Mango v Tanzania (merits) (2018) 2 AfCLR 314

Application 005/2015, *Thomas Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania*

Judgment, 11 May 2018. Done in English and French, the English text being authoritative.

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

The Applicants had been convicted and sentenced for armed robbery. They brought this Application claiming violations of their rights as a result of their detention and trial. The Court held that the failure and delay in providing the Applicants with witness' statements violated the African Charter. The Court further held that the failure to provide the Applicants with free legal representation violated the African Charter.

Jurisdiction (conformity of domestic proceedings with Charter, 31)

Interpretation (Universal Declaration forms part of customary international law, 33; Court cannot find violations of national law and treaties to which the Respondent State cannot be a party, 35)

Admissibility (exhaustion of local remedies, fair trial, 45, 46; submission within reasonable time, 53-56)

Fair trial (evaluation of evidence, 70, 94, 95, 116, 118; defence, witness statements, 78, 79, free legal representation, 86, 87; reasoning, 111, 112)

Reparations (release, 155)

I. The Parties

1. Messrs Thobias Mang'ara Mango and Mr Shukurani Masegenya Mango (hereinafter referred to as "First Applicant" and "Second Applicant", respectively) are both citizens of the United Republic of Tanzania.

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

II. Subject of the Application

A. Facts of the matter

3. The Court was seized of the Application on 11 February 2015. In the Application, they allege violation of their rights following their arrest, detention and the manner in which their various cases were treated before the domestic courts of the Respondent State.

4. According to the Application, on 3 July 1999 at about 8.30 am two individuals struck at gunpoint, the Zeid *Bureau de Change* located at Mwanza Hotel and stole large sums of money and travellers cheques. The only witness to the robbery was Ms Fatuma Said who worked as a cashier at this *Bureau de Change.*

5. A police investigation was mounted at the end of which four (4) persons were arrested among whom were the Second Applicant who was arrested on 3 July 1999 and the First Applicant who was arrested on 4 July 1999. They were charged on 5 July 1999 with the offence of armed robbery contrary to Sections 285 and 286 of the Tanzanian Penal Code.

6. Following the trial before the District Court of Mwanza in Criminal Case No. 672 of 1999, the Applicants were convicted and sentenced on 7 May 2004 to a term of thirty (30) years imprisonment each in Criminal Case No. 672 of 1999.

7. The Applicants appealed the conviction and sentences to the High Court of Tanzania in Criminal Appeal No. 201 of 2004. The appeal was dismissed in its entirety by the High Court of Tanzania on 31 October 2005 on the basis that the sentence of thirty (30) years imprisonment was lawful.

8. The Applicants further appealed to the Court of Appeal of Tanzania sitting at Mwanza in Criminal Appeal No. 27 of 2006 and this Appeal was also dismissed in its entirety on 12 May 2010. The Court of Appeal found that there was no error in the findings of the District Court and High Court on the substantive matters under appeal and that the appeal lacked merit.

9. The Applicants then filed an Application for Review at the Court of Appeal in Criminal Application No. 8 of 2010 but this was dismissed on 18 February 2013 on the basis that it showed no ground that raised the need for a review of the Court of Appeal's judgment in Criminal Appeal No. 27 of 2006.

10. The Applicants claim that they subsequently filed on 17 June 2013 a Constitutional Petition at the High Court at Mwanza alleging violation of their human rights under the Basic Rights and Duties Enforcement Act. They claim that the Constitutional Petition was

endorsed with the stamp of the District Registrar of the High Court on 17 June 2013. The Applicants allege that following a considerable period of enquiry about the Constitutional Petition, it was returned to them by the Registrar of the High Court without an official letter. They allege that they were verbally instructed to direct their petition to the Court of Appeal.

B. Alleged violations

11. The Applicants outlined several complaints in relation to the manner in which they were detained by the Respondent State's police authorities and tried and convicted by the Respondent State's judicial authorities. They claim that:

"i. The principles of law and practice governing the matter of visual identification were neither met nor considered by the Trial Court;

ii. They were not represented by a Counsel, were denied medical treatment and overstayed in Police custody;

iii. They were denied a chance to be heard when the presiding Magistrate was changed;

iv. No actual weapon was discovered or tendered in Court to support the charge of armed robbery and the owner of the B*ureau de Change* mentioned on the Charge Sheet was never called before the Court to testify;

v. The trial proceeded despite them being denied some witness statements and some being provided to them after undue delays;

vi. The judgments of the Trial Court, first and second Appellate Courts were defective due to the contradiction between the evidence of Prosecution Witness 2 and Prosecution Witness 3;

vii. The Trial Court tried the case to its finality without considering or according weight to the written submissions;

viii. The High Court concluded the appeal by relying on misapprehension or misdirected evidence;

ix. The Court of Appeal relied on misconceived findings to convict them;

x. Their Constitutional Petition was irregularly rejected and returned to them unprocedurally, with no official letter;

xi. Their Application for Review at the Court of Appeal was dismissed on grounds that it should have been raised in an Appeal;

xii. The sentence meted against them following their conviction is contrary to Sections 285 and 286 of the Penal Code of Tanzania as this sentence did not exist at the time the offence was committed and it was harsh;

xiii. They have suffered irreparable damage and inhuman treatment due to the violation of their human rights."

12. In their Application, the Applicants allege violations of their human rights under:

"i. Articles 1, 2, 3, 5, 6, 7, 8 and 10 of the Universal Declaration of Human Rights;

ii. Articles 3, 7, 7(2), 19, and 28 of the Charter;

iii. Articles 107A (2)(e) and 107B; 12(1) and (2); 13(1), (3), (4) and (6)(c); 26(1) and (2); 29(1), (2) and (5); 30(1), (3) and (5) of the Constitution of the United Republic of Tanzania;

iv. Article 6 of the European Convention on Human Rights.

v. Article 8 of the American Convention on Human Rights; and

vi. Sections 285 and 286 of the Penal Code of the United Republic of Tanzania regarding their illegal sentencing to thirty years' imprisonment."

III. Summary of the procedure before the Court

13. The Application was filed on 11 February 2015. By two separate notices both dated 20 March 2015 pursuant to Rules 35(2) and (3) of the Rules (hereinafter referred to as "the Rules"),the Registry, served the Application on the Respondent State and transmitted it to the Executive Council of the African Union and the State Parties to the Protocol through the Chairperson of the African Union Commission.

