has violated his right to non-discrimination as set out in Article 2 of the Charter.

73. The Respondent State disputes this allegation and avers that the Applicant has not proved it.

74. Article 2 of the Charter provides as follows:

> "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."

75. In the Matter of the *African Commission on Human and Peoples' Rights v Republic of Kenya*, the Court noted that the principle of non-discrimination prohibits any differential treatment among persons existing in similar contexts, on the basis of one or more of the prohibited grounds listed under Article 2 of the Charter.[7]

76. In the present case, the Applicant has failed to show how his

5 Application No. 003/2015. Judgment of 28/09/2017, *Kennedy Owino Onyachi and Another v United Republic of Tanzania,* para 140; Application No. 005/2015. Judgment of 11/05/2018, *Thobias Mango Mang'ara and Shukurani Masegenya Mango v United Republic of Tanzania,* para 104.

6 *Alex Thomas v Tanzania* Judgment, para 140; *Mohamed Abubakari v Tanzania* Judgment, para 154; *Kijiji Isiaga v Tanzania* Judgment, para 86.

7 Application No. 002/2012. Judgment of 26/05/2017, *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 138.

right not to be discriminated against on the basis of any of the ground(s) prohibited under Article 2 of the Charter has been violated.

77. The Court therefore finds that the Respondent State has not violated the Applicant's right to non-discrimination provided under Article 2 of the Charter.

VIII. Reparations

78. As indicated in paragraphs 24 and 25 and above, the Applicant requests that the Court declare the Respondent State's administrative omission to be unconstitutional, grant him a declaratory order to be immediately supplied with certified true copies of proceedings and judgments in Criminal Cases No. 244 of 1995 and 278 of 1995 and if the Respondent State fails to supply them then the Court should order his immediate release from prison and any other orders or reliefs it may deem fit.

79. In its Response to the Application, as indicated in paragraph 26 and 27 above, the Respondent State did not address the Applicant's prayers on remedies, rather it stated that the Application is inadmissible, the Court should find that it has not violated Articles 2, 3(1) and (2) and 7(1)(a) of the Charter and the Application should be dismissed with costs for lack of merit.

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

81. In this respect, Rule 63 of the Rules stipulates 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".

82. 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".[8]

83. With regard to the issue of supplying the certified true copies of the records of proceedings and judgments, the Court had, pursuant to Rule 41 of the Rules, directed the Respondent State to file them, as stated in paragraph 20 above, but the Respondent State did not comply.

84. As regards the Applicant's prayer to be released if the

8 Application No. 011/2011. Ruling on Reparations of 13/06/2014, *Reverend Christopher R Mtikila v United Republic of Tanzania,* para 27.

Respondent State fails to provide him with the certified true copies of the record of proceedings and judgments, the Court has established that such a measure could be directly ordered by the Court only in exceptional and compelling circumstances.[9] The Court has stated that examples of such compelling circumstances include "if an Applicant sufficiently demonstrates or the Court itself establishes from 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 to order "all appropriate measures" including the release of the Applicant".[10]

85. In the instant case, the Court has found at paragraph 65 of this judgment that the Respondent State has violated the Applicant's right to appeal under Article 7(1)(a) of the Charter by not providing him the certified true copies of the records of proceedings and judgments in the two Criminal Cases. The Court notes that this has resulted in the Applicant having served twenty (20) years in prison, a period which represents two-thirds of the total prison term of thirty (30) years following his convictions, without having exercised his right to appeal.

86. The Court considers that these circumstances have resulted in a miscarriage of justice and are compelling enough to warrant it to grant the Applicant's prayer to be released as being the most proportionate measure to restore the Applicant.

IX. Costs

87. The Applicant has made submissions that costs be granted following the event. The Respondent State has asked for the costs to be borne by the Applicant.

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

89. The Court will make a ruling on costs when considering the claim on reparations.

X. Operative part

90. For these reasons,

9 *Alex Thomas v Tanzania* Judgment *op cit*, para 157; *Mohamed Abubakari v Tanzania* Judgment *op cit,* para 234.

10 Application No. 016/2016. Judgment of 21/09/2018, *Diocles William v United Republic of Tanzania*, para 101; See also Application No. 027/2015. Judgment of 21/09/2018, *Minani Evarist v United Republic of Tanzania*, para 82.

The Court,
Unanimously:

On *jurisdiction*
i. *Declares* that the Court has jurisdiction.

On *admissibility*
ii. *Dismisses* the objection on the admissibility of the Application;
iii. *Declares* that the Application is admissible.

