Nguza v Tanzania (merits) (2018) 2 AfCLR 287

Application 006/2015, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*

Judgment, 23 March 2018. Done in English and French, the English text being authoritative.

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

The Applicants had been convicted and sentenced for rape and unnatural offences. They brought this Application claiming violations of their rights as a result of their detention and trial. The Court held that the Applicants did not provide evidence of alleged procedural irregularities except for the denial of access to witness' statements and the opportunity to cross-examine witnesses which constituted violations of the African Charter. The Court further held that the failure to test the First Applicant for his alleged impotence violated his rights under the African Charter.

Jurisdiction (conformity of domestic proceedings with Charter, 35, 36)

Admissibility (exhaustion of local remedies, extraordinary remedy, 52; issues not raised in domestic proceedings, 53; submission within reasonable time, 61)

Evidence (burden of proof, 71, 81, 124; court record, 90)

Cruel, inhuman or degrading treatment (incommunicado detention, evidence, 73)

Fair trial (prompt information about charges, 80; defence, access to witness statements, 99, 100; medical tests, 116, 117)

Reparations (release, moot, 141)

I. The Parties

1. The Applicants, Nguza Viking (Babu Seya), hereinafter referred to as the First Applicant and Johnson Nguza (Papi Kocha) hereinafter referred to as the Second Applicant, allege that they are citizens of the Democratic Republic of Congo who lived and worked as musicians in Dar es Salaam, Tanzania. The Second Applicant is the biological son of the First Applicant.

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

2010. The Respondent State became a Party to the International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant") on 11 June 1976.

II. Subject of the Application

A. Facts of the Matter

3. The Applicants allege that they were arrested by police officers on 12 October 2003 and taken to the Magomeni Police Station in the United Republic of Tanzania. The Applicants, Nguza Mbangu and Francis Nguza, who are also the First Applicant's sons and another person (later identified as a teacher), were arraigned before the Resident Magistrate's Court of Kisutu, Dar es Salaam, on 16 October 2003 on a 10-count charge of rape and an 11-count charge of unnatural offence in Criminal Case Number 555 of 2003. Nguza Viking (Babu Seya) was the First accused, Johnson Nguza (Papi Kocha) was the Second accused, Nguza Mbangu was the Third accused, Francis Nguza was the Fourth accused and the teacher was the fifth (5th) accused, in that case. They pleaded not guilty to all the charges. The ten (10) alleged victims were children aged between six (6) and ten (10) years old, all school pupils in the same class at Mashujaa Primary School, Sinza in Kinondoni District. It was alleged that the ten (10) victims were gang-raped and sodomised in turn by five (5) adults, including the Applicants.

4. On 25 June 2004, save for the Fifth accused, the Applicants and the Third and Fourth accused were found guilty of all charges against them and sentenced to life imprisonment and to pay a fine of Tanzania Shillings two (2) million to each of the victims. The Applicants and the Third and Fourth accused then filed an appeal before the High Court of Tanzania, in Criminal Appeal No. 84 of 2004. In its judgment of 27 January 2005, the High Court held that the evidence adduced fits the definition of gang rape and substituted the offence of unnatural offence with that of gang rape and dismissed the appeal.

5. The Applicants and the Third and Fourth accused filed an appeal before the Court of Appeal of Tanzania in Criminal Appeal No. 56 of 2005. The Court of Appeal's judgment delivered on 11 February 2010, quashed the conviction and sentence of the Third and Fourth accused and convicted the First Applicant of two (2) counts of rape and both Applicants of two (2) counts of gang rape and acquitted them on the rest of the charges. The Court of Appeal substituted their life sentences with sentences of thirty (30) years imprisonment.

6. On 9 April 2010, the Applicants filed a Notice of Motion for Review of the decision of the Court of Appeal. This Application for Review,

Criminal Application No. 5 of 2010**,** was dismissed on 13 November 2013.