14. By a letter dated 31 March 2015 the Registry notified Pan African Lawyers' Union (PALU) of the Court's decision to request its assistance to provide the Applicants with legal assistance and by an email dated 2 April 2015 PALU confirmed that it would represent the Applicants.

15. The Respondent State filed the List of its Representatives on 5 May 2015.

16. On 27 May 2015 the Respondent State requested the Court to grant her an extension of time to file the Response to the Application and by a notice dated 24 June 2015 the Registry notified the Respondent State of the Court's decision to grant her thirty (30) days' extension of time to file the Response.

17. On 20 August 2015 the Respondent State filed the Response to the Application. This was transmitted to the Applicant by a notice dated 26 August 2015.

18. By a letter dated 18 November 2015 the Applicants requested

the Court to grant them an extension of time to file their Reply to the Respondent State's Response; by a notice dated 14 March 2016, the Registry notified the Applicants of the Court's decision to grant them thirty (30) days extension of time to file the said Reply. The Applicants' filed Reply to the Respondent State's Response on 23 March 2016.

19. By a notice dated 10 June 2016 the Registry informed the Parties that the written procedure was closed with effect from 3 June 2016.

IV. Prayers of the Parties

20. In their Reply, the Applicants reiterated their prayers in the Application as follows :

"i. A Declaration that the Respondent State has violated the Applicants' rights guaranteed under the African Charter, in particular: Articles 1 and 7.

ii. A Declaration that the Respondent State violated Articles 2, 3, 5, 7 and 19 of the Charter and Articles 1, 2, 5, 6, 7, 8 and 10 of the Universal Declaration of Human Rights at various stages of the trial process.

iii. A Declaration that s142 of the Evidence Act (Cap 6 R.E 2002) is incompatible with international standards of the right to a fair trial.

iv. An Order that the Respondent State takes immediate steps to remedy the violations.

v. An order for reparations.

vi. Any other orders or remedies that this Honourable Court shall deem fit."

21. In the Response to the Application, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to rule as follows:

"1. That the Application has not evoked the jurisdiction of the Honourable Court.

2. That the Application be dismissed as it has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court.

3. That the Application be dismissed as it has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court.

4. That the Application be dismissed in accordance to Rule 38 of the Rules of Court."

22. With regard to the merits of the Application, the Respondent State prays the Court for an order that it has not violated Articles 1, 2, 6 and 7 of the United Nations Declaration of Human Rights and Articles

3, 7, 10, 19 and 28 of the Charter.

23. The Respondent State further prays that reparations be denied to the Applicants, they continue serving their sentence and the Application be dismissed in its entirety.

V. Jurisdiction

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

25. The Respondent State raised only one objection, on the material jurisdiction of the Court.

A. Objection on material jurisdiction

26. In the Response to the Application, the Respondent State contends that the Court would sit as a Court of first instance in respect of some allegations and as a "Supreme Appellate Court" in respect of matters of law and evidence that have already been determined yet the Protocol does not give it such jurisdiction. The Respondent State refers to the Court's decision in *Ernest Francis Mtingwi v Republic of Malawi* in this regard.[1]

27. The Respondent State outlines the following allegations as requiring the Court to sit as a Court of first instance:

> "i. That they were not given an opportunity to be represented by counsel, before and after they were charged in Courts of law, they were denied medical treatment and they overstayed in police custody.
>
> ii. That they filed an application in the High Court of Tanzania under the Basic Rights and Duties Enforcement Act, which was endorsed with the stamp of the District Registrar of the High Court on 17 June 2013 and after a considerable period it was irregularly rejected with no official communication to that effect.
>
> iii. That they were sentenced to thirty (30) years imprisonment contrary to Sections 285 and 286 of the Penal Code, that the charge against them was not a legally punishable offence at the time it was committed, in that, the sentence against them was harsh and excessive contrary to their

1 Application No. 001/2013.Decision of 15/03/2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*. (Ernest Mtingwi v Malawi Decision) para 14 where the Court held that: "It does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and or regional Courts".

rights under Article 7(2) of the Charter and Article 13(6)(c) of the Constitution of the Respondent State of 1977."

28. The Respondent State further argues that the allegations which require the Court to sit as a 'Supreme Appellate Court' are those relating to the Applicants' identification, the non-tendering of evidence of the weapon alleged to have been used to commit the robbery, not calling the owner of the Bureau de Change to testify in Court, the changes of the venue of the hearing of the trial, their conviction on the basis of misconceived findings, the determination of their appeals on misdirected evidence and the dismissal of their Application for Review on the ground that the matters raised could have properly been raised in an appeal.

29. In their Reply to the Respondent State, the Applicants maintain that the Court has jurisdiction to deal with the matter pursuant to the provisions of the Charter and the Protocol because, the Application relates to violations of their human rights which are protected by the Charter and other human rights instruments ratified by the State concerned. They refer to the decision in *Alex Thomas v United Republic of Tanzania* in this regard.[2]

30. Pursuant to Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules of the Court, 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".

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

2 Application No.005/2013.Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania. (Alex Thomas v Tanzania* Judgment*)* para 130 where the Court stated: "Though this Court is not an Appellate body with respect to decision of national courts, this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned. […] The Court will examine whether the national courts applied appropriate principles and international standards in resolving the errors".

3 *Ernest Mtingwi v Malawi Decision op cit* para 14.

the Respondent State is a Party.[4] Consequently, the Court rejects the Respondent State's objection that the Court is acting in the instant matter as an appellate Court.

32. Furthermore, regarding its material jurisdiction, the Court notes that since the Applicant alleges violations of provisions of some of the international instruments to which the Respondent State is a Party, it has material jurisdiction in accordance with Article 3(1) of the Protocol.

33. The Court notes that while the Universal Declaration of Human Rights is not an international human rights instrument that is subject to ratification by States, it has previously held in the *Matter of Anudo Ochieng Anudo v Tanzania* that the Declaration has been "recognised as forming part of Customary International Law".[5] As such, the Court is enjoined to interpret and apply it.

34. The Applicants have also invoked the American Convention on Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Respondent State's Constitution and Penal Code.