On *merits*
iv. *Finds* that the Respondent State has not violated Article 2 of the Charter as regards the right to non-discrimination;
v. *Finds* that the Respondent State has not violated Article 3(1) and 3(2) of the Charter as regards to the right to equality before the law and equal protection of the law;
vi. *Finds* that the Respondent State violated Article 7(1)(a) of the Charter as regards the failure to provide the Applicant with the certified true copies of the records of proceedings and judgments in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 heard at the District Court of Bunda, to facilitate the Applicant file the appeals therefrom and therefore orders the Respondent State to provide them to the Applicant;

On *reparations*
vii. *Orders* the Respondent State to release the Applicant from prison within thirty (30) days of this Judgment;
viii. *Reserves* its decision on the Applicant's prayer on other forms of reparation;
ix. Allows the Applicant, in accordance with Rule 63 of its Rules, to file his written submissions on the other forms of reparation within sixty (60) days from the date of notification of this Judgment; and the Respondent State to file its Response thereto within thirty (30) days from the date of receipt of the Applicants' written submissions;
x. Orders the Respondent State to submit to the Court a report on the measures taken in respect of paragraphs (vi) and (vii) above within sixty (60) days of notification of this Judgment; and

On costs
xi. *Reserves* its decision on costs.

Separate opinion: TCHIKAYA

1. There are works which though collective and have a common goal, still keep their specificities. The *Mgosi Mwita Makungu v United Republic of Tanzania* decision of the African Court lends credence to this assertion. I agree with the majority of the judges as regards admissibility, jurisdiction[1] and the operative part, but I believe that the Court should have given further thought to the issue of consistency of the evidence before it in this case. The question arose as to the admissibility of Mr *Mgosi*'s assertions in support of his claims; a crucial question, one may say, that the court should have set out in detail.

2. I believe that the court should have paid particular attention to the question which the point of law raises in that judgement. Had Mr Mgosi sufficiently proven his key allegation that the Tanzanian State failed to provide him with the documents necessary for his appeal? The African Court should have made sure that this issue is well tackled and investigated well in advance of any other facets of this dispute. *A fortiori,* it is known that international human rights law has abundant jurisprudence[2] protecting the rights of individuals against the non-availability of documents necessary for procedure. The court was aware of this and it was within its jurisdiction to enforce this fundamental right. But, of course, this must be clearly proven.

3. It is needful to consider not only the insufficiency of the allegations on the ground that the Applicant did not substantiate them (I) but also that proof of claims has always impacted the judgements of the Court.

I. The claims presented are not substantiated

4. The Applicant sought compensation from the Arusha Court sitting in Tunis, for the prejudice generated by the refusal of the State of Tanzania to provide copies of the records of proceedings in the criminal judgments of the *Bunda* District Court and the decisions of 18 June 1996 and 15 April 1996, respectively, finding the Applicant guilty of the offence of armed robbery and sentencing him to 35 years in prison. The Applicant also claimed that he had requested the said

1 There were no objections to jurisdiction or admissibility. As it established in *Alex Thomas v Tanzania,* 20/11/2015 and *Peter Joseph Chacha v Tanzania*, 28/3/2014: …"as long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned , the Court will have jurisdiction over the matter".

2 EUCJ, ***Seyersted and Wiberg v Sweden,*** 20/9/2005 (right of access to personal information in the file held by the public services); CEDH ***Ramzy v The Netherlands,*** 20 May 2010; CEDH, ***Gulijev v Lettonia,*** 16 December 2008; CEDH, ***Tsourlakis v Greece,*** 15 October 2009.

records from the Respondent State on several occasions, but to no avail. He said he needed the documents to lodge appeal. He further alleged that twenty years had elapsed between his declaration of guilt and conviction on the one hand, and the filing of his application before the Court on the other. Given the passage of time, it is understandable that the evidence in assessing this allegation would be of paramount importance in the conduct of the trial before the Court.

5. It was clear from his application that the Applicant did not contest the charges levelled against him; on the contrary, his claims were centred on the alleged failure of the Tanzanian State to make legal remedies available to its citizen in accordance with the African Charter on Human and Peoples' Rights[3]. However, it is apparent from the documents before the Court that Mr. Mgosi filed a notice of appeal dated 16 April 1996 in criminal case No. 278 of 1995 and another notice of appeal dated 22 June 1996 in criminal case No. 244 of 1995. In accordance with Tanzanian law, these notices would constitute appeals in the strict sense only if they are accompanied by an appeal file. Such file must be accompanied by records of the trial proceedings. The absence of these documents allegedly handicapped the Applicant in his effort to file a proper appeal. He was reportedly refused the documents, thus making his appeal incomplete or inadmissible.