B. Alleged Violations

7. The Applicants allege that:

"i. They were not promptly informed of the charges brought against them; they were held *incommunicado* for four (4) days, deprived of the opportunity to contact a Counsel or anyone else; they were maltreated by police officers who insulted them; and it was only after they had spent some time in custody that a police officer informed them of the rape charges;

ii. The trial was not fair for various reasons. First, the Court repeatedly dismissed their requests to adduce evidence; the results of their blood and urine tests were not presented in evidence before the Trial Court, even though the alleged victims claimed to have been infected with HIV/AIDS and gonorrhoea; and the First Applicant's prayer to the Court for a test to be conducted to establish his impotence was rejected;

iii. The Court relied on the alleged victims' statements as evidence, whereas the said statements were memory recollections of the room where the rape allegedly took place and the Court did not take into account the fact that the children and their parents had visited the house of the accused persons before the hearing and had studied the premises several times;

iv. The charges brought against them were fabricated in vengeance and that the judgment rendered was not based on credible evidence;

v. Their right to a fair trial was also flouted;

vi. The Respondent State violated all established human rights and international law principles;

vii. Their trial was inequitable and marred by procedural irregularities attributable to the national courts and other State agencies and institutions; and

viii. The trial was unfair at all levels and that they were harassed and their defence was not given due consideration, all resulting in the violation of Articles 1, 2, 3, 5, 7(1)(b), 13 and 18(1) of the Charter."

III. Summary of procedure before the Court

8. The Application was filed on 6 March 2015 and served on the Respondent State by a notice dated 8 April 2015, directing the Respondent State to file the list of representatives within thirty (30) days and to file the Response to the Application within sixty (60) days of receipt of the notice, in accordance with Rules 35(2) (a) and 35(4)(a) of the Rules of Court (hereinafter referred to as "the Rules").

9. By a notice dated 8 April 2015, the Application was transmitted to the Executive Council of the African Union and to State Parties to the Protocol through, the Chairperson of the African Union Commission in accordance with Rule 35(3) of the Rules.

10. Following the Applicants' request for legal aid, the Court directed the Registrar to seek the assistance of the Pan African Lawyers' Union (PALU) in this regard; PALU accepted to represent the Applicants and the Parties were duly notified by a notice dated 30 June 2015.

11. The Respondent State submitted the list of representatives on 26 May 2015. It submitted its Response to the Application on 10 August 2015, out of time. The Court decided, in the interests of justice, to accept the Response and it was served on the Applicants by a notice dated 30 November 2015.

12. By a letter of 5 January 2016, the Applicants requested the Court to grant them an extension of time to file their Reply to the Respondent State's Response; by a letter dated 11 March 2016, the Registry notified the Applicants of the Court's decision to grant them thirty (30) days extension of time in that regard.

13. By an email dated 15 April 2016, PALU filed the Applicants' Reply to the Response and this was served on the Respondent State by a notice dated 19 April 2016.

14. By a notice dated 14 June 2016, the Registry informed the Parties that the written procedure was closed with effect from 4 June 2016 and notified the Parties of the possibility of filing additional evidence in accordance with Rule 50 of the Rules. Neither of the Parties sought leave to file additional evidence on the basis of this Rule.

15. On 11 July 2016, the Respondent State sought leave to file a Rejoinder to the Applicants' Reply and since pleadings were already closed, the Court did not deem it necessary to grant this request.

16. By a letter dated 16 March 2018 and received at the Registry on the same date, the Applicants' Counsel informed the Court that the Applicants have been released from prison by way of a Presidential pardon, on the occasion of the celebration marking the 56th Anniversary of the Respondent State's Independence Day. This letter was transmitted to the Respondent State on 19 March 2018, for observations, if any.

17. By a letter dated 20 March 2018, the Respondent State informed the Court that the Applicants had been released by way of Presidential Pardon as evidenced in Constitutional (Special Remission of Whole Punishment) Order, 2017 containing the instrument of remission of punishment of sixty three (63) prisoners, including the Applicants. The Respondent argued that the Parties should have been informed that there was not going to be a public hearing on the matter, before they were notified of the delivery of judgment. The Respondent State also prayed that in view of the Applicants' release from prison, the Application should either be withdrawn before the delivery of the Judgment or the delivery of Judgment be postponed. The Respondent State makes this prayer on the basis that the Application has been overtaken by events, the Applicants are satisfied with their release and are appreciative of the Government's decision in this regard and they ought to be personally heard on their status and wishes regarding the Application. This letter was transmitted to the Applicant on 21 March 2018 for their observations, if any.

18. By a letter dated 21 March 2018, the Registrar informed the Respondent State that the Court draws their attention to the provisions of Rule 27(1) of the Rules regarding the written and oral proceedings, the provisions of Rule 58 regarding discontinuance of Applications and that the Applicants' prayers raised matters beyond their release on which the Court has to pronounce itself.