35. In accordance with Article 3(1) of the Protocol, the Court finds that it cannot establish violations based on the Constitution and Penal Code of the Respondent State which are national laws. The same applies to the American Convention on Human Rights and the European Convention on Fundamental Rights and Freedoms to which the Respondent State is not and cannot be a Party.

36. The Court consequently finds that it has material jurisdiction over the Application.

B. Other aspects of jurisdiction

37. The Court notes that its personal, temporal and territorial jurisdiction has 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. 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

4 Alex *Thomas v Tanzania Judgment op cit* para 130 and Application No. 007/2013. Judgment of 03/06/2016, *Mohamed Abubakari v United Republic of Tanzania (Mohamed Abubakari v Tanzania* Judgment). para 29.

5 Application No. 012/2015. Judgment of 23/03/2018. *Anudo Ochieng Anudo v United Republic of Tanzania*, *(Anudo Anudo v Tanzania* Judgment*)* para 76; *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States v Iran)* [1980] ICJ Rep 3 p 42, Collection 1980; Article 9(f) of the Constitution of the United Republic of Tanzania, 1977.

the Protocol;

ii. it has temporal jurisdiction on the basis that the alleged violations are continuous in nature since the Applicants remain convicted and are serving a thirty (30) year imprisonment sentence on the basis of what they consider an unfair process;[6]

iii. it has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

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

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:
>
> 1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> 2. Comply with the Constitutive Act of the Union and the Charter:
> 3. Not contain any disparaging or insulting language;
> 4. Not be based exclusively on news disseminated through the mass media;
> 5. Be filed after exhausting local remedies, if any, unless it is obvious that the procedure 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."

6 Application No. 003/2015. Judgment of 28/09/2017, *Kennedy Owino Onyachi and Another v United Republic of Tanzania (Kennedy Onyachi v Tanzania* Judgment) para 40.

A. Conditions of admissibility in contention between the Parties

41. While some of the above conditions are not in contention between the Parties, the Respondent State raised two objections regarding exhaustion of local remedies and the timeframe for seizure of the Court.

i. Objection based on the ground of non-exhaustion of local remedies

42. The Respondent State contends that the Applicants should have raised their complaints within the domestic courts as required by Article 56(5) of the Charter, before filing their application before this Court. The Respondent State also alleges that it first became aware of the allegations enumerated in paragraph 11 above, after the filing of this Application. The Respondent State maintains that the Applicants can still pursue a Constitutional Petition within the domestic courts in this regard.

43. The Applicants contend that they exhausted all the local remedies available because they were heard up to the Court of Appeal which is the highest court in the Respondent State. The Applicants state that any other remedies available are to be considered as "extraordinary remedies" which they were under no obligation to pursue.

44. The Applicants have raised thirteen (13) claims before this Court as indicated in paragraph 11 above. The record indicates that eight (8) of the claims indicated at paragraph 11(i), (iii), (iv), (v), (vi), (vii), (viii) and (ix) were raised at various stages during their trial and appeals before the courts of the Respondent State. The record also indicates that, five (5) claims are being raised for the first time before this Court. They are denial of their right to legal representation, prolonged detention in police custody; the dismissal of the Application for Review before the Court of Appeal; the irregular rejection of their constitutional petition and the illegality and harshness of the sentence imposed on the Applicants following their conviction.

45. Any application before the Court must comply with the requirement of exhaustion of local remedies.[7] However, in *Alex Thomas v United Republic of Tanzania*, the Court also held that the Applicant was not required to exhaust domestic remedies in respect of alleged violations of fair trial rights which were occasioned in the course of his

7 Application No. 003/2012. Ruling of 28/03/2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania (Peter Chacha v Tanzania* Ruling), para 40.

trial and appeals in the domestic courts.[8]

46. In the instant case, the Court notes that allegation relating to the denial of legal assistance, prolonged detention in police custody and illegality and harshness of the sentence imposed on the Applicants constitute part of the "bundle of rights and guarantees" related to a fair trial which were not required to have been specifically raised at the domestic level. The Court consequently holds that the Applicants are deemed to have exhausted local remedies with respect to these claims.

47. Concerning the filing of a Constitutional Petition regarding the violation of the Applicants' rights, the Court has already stated that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicants are not required to exhaust prior to seizing this Court.[9]

48. In sum, the Court therefore finds that the Applicants have exhausted local remedies with respect to all their claims.

49. Accordingly, the Court dismisses the Respondent State's objection to admissibility of the Application for non-exhaustion of local remedies.

ii. Objection based on the ground of not filing the Application within a reasonable time

50. The Respondent State contends that the Application was not filed within a reasonable time as required by Rule 40(6) of the Rules. The Respondent State avers that at the time of the filing of this Application, four (4) years and two (2) months had elapsed from the time of delivery of the Court of Appeal's judgment in the Appeal and two (2) years had elapsed from the time of delivery of the Ruling on the Applicants' Application for Review of the Court of Appeal's judgment. The Respondent State therefore argues that this Application is inadmissible and that it should be dismissed with costs.

51. The Applicants contend that they are both lay, indigent incarcerated persons without legal education. They also contend that they have not had the benefit of legal aid or legal representation until the Court appointed *pro bono* Counsel for them and that the circumstances of their particular case warrants the Court to admit the Application as there are sufficient grounds to justify why they filed it at

8 *Alex Thomas v Tanzania Judgment op cit* para 60.

9 *Ibid* paras 60-62; *Mohamed Abubakari v Tanzania Judgment op cit* paras 66-70; Application No.011/2015. Judgment of 28/09/2017, *Christopher Jonas v United Republic of Tanzania. (Christopher Jonas v Tanzania* Judgment) para 44.

the time they did.

52. The Court notes that Rule 40(6) of the Rules and Article 56(6) of the Charter do not specify any period within which Applicants should seize the Court, rather, these provisions speak of filing of the Application within a reasonable time from the date when local remedies were exhausted or any other date as determined by the Court.