6. In the instant case, it seems unconvincing: (1) that the key decisive elements emanate from the claims of Mr Mgozi and (2) that the said claims are not verified and sufficiently investigated by the Court, even though the latter relies on them for its proceedings, and (3) that the Court is discarding an approach which it has always adopted. On 23 March 2018, it had this attention in the case of *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania,* which was decided on 23 March 2018. The court emphasised the value of greater scrutiny of the probative value of allegations. The court seemed to have established its jurisprudence based on the evidence adduced by the Parties in the context of its jurisdiction in that case. There was in the *Nguza* dispute, a problem of identification of the accused persons. The Court noted that "the court is of the opinion that the decision on the form of identification of the accused falls within the discretion of the competent national authorities, since it is they which determine the

3 The violations are: "the right to equality before the law and to equal protection of the law (Section 13(1) of the Charter); the right to protection of its interests by courts and public bodies; the right to non-discrimination by persons exercising state functions (Section 13(3) of the Charter); the right to a fair trial, to lodge an appeal or to exercise any other remedy against the decision of a court or any other competent body (Article 13(6)(a)) of the Charter; and also as this led to a failure to observe National Law, there was a breach of the duty to observe and respect the Constitution and laws (Article 26(1))...finally, an infringement of the right to appeal (Article 7(1)(a)).

probative value of the evidence and they have a wide discretion in this respect. The Court generally defers to the decision of national courts as long as this does not give rise to a denial of justice"[4]. The Court adopted a concrete approach to its investigation; a public hearing was required.

7. A litigation is the sum total of litigious material facts[5] in so far as those facts constitute essential elements of the decision. The material accuracy of such elements is consubstantial with the decision. Here is a meeting point between domestic human rights law and international human rights law[6]. The administration of evidence will always be a legal as well as a practical issue. *Mr Mgosi acknowledged before the Court that he had filed two notices of appeal without being able to tender exhibits. Apart from the fact that he does not state before the Court that his appeal would have succeeded, had it been filed, it is further clear that the refusal of the State which he alleges according to the Court, is based only on his claim. He simply alleged that because of the refusal he could not defend his cause before the court of Appeal.* Even if there had been no lawyer, it is possible to suppose that Mr Mgosi, just as he was able to file the notices of Appeal, did not continue the procedure normally, in the belief that because of his heavily sanctioned offences, he was already condemned. It may also be said that the different approaches of the Applicant, some of them through defence organisations, entailed unearthing a dispute that has already been settled. The judgement states that "the president of the Mwanza District Court, on which the Bunda District Court is administratively dependent, wrote to the Applicant on 13 October 2010 to inform him that the record of proceedings in criminal cases had not yet been returned from the High Court, where they had been sent to by letter dated 7 November 2003".[7] Similarly, it is reasonable to assume that subsequent events in which the Applicant "sought the intervention of the Respondent State's Commission for Human Rights and Good Governance in his criminal cases of 1995"[8] cannot be used in judicial decisions. The commission's

4 See CADHP, *NGuza Viking,* 28/3/2018, para 89.

5 DR Mougenot , *La preuve,* Larcier, Bruxelles, 2002, No. 14 -1.

6 L Favore, 'Challenge and evidence before the International Court of Justice. About South West African Affairs', (1965) ***AFDI,*** 233-277 ; also, the matter of the ICC, *Detroit De Corfu, United Kingdom v Albania, 25 March 1948, Rec.* 1948, 15 ; merits, 9 April 1949, *Rec.* 1949, p. 4 ; , ICC, *Temple de Preah-Vihear,* 26 May 1961 and 15 June 1962; M Lalive 'Some remarks on evidence before the Permanent Court and the International Court' (1950) *Swiss Yearbook of International law* 97, note 72).

7 See Judgement, para 45 and seq.

8 *Idem,* para 48.

letter of 3 July 2013, in which it informed the Applicant on 11 May 2012 that the record of proceedings in respect of his cases before the Bunda District Court could not be located, does not concern the point of law raised here, that is, the deadline for appeal. In any event, if the state had actually refused to produce the necessary documents in support of the appeal, after a certain time, the Applicant would have been entitled to file his appeal, within a time which takes into account the general principle of law that a case must be heard. Mr. Mgosi was entitled to appeal without these documents, as the notice of Appeal had been filed.

8. In this view, as one might think, this case does not leave room for reflection on equality of arms, a principle of the common law system that prescribes a fair balance between the Parties; a principle which could have been used had the Applicant established the State's refusal. However, as the court pointed out in the same year, proof of refusal "falls within the discretionary powers of the competent national authorities since it is they who determine the probative value of that evidence and they enjoy a wide discretion in that regard". Coming back to the requests for copies of the record of proceedings and judgements, the application was dismissed on 21 September 2015 on the ground that it was unfounded.