53. The Court notes that local remedies were exhausted when the Court of Appeal dismissed the Applicants' appeal on 12 May 2010, therefore this is the date from which time should be reckoned regarding the assessment of reasonableness of time as envisaged in Rule 40(6) of the Rules.[10]

54. The Court notes that the Application was filed four (4) years, eight (8) months and thirty (30) days after local remedies were exhausted. As the Court has previously held, the computation of reasonableness of time "…depends on the circumstances of each case and must be assessed on a case-by-case basis."[11]

55. The Court considers in this regard that the Applicants being incarcerated they may not have been aware of the existence of the Court or how to approach it, particularly since the Respondent State had filed the Declaration under Article 34(6) less than two (2) months prior to when local remedies were exhausted. They should also not be penalised for attempting to use an extraordinary remedy, that is, the Application for Review of the Court of Appeal's Judgment, which was dismissed on 18 February 2013. The Court finds that these factors constitute sufficient justification as to why the Applicants filed the Application four (4) years, eight (8) months and thirty (30) days after local remedies were exhausted.

56. For these reasons, the Court finds that the Application has been filed within a reasonable time as envisaged under Article Rule 40(6) of the Rules. The Court therefore overrules this preliminary objection on admissibility.

B. Conditions of admissibility not in contention between the Parties

57. The conditions regarding the identity of the Applicant, the

10 Application No. 038/2016. Judgment of 22/03/2018, *Jean-Claude Roger Gombert v Cote d'Ivoire*. paras 35-37.

11 Application No. 013/2011. Judgment of 28/03/2014, *Beneficiaries of Late Norbert Zongo and Others v Burkina Faso.* (*Norbert Zongo v Burkina Faso Judgment*) para 92; See also: *Alex Thomas v Tanzania Judgment op cit* para 73; *Mohamed Abubakari v Tanzania Judgment* o*p cit* para 91; *Christopher Jonas v Tanzania* Judgment *op cit* par. 52.

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 on the record suggests that these conditions have not been met in the instant case. The Court therefore holds that the requirements under those provisions are fulfilled.

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

VII. The merits

A. Alleged violation of the right to a fair trial

60. The Applicants have raised several claims that stem from the alleged violation of the right to a fair trial under Article 7 of the Charter which reads as follows:

> "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;
>
> b. the right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> c. the right to defense, including the right to be defended by counsel of his choice;
>
> d. the right to be tried within a reasonable time by an impartial court or tribunal.
>
> 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

61. The Applicants also allege violations of Articles 8 and 10 of the Universal Declaration of Human Rights which provide as follows:

"8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

"10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

i. Allegation relating to the Applicants' identification

62. The Applicants allege that considering the gravity of the offence and the sentence they were facing, their identification through an informal identification process was insufficient and did not meet national and international standards. They allege that proper identification processes ought to have been undertaken. The Applicants maintain that no identification parade took place and no documentary evidence relating to their identification was tendered in Court. They claim that Prosecution Witness 3, Inspector Peter Mvulla stated that police investigators took the suspects to the complainant to be identified. The Applicants also argue that the whole evidence adduced in the Trial Court was not in compliance with the principles of law and practice governing visual identification The Applicants maintain that their conviction should be quashed, because they were based on their identification that did not follow the procedure set out in the law.

63. The Respondent State submits that this allegation was a ground of the Applicants' appeal before the Court of Appeal in Criminal Case No. 27 of 2006 and that the Court of Appeal considered the allegation and upheld the findings of the Trial Court and High Court. The Respondent State submits that the allegation lacks merit and should be dismissed.

64. The contention is whether the Applicants were properly identified and whether the Respondent State's Courts applied the appropriate principles and law in evaluating the evidence of witnesses on identification.

65. The record indicates that both the High Court and Court of Appeal considered the issue of visual identification and satisfied themselves that the criterion under the law was met and that the identification parade was carried out properly.[12]

66. The High Court examined the evidence of Fatuma Said, the *Bureau de Change* staff who was manning it when the robbery took place and who testified that she saw both Applicants on the material day and that the Second Applicant pointed a pistol at her. The High Court

12 Referring to *Ezekiel Peter v Republic* [1972] Crim. App. 20-DSM-72.

further noted that Fatuma Said was able to identify both Applicants at the identification parade which was carried out two (2) days later on 5 July 1999.

67. The Court of Appeal also considered both issues relating to identification and observed that there was no dispute in the description that Fatuma Said gave of the robbers. The Court of Appeal also observed that the clothing found in the Second Applicant's possession at the time of his arrest matched the description of the robbers.

68. On the issue of visual identification, this Court notes that the Court of Appeal observed that the identification by a single witness must be absolutely watertight to justify a conviction. The Court notes that the Court of Appeal also considered the principles guiding visual identification as set out in the Respondent State's relevant jurisprudence.[13] The Court of Appeal examined these principles and the findings of the Trial Court and High Court and it was satisfied there was no mistaken identity.

69. Moreover, the record before this Court shows that the Police Form (PF) 186 recording the conduct of the identification parade was tendered in evidence and the Police Officer who conducted the identification parade, Deputy Sergeant Nuhu also testified as Prosecution Witness 5 during the trial.

70. In the view of this Court, nothing on the record shows that the domestic courts did not apply the law appropriately and in light of applicable standards. Both the High Court and the Court of Appeal examined the applicable principles governing the issue of identification and applied them to the evidence tendered in a manner that was fair and just.

71. The Court finds that the Respondent State did not violate the right to a fair trial with regard to the identification of the Applicants.

ii. Allegation relating to the failure and delay in providing the Applicants with some witness statements

72. The Applicants state that they repeatedly requested witnesses' statements and that the trial proceeded despite them not having received them. They state that the trial in Criminal Case No. 672 of 1999 commenced on 8 July 1999 without them having received the witness statements. They allege that they repeatedly requested for them on 9 August 2000, 22 September 2000, 4 July 2001, 10 September 2001, 15 October 2001, 21 January 2002, 29 October 2002 and 12 December 2002. On its part, the Trial Court reminded the Prosecution on several

13 See *Waziri Amani v Republic* (1980) *Tanzania Law Reports* 250.

occasions between 9 August 2000 and 4 July 2001, to supply the Applicants with witness statements, in accordance with their statutory right and the Court's orders in this regard.

73. The Applicants state that, it was not until 22 February 2002 that the Prosecution informed the Court that they had supplied the accused with witness statements, over two (2) and a half years since the trial proceedings started. The Applicants allege that on 16 November 2001, they were subjected to interrogation for requesting the witness statements.

74. The Applicants maintain that the delay in supplying them with the statements violated their right to a fair trial and in particular the right to defence. The Applicants state that 'equality of arms' is a common law principle which imposes on the prosecution an obligation to disclose any material in their possession, which may assist the accused in exonerating himself.

75. The Court notes that the Respondent State has neither responded to this allegation nor challenged the veracity of the Applicants' contention in this regard.

76. The Court recalls that in accordance with Article 7(1)(c) of the Charter everyone has a right to defence. In criminal matters, this right requires that accused persons such as the Applicants should be promptly informed of the evidence that will be tendered to support the charges against them, whether testimonial or in other forms to enable them to prepare their defence in this regard.

77. The Applicants should have been promptly provided with all copies of the Prosecution Witness' statements to facilitate them to prepare their defence. The Court notes that, by the time the prosecution's case started on 28 August 2002, the Respondent State had not provided the Applicants some witness statements and this continued up to two and a half years later despite the orders of the Trial Court in this regard.

78. The Court is of the view that this undue delay in providing the Applicants with the witness statements, affected the Applicants' right to prepare their defence which constitutes a violation of Article 7(1)(c) of the Charter.

79. Consequently, the Court holds that the denial of access to some of the Prosecution's witness's statements and the delay in providing them with some witness statements was a violation of Article 7(1)(c) of the Charter by the Respondent State.

iii. Allegation relating to the Applicants not being given an opportunity to be represented by Counsel

80. The Applicants submit that they were not given any opportunity

to be represented by Counsel at the trial and appellate stages of the proceedings.

81. The Applicants submit that in spite of them being lay, indigent and incarcerated persons facing serious offences carrying heavy sentences they were not assigned legal representation for most of the trial process. They state that they were only briefly represented by Advocate Muna on 9 August 1999 while their bail applications were being heard.

82. The Applicants further argue that the Legal Aid (Criminal Proceedings) Act places a positive obligation on the presiding authority to grant legal aid where it is desirable and necessary, in the interest of justice and where the accused does not have the means to retain legal assistance.

83. The Respondent State avers that the above-mentioned Act entitles accused persons to legal assistance subject to their request. The Respondent State argues that the Applicants never requested for legal aid and that the First Applicant, Thobias Mango was represented by Advocate Feren Kweka during the hearing of the appeal before the Court of Appeal.

84. Article 7(1)(c) of the Charter provides that. "1. Every individual shall have the right to have his cause heard. This comprises: …(c) the right to defense, including the right to be defended by counsel of his choice".

85. It emerges from the file that Advocate Muna represented the Applicants on 9 August 1999 during their bail applications and Advocate Feren Kweka represented the First Applicant during the oral phase of their appeal before the Court of Appeal. The Applicants on the other hand, were not represented during their trial at the District Court of Mwanza and their appeal in the High Court and the Second Applicant was unrepresented during the oral phase of the proceedings in the Court of Appeal.

86. The Court has previously held that the right to a fair trial under Article 7 of the Charter includes the right to free legal representation especially in cases where accused persons are charged with serious criminal offences that attract heavy sentences.[14] The Court has also previously held that for serious offences such as armed robbery that carry heavy custodial sentences, the Respondent State is under an obligation to provide the accused persons, such as the Applicants, *proprio motu* and free of charge, the services of a lawyer throughout

14 *Mohamed Abubakari v Tanzania* Judgment *op cit* paras 138 - 142.

the judicial proceedings in the local courts.[15] In the instant case, the Applicants were charged with armed robbery, an offence that attracts a minimum sentence of thirty (30) years imprisonment.

87. The Court therefore finds that by failing to provide the Applicants with a lawyer to represent them in the proceedings, the Respondent State violated the Applicants' right to defence.

iv. Allegation that the Courts did not apply the required standard of proof

88. The Applicants have raised allegations relating to the standard of proof applied for their cases. The Applicants submit that the charges against them were not proved to the standard required in a criminal trial since no weapon was discovered or tendered to support the charge of armed robbery. The Applicants further submit that the owner of the *Bureau de Change* mentioned in the charge sheet never testified in Court on the ownership of the money allegedly stolen therefrom. The Applicants submit that it is not possible to prove the offence of robbery without first proving theft and in turn, theft can be proven only if the ownership of the item stolen is established.

89. The Respondent State avers that the Applicants raised the issue of non-production of a weapon in their appeal in the High Court but later abandoned this ground of appeal before the Court of Appeal.

90. The Respondent State further submits that the Second Applicant raised the issue of the prosecution not proving the offence against them beyond reasonable doubt on the basis of the lack of testimony in Court by the owner of the *Bureau de Change* that the alleged stolen money was his property. The Respondent State submits that the Court of Appeal found that the evidence tendered by the prosecution met the standard of proof beyond reasonable doubt even without production of weapons or the testimony of the owner of the *Bureau de Change*.

91. The issue for determination by this Court is whether in the absence of testimony of the owner of the *Bureau de Change* and the lack of production of the crime weapon, the national courts failed to apply the required standard of proof.

92. This Court notes that the record before it indicates that the High Court examined the evidence of the victim of the armed robbery, Fatuma Said, the evidence of the police investigators and the Applicants' accomplice's evidence. Fatuma Said acted as a witness

15 *Alex Thomas v Tanzania* Judgment *op cit* para 124; *Mohamed Abubakari v Tanzania Judgment op cit* para 139; Christopher *Jonas v Tanzania* Judgment *op cit* paras 77 - 78.

throughout the trial. The High Court examined the record which shows that Fatuma Said who testified as Prosecution Witness 4 stated that she was attacked by two suspects who pointed a gun at her. The High Court also found that the third Accused in the trial, Mr. Wilfred Wilbert (now deceased) also confessed that he and the Second Applicant robbed Fatuma Said. The record shows that the Third Accused's testimony was corroborated by Detective Constable Shaban and Moses who interrogated and witnessed the Third Accused's confession and testified as Prosecution Witnesses 1 and 2, respectively.

93. This Court also notes that the Court of Appeal examined the record and the findings of the Trial Court and the High Court and found no fault therein. The Court of Appeal found that the absence of the weapon used to commit the crime and of the testimony of the owner of the *Bureau de Change* on their own did not prevent the Applicants from defending themselves and the Courts from finding that the Prosecution had proven the case beyond reasonable doubt since there were other sources of evidence that corroborated the testimony of the victim, Fatuma Said. The Court notes that the Applicants have also not demonstrated how the absence of the weapon and the lack of testimony by the owner of the *Bureau de Change* could lead to the domestic courts to conclude that the required standard of proof was not met.