9. The above demonstrates the importance of the provision of evidence that has always impacted on the court's judgements.

II. Proof of claims has always impacted the judgement of the Court

10. Only proven claims form the content of judicial decisions.[9] In AfCHPR*, Abubakari v Tanzania,*[10] the court noted that "it is for the party alleging discriminatory treatment to prove it". This shows the decisive nature of the evidence of claims adduced before a court. It is rightly believed that where claims are proven, this should be reflected in the operative part. In this Mgosi decision, I stand with the majority on the fact that the Court does not grant "the Applicant's request to order his

9 See ECHR, *Gafgen v Germany*, 1 June 2010: the Applicant brought an action before the court alleging a violation of Article 3 ECHR on the ground that the treatment he was allegedly subjected to during the interrogation of the National Police concerning the whereabouts of the child he had abducted amounted to torture. The use of material evidence obtained through his confession, which incriminated him, should have been excluded by respect for the right to a fair trial. The court had issued a decision on this evidence, Article 6 ECHR on the right to a fair trial would have been violated. Also see ECHR, 1 June 2010, *Gafgen v Germany* (application No. 22978/05), reports of judgements and decisions 2010-IV, 327-407.

10 *Mohamed Abubakari v United Republic of Tanzania*, 3/6 2016.

release, without prejudice to the decision of the respondent State to take such a measure on its own initiative ". It had thus rejected that point, which featured among the prayers of the Applicant.

11. The essential nature of the concrete evidence adduced in support of a claim naturally shapes a judicial decision. Mr Mgosi does not provide the court with any concrete evidence of the exercise of appeal, but merely states that he was unable to do so, even though in accordance with the Tanzanian system, he had gone beyond the notice of appeal stage. The court should not grant his requests. It stated in the case of *Alex Thomas v Tanzania*[11] that general claims whereby his right has been violated are not sufficient. Concrete evidence is required. We understand the meaning of its decision in this case.

12. Mr MGosi supposedly did not benefited from the availability of the domestic courts. The violation of Article 7(1)[12] of the African Charter on Human and Peoples' Rights was retained in the operative part of judgement. In my opinion, this aspect - availability of justice - does not form part of the shortcomings actually attributable to the State. While remaining in solidarity with the majority of my colleagues, it should be noted that the question at issue is the Applicant's inconsistency and lack of rigour in the use of the means of action at his disposal. To refuse a litigant all means of action may mean denying him the action in question, but in this case, it seems possible to say that this was not the case. The first point of the operative part should be specific.

13. The Court had to examine the wrongful conduct of the domestic courts. The Applicant in this case pointed to the impartiality of the judges in establishing the breaches enshrined in the Charter. In the case of *Thobias Mango and others v Tanzania,* decision of 11 May 2018, the aim of which was to highlight the lack of judicial fairness. As in the present case, the African Court found that the Applicant had failed to prove that the judges of the national courts were biased and thus generated a violation of the right to be tried by an impartial tribunal.[13] In the present case, the court, while citing its jurisprudence - *Abubakari*[14] - noted that the domestic courts had determined that there was evidence beyond a reasonable doubt that the Applicants had committed the crime of which they were accused. The relevance

11 *Alex Thomas v United Republic of Tanzania*, 20/11/2015.

12 This article states that "every individual shall have the right to have his case heard. This comprises: the right to an appeal to competent national organs against acts of violating his fundamental rights recognized and guaranteed by conventions, laws, regulations and customs in force. ".

13 *Thobias Mang 'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania*, 11/5/2018, para 104.

14 *Mohamed Abubakari v United Republic of Tanzania,* 3/6/ 2016.

to the case at hand lies in the fact that the Mgosi decision sets aside the necessary and thorough verification of the Applicant's claims and allegations concerning his initiative to lodge an appeal. Reasonable doubt persists

14. A special feature is worth noting. It is tied to the specificity of the litigation of the Court. This is also present in the Mgosi case. While the burden of proof did not always rest with the Applicants in human rights cases, it was desirable for the court to make reasonable use of the principle. It is right that the person who alleges a wrongful practice or initiative that causes damage should adduce proof thereof. The adage is universally known: "*actori incumbit probatio, reus in excipiendo fit actor*" (the one who asserts a right must prove it). The material elements of human rights abuses leading to a suit in court, are often extremely damaging, and come after lengthy internal proceedings. The emergence of evidence at international level is necessary as much as it is complex. The African Human Rights judge, as in Mgosi case, must face up to this fact.

15. While sharing the position of my colleagues on the decision on the merits, I nevertheless express this individual opinion to highlight the insufficiency of unsubstantiated or unproven claims before the Court.