94. In line with its jurisprudence, in the Matter *of Mohamed Abubakari v United Republic of Tanzania*, this Court is of the view that a fair trial requires that where a person faces a heavy prison sentence, the finding that he or she is guilty and the conviction must be based on strong and credible evidence.[16] In the instant case, the Court notes that the Trial Court, the High Court and the Court of Appeal determined that there was evidence to prove beyond reasonable doubt that the Applicants committed the crime they were charged with despite the fact that the weapon alleged to have been used to commit the crime was not tendered in evidence and the owner of the *Bureau de Change* did not testify.

95. In the view of this Court, there is nothing on the record to show that the domestic courts did not apply the required standard of proof in convicting the Applicants. In any event, the Applicants have not provided sufficient evidence to show that the procedures followed by the domestic courts in addressing the issue of the weapon used to commit the crime and the testimony of owner of the *Bureau de Change* violated their right to a fair trial with respect to the standard of proof.

96. Accordingly, the Court finds that the Respondent State did not

16 *Mohamed Abubakari v Tanzania Judgment op cit* para 174.

violate the Applicants' right to a fair trial in this regard.

v. Allegation relating to the changing of the Magistrate hearing the case

97. The Applicants allege that the changing of the Magistrate denied them a chance to be heard and that therefore they did not have a fair trial.

98. The Respondent State submits that the Court of Appeal considered this matter in Criminal Appeal No. 27 of 2006 and found that the change of magistrates did not occasion an injustice. The Respondent State avers that Section 214 of the Criminal Procedure Act provides for conviction or committal where proceedings are heard partly by one magistrate and partly by another.[17]

99. The issue for determination is whether the change of the Magistrate hearing the case affected the Applicants' right to be heard.

100. The Court notes that the record indicates that the case was heard by three different Magistrates successively, in three different instances. The first Magistrate heard the matter until he was transferred to another duty station. The second Magistrate continued hearing the matter until, following the Applicants' complaints of loss of confidence in her, she recused herself from hearing the case. Thereafter, the third Magistrate completed the hearing of the case and delivered the judgment.

101. The record also indicates that the High Court considered whether the second Magistrate had proper grounds to recuse herself and whether the Applicants were prejudiced when the second and third Magistrates did not address the Applicant's concerns in terms of Section 214 of the Criminal Procedure Act. The High Court examined the circumstances under which a judicial officer may be recused namely, that there should be evidence of a conflict between the litigant and the Magistrate or the latter has a close relationship with the adversary party or one of them, and that the Magistrate or a family member has an interest in the outcome of the litigation other than the administration of justice. After examining these circumstances in light of the facts of the case, the High Court found that there was no justification for the second Magistrate to have disqualified herself.

102. Nonetheless, the High Court found that the failure of the second and third Magistrates to address the accused in terms of Section 214 of the Criminal Procedure Act did not amount to an omission that would

17 Section 214 of the Criminal Procedure Act [Cap. 20 Revised Edition 2002] provides that if a magistrate is unable to continue hearing a case, it is at the discretion of the magistrate who takes it over whether to proceed with the matter based on the evidence recorded so far or start taking the evidence afresh.

occasion an injustice.

103. The Court of Appeal also examined the issue and found that the Trial Court's failure to accord the Applicants an opportunity to address it on whether the trial should have proceeded or started afresh did not constitute a fatal omission as, pursuant to Section 214 of the Criminal Procedure Act, the Trial Court had the discretion to proceed with the hearing without according the Applicants this opportunity. The Court of Appeal found that the second and third Magistrates who heard the case applied the discretion given to them under the law judiciously.

104. The Court notes further that, the Applicants did not prove whether the Magistrates were biased, whether the evidence admitted by the Second Magistrate was prejudicial to their case or how the Magistrates failed to properly apply their discretion by proceeding with the matter rather than hearing it afresh.

105. In light of the foregoing, the Court finds that the replacement of the Magistrate in charge of the case does not violate the Applicants' right to be tried by an impartial court.

vi. Allegation relating to the lack of due consideration of written submissions by the Court of first instance

106. The Applicants submit that during the trial, the Court did not consider or accord any weight to their written submissions tendered in Court as their defense, and that the High Court and Court of Appeal did not draw any adverse inference on this omission by the Trial Court.

107. The Respondent State submits that the Second Applicant raised this allegation as his eleventh ground of appeal before the Court of Appeal, but that the Court of Appeal did not consider it because it could not consider matters of evidence not adduced at the High Court, without good reason.

108. The question for the Court to determine is whether the Applicants' right to be heard would be violated if their written submissions are not referenced in the judgment.

109. The Court is of the view that the right to be tried heard as provided under Article 7(1) of the Charter extends to the right to be given reasons for the decision.[18]

110. In the instant case, the record shows that the Magistrate recorded the Applicants' oral evidence and after the close of the defence case, only the Second Applicant chose to file written submissions. The record

18 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* adopted by the African Commission on Human and Peoples' Rights in 2003 para 2(i).

also shows that the Magistrate acknowledged receipt of the Second Applicant's written submissions and that the Prosecution chose to abandon their right of reply to the same.

111. This Court notes that the Magistrate examined the evidence on record and provided a reasoned ruling on that basis without having to make reference to the written submissions. This Court further notes that record indicates that the lack of reference to the written submissions did not form a ground of appeal before the High Court, but it was raised as a ground of appeal before the Court of Appeal.

112. The Court finds that it has not been proven that the lack of consideration of the Second Applicant's written submissions violated the Applicants' right to be heard.

113. Accordingly, the Court holds that the Respondent State did not violate Article 7(1) of the Charter.

vii. Allegation relating to the judgments being defective and erroneous due to contradictory evidence and therefore being based on the wrong record

114. The Applicants submit that the evidence of Prosecution Witness 2, Detective Constable Moses was prejudiced and contradicted itself with the evidence of Prosecution Witness 3, Assistant Inspector Mvulla who was the officer who arrested, searched and interrogated them. The Applicants further submit that as a result, the findings of the Respondent State's Courts were based on the wrong record which had patent errors.

115. The Respondent State avers that the issue of contradictions in the evidence of Prosecution Witnesses 2 and 3 were never raised as a ground of appeal before the High Court or the Court of Appeal. The Respondent State avers that the Court of Appeal evaluated all the evidence and ruled that the Prosecution Witnesses 1, 2 and 3 were credible. The Respondent State maintains that the Court of Appeal duly evaluated the points of law and evidence adduced and confined its assessment to the substantial issues of evidence.

116. The Court recalls that though it has no power to re-evaluate the evidence on which the domestic courts relied to convict the Applicants, it has jurisdiction to determine whether, the manner in which the domestic courts have evaluated the evidence is compliant with standards set out in applicable international human rights instruments. The issue for determination in this regard is whether the domestic courts' determination on the alleged contradictions between Prosecution Witnesses 1 and 2 was in line with the standards set out in Article 7(1)(c) of the Charter.

117. The record indicates both the High Court and Court of Appeal

examined and evaluated the evidence of Prosecution Witnesses 2 and 3 and found that there were no contradictions and consequently, the record was not erroneous.

118. The Court finds that there is nothing on the record before it indicating that the domestic courts did not comply with the provisions of Article 7(1)(c) of the Charter in assessing the evidence of these prosecution witnesses. Accordingly, the Court holds that the Respondent State did not violate Article 7(1)(c) of the Charter.

viii. Allegation relating to misconstrued and misapplied evidence by the Courts

119. The Applicants submit that the Court of Appeal determined their appeal contrary to principles of law.

120. The Respondent State avers that the Court of Appeal considered the argument and did not find fault with the findings of the Trial Court or the High Court.

121. The Court notes that the Applicants have not elaborated on this claim.

122. In a previous case, this Court has stated that

> "General statements to the effect that this right has been violated are not enough. More substantiation is required".[19]

123. The Court notes that, in the instant case, the Applicants are making general claims regarding the violations of their rights without substantiation.

124. Accordingly, the Court finds that the alleged violations have not been proven, and therefore dismisses the same.

ix. Allegation that the thirty-year Sentence was not in force at the time the robbery was committed

125. In the Application, the Applicants submit that they were condemned to serve a sentence of thirty (30) years imprisonment contrary to Sections 285 and 286 of the Penal Code, and that this was not the sentence for the offence at the time it was committed. They state that the sentences against them were harsh and excessive and therefore in violation of their rights under Article 7(2) of the Charter and Article 13(6)(c) of the Respondent State's Constitution. In the Reply to the Response, the Applicants abandoned this claim.

126. The Respondent refutes this allegation, stating that the Applicant

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

has raised it for the first time before this Court. The Respondent State maintains further that, the applicable law required that conviction for armed robbery attracted a minimum sentence of thirty (30) years' imprisonment.[20]

127. In view of the fact that the Applicants abandoned this claim, the Court finds that this allegation has become moot.

x. Allegations relating to violation of Articles 8 and 10 of the Universal Declaration of Human Rights

128. The Applicants allege that the Respondent State has violated their rights provided under Articles 8 (right to an effective remedy by competent national tribunals for acts violating fundamental rights) and 10 (entitlement in full equality to a fair hearing by an independent and impartial tribunal in determination of rights and obligations and of criminal charges) of the Universal Declaration of Human Rights.

129. The Respondent State did not specifically respond to these allegations.

130. The provisions of Articles 8 and 10 of the Declaration are reflected in Article 7 of the Charter under the aegis of which the Court has already made determinations regarding some allegations of violation of the Applicants' rights by the Respondent State. In this regard therefore, the Court finds that it is not necessary to determine whether the Respondent has violated Articles 8 and 10 of the Universal Declaration of Human Rights.

xi. Allegation that Section 142 of the Respondent State's Evidence Act is incompatible with international standards on the right to a fair trial

131. The Applicants claim that Section 142 of the Respondent State's Evidence Act is incompatible with international standards on the right to a fair trial on the basis that it denies accused persons the opportunity to cross-examine accomplices who testify for the prosecution.

132. The Respondent State did not make submissions regarding this prayer.

133. Section 142 of the Law of Evidence Act [Cap. 6 Revised Edition, 2002] provides that:

> "An accomplice shall be a competent witness against an accused

20 Section 285 and 286 of the Penal Code [Cap 6. As amended by Act No. 10 of 1989], the Minimum Sentences Act [Cap. 90 of 1972] as amended by Act No. 6 of 1994 Written Laws (Miscellaneous Amendments) and Court of Appeal of Tanzania (Criminal Appeal No. 69 of 2004), *William R Gerison v The Republic*.

person; and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

134. The Court notes that national laws are considered as fact before international courts and can form the basis of allegations of violations of international law.[21] The Court observes however that it does not appear from the above-mentioned provision that there is a restriction on cross-examination of accomplices. In any event, the Applicants have not elaborated how the aforementioned provision of the Evidence Act does not conform to the international standards on the right to a fair trial. The Court therefore finds that this allegation lacks merit and consequently dismisses it.

B. Allegations of violations of other rights

i. Allegation relating to the dismissal of the Applicants' review and constitutional petition

135. The Applicants submit that their Application for Review of the Court of Appeal's decision of 12 May 2010 was dismissed on the basis that their grounds for review may have been raised in an Appeal. They also submit that their first ground of appeal regarding their identification qualified as a ground for review.

136. The Respondent State maintains that the Applicants' ground for review that the decision was based on a manifest error on the face of the record resulting in a miscarriage of justice did not fall within the criteria set by the Court of Appeal Rules.

137. This Court notes that the Applicants have not provided proof to support this allegation and nothing on record to indicate that the Court of Appeal rejected the Application for Review arbitrarily. This Court accordingly dismisses this allegation for lack of merit.

ii. Allegation relating to the rejection of the Constitutional Petition

138. The Applicants state that they filed an Application in the High Court of Tanzania pursuant to the Basic Rights and Duties Enforcement Act. They claim that their Application was acknowledged as received

21 See Application No. 009/2011 and Application No. 011/2011 (Consolidated). Judgment of 14/06/2013, *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania*. paras 91-119; Application No.001/2014. Judgment of 18/11/2016 *Action Pour la Protection des Droits de L'Homme v Republic of Cote d'Ivoire* paras 107-151.

by the stamp of the District Registrar of the High Court at Mwanza dated 17 June 2013. They maintain that after some time they enquired about their Application but that it was irregularly rejected and returned to them without any official correspondence. They allege that they were verbally informed that their complaints should be directed to the Court of Appeal.

139. The Respondent State denies the allegations and puts the Applicants to strict proof. The Respondent State further states that in the event that the Applicants' Application to the High Court was rejected, the Applicants could have pursued the matter administratively or by filling another petition before the Court.

140. The Court notes from the record before it that only copies of correspondence to the Chief Justice, the Judicial Service Commission and the Ministry of Constitutional and Legal Affairs relating to the consideration of their Application for review of the Court of Appeal's decision of 12 May 2010 on their appeal and their constitutional petition filed under the Basic Rights and Duties Enforcement Act are herein attached. Though the correspondence indicates that the Applicants filed a constitutional petition under the Basic Rights and Duties Enforcement Act, it is not enough proof to support their claim that their petition was irregularly rejected.

141. The Court therefore finds that this allegation lacks merits and consequently dismisses it.

C. Allegations relating to violations of Articles 2, 3, 5, 19 and 28 of the Charter and Articles 1, 2, 5, 6 and 7 of the Universal Declaration of Human Rights

142. The Applicants allege that the Respondent State has violated Articles 2 (right to enjoyment of the rights and freedoms recognised in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status), 3 (right to equality before the law and equal protection of the law), 5 (right to respect of one's dignity and to recognition of legal status and prohibition of all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment), 19 (equality of all peoples) and 28 (duty to consider others without discrimination) of the Charter. The Applicants also claim that the Respondent State has violated Articles 1 (recognition of freedom and equality in dignity and rights), 2 (entitlement to the rights and freedoms, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status), 5 (right not to be subjected to torture or to cruel,

inhuman or degrading treatment or punishment), 6 (right to recognition everywhere as a person before the law) and 7 (right to equality before the law and to equal protection of the law) of the Universal Declaration of Human Rights.

143. In the Response, the Respondent State specifically denies violating Articles 3 and 19 of the Charter and Articles 1, 2, and 6 of the Universal Declaration of Human Rights and they do not respond to the other allegations.

144. Other than claiming that they were denied medical treatment and they overstayed in police custody, the Applicants make general statements in this regard.

145. The Court has reiterated that, "General statements to the effect that this right has been violated are not enough. More substantiation is required".[22] The Court notes that, in the instant case, the Applicants are making general claims regarding the violations of these rights without substantiation.

146. Accordingly, the Court finds that the alleged violations have not been substantiated and they are therefore dismissed.

D. Allegation of violation of Article 1 of the Charter

147. In their Reply to the Respondent State's Response to the Application, the Applicants have alleged that the Respondent State has violated Article 1 of the Charter.

148. The Respondent State has not responded regarding the alleged violation of Article 1 of the Charter.

149. The Court recalls its previous decisions[23] in which it held that "when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated."

150. In the instant case, the Court has held that the Respondent State has violated Article 7(1)(c) of the Charter. On the basis of the foregoing observations, the Court thus finds in conclusion that the violation of the said rights entails violation of Article 1 of the Charter.

VIII. Remedies sought

151. The Applicants claim to have suffered irreparable damage due

22 *Alex Thomas v Tanzania Judgment op cit* para 140.

23 *Ibid* para 135; See also *Norbert Zongo v Burkina Faso Judgment op cit* para 199; *Kennedy Onyachi v Tanzania Judgment op cit* para 159.

to the violation of their human rights. As indicated above in paragraphs 11 and 20 of this judgment, the Applicants have requested the Court to, *inter alia*, order their release from custody and grant them reparations. They have not specified the additional reparations they seek.

152. For its part, as indicated in paragraph 23 above of this Judgment, the Respondent State has, among others, prayed the Court to order that the Applicants continue serving their sentences and deny their request for reparations

153. 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."

154. In this respect, Rule 63 of the Rules provides that "The Court shall rule on the request for reparation submitted in accordance with Rule 34(5) of these Rules, by the same decision establishing the violation of a human and people's rights, or if the circumstances so require, by a separate decision".

155.

156. As regards the Applicant's prayer to be set free, the Court has established that such a measure could be directly ordered by the Court only in exceptional and compelling circumstances.[24] In the instant case, the Applicants have not indicated and provided proof of such circumstances. Consequently, the Court dismisses this prayer.

157. The Court however notes that the aforesaid finding does not preclude the Respondent State from considering such a measure on its own.

158. The Court notes that neither Party 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

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

160. None of the Parties have made a prayer as to costs.

161. Having considered the circumstances of this case, the Court decides that each Party shall bear its own costs.

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

X. Operative part

162. For these reasons:
The Court,
Unanimously,

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

On admissibility:
iii. *Dismisses* the objections on the admissibility of the Application;
iv. *Declares* the Application admissible;

On the merits:
v. *Finds* that the Applicants have not established the alleged violation of Articles 2, 3, 5 ,19 and 28 of the Charter and Articles 1, 2, 5, 6 and 7 of the Universal Declaration of Human Rights
vi. *Finds* that the Respondent State has not violated Article 7 of the Charter as regards: the Applicants' identification; the changing of the Magistrate hearing the case; the alleged failure by the national courts to apply the required standard of proof; the alleged lack of consideration of the Second Applicant's written submissions by the Trial Court and the allegation that the judgments against the Applicants were defective and erroneous; *Consequently* finds that the prayer that the Respondent State has violated Articles 8 and 10 of the Universal Declaration of Human Rights has become moot;
vii. *Finds* that the incompatibility of Section 142 of the Evidence Act with the international standards on the right to a fair trial has not been established;
viii. *Finds* that the allegations relating to the dismissal of the Applicants' Application for Review and the rejection of their Constitutional Petition have not been established;
ix. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter as regards: the failure to provide the Applicants with free legal assistance; and the failure to provide the Applicants with copies of some witness statements and the delay in providing them some witness statements; *Consequently finds* that the Respondent State has violated Article 1 of the Charter;

On remedies
x. *Does not grant* the Applicants' prayer for the Court to directly order their release from prison, without prejudice to the Respondent State applying such a measure *proprio motu*; and

xi. *Allows* the Applicants, in accordance with Rule 63 of its Rules, to file their written submissions on the other forms of reparation within thirty (30) days from the date of notification of this Judgment; and the Respondent State to file its Response within thirty (30) days from the date of receipt of the Applicants' written submissions.

On costs

xii. *Decides* that each Party shall bear their own costs.