19. By a letter dated 22 March 2018, the Applicants' Counsel sent their observations on the Respondent's letter of 20 March 2018 where they stated that the Rules envisage that it is not a requirement that the Court hold public hearings for all cases. They also stated that they have not received instructions from the Applicants to discontinue the case and called for an expeditious delivery of the judgment.

20. By correspondence dated 22 March 2018, the Registrar informed both Parties that the Court has confirmed the delivery of judgment for 23 March 2018.

IV. Prayers of the Parties

21. The prayers of the Applicant, as submitted in the Application, are as follows:

> "44. We request the Court to facilitate us with free legal representation or legal assistance under rule 31 and Article 10(2) of the Protocol;
>
> 45. We the Applicants pray the Court under rule 45(1) and (2) of the rules of Court on (Measures for taking evidence) with a purpose of obtaining from an expert which in our opinion may provide clarification of the fact of the case

and likely to assist the Court in carrying out its task.

a. Request of the persons, witness or expert likely to assist:

i. Parent of child/children of tender age (6 – 8 years)

ii. Teacher of school children of tender age (6 – 8 years)

iii. Paediatric expert

46. That, the Applicants are hereby reiterating the reliefs that they seek from the honourable court.

i. A declaration that the respondent state violated their rights as guaranteed under Article 1, Article 2, Article 3, Article 5, Article 7(1)(b), Article 13 and Article 18(1) of the African Charter on Human and Peoples' Rights;

ii. Consequently, an order compelling the respondent state to release the Applicants from custody;

iii. That, the Applicants also seek an order for reparations pursuant to Article 27(1) of the protocol and rule 34(5) of the rules of court;

iv. Any other order or remedy that this honourable court may deem fit to grant."

22. In the Reply to the Respondent State's Response, the Applicants reiterate their prayers seeking the following orders from the Court:

"46.a. A Declaration that the Respondent State has violated the Applicants rights under Articles 2, 3, 5, 7(1)(b), 13 and18(1) of the African Charter

b. To facilitate the production of the following witnesses under this Honourable Court's Rules 45(1) and (2):

i. Parents of child/children of tender age of 6-8 years.

ii. Teacher of school children of tender age 6-8 years

iii. Paediatric expert

c. An order compelling the Respondent State to release the Applicants from custody.

d. An order for reparations

e. Any other orders or remedies that this Honourable Court may deem fit."

23. In the Response, 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 has not met the admissibility

requirements provided under Rule 40(5) of the Rules of the Rules of Court.

3. That the Application has not met the admissibility requirements provided under Rule 40(6) of the Rules of the Rules of Court.

4. That the Application be declared inadmissible and duly dismissed."

24. With regard to the merits of the Application, the Respondent State prays that the Court grants the following orders:

"1. That the Court rejects the Applicants' request to facilitate the production of … witnesses

2. That the redress sought in the Application is rejected."

25. The Respondent State also seeks orders that it has not violated Articles 1, 2, 3, 5, 7(1)(b), 13 and 18(1) of the Charter.

26. The Respondent further seeks orders:

"10. That the Applicants continue to serve their sentences accordingly.

11. That the Applicants be denied reparations

12. That this Application be dismissed in its entirety for lack of merit."

V. Applicants' request for calling of witnesses by this Court

27. The Applicants requested that the Court facilitates the production of children of tender age and their parents and teacher as well as a paediatric expert, as witnesses.

28. The Respondent State maintains that this request should be rejected.

29. In view of the fact that the Court considered that the written pleadings were sufficient to consider the matter, it did not deem it necessary to grant the Applicants' request.

VI. Jurisdiction

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

A. Objection on material jurisdiction

31. In the Response to the Application, the Respondent State submits that the Applicants are asking the Court to sit as a court of first

instance for some of their allegations, and to adjudicate as a supreme court of appeal on matters of law and evidence that have been duly determined by the Court of Appeal of Tanzania, the highest Court in the Respondent State.

32. The Respondent State also submits that the Court is being asked to reverse a decision of the Court of Appeal of Tanzania, which is, effectively, an appeal against the decisions of the Court of Appeal in Criminal Appeal No. 56 of 2005, and Review Application No. 5 of 2010.

33. The Respondent State makes reference to the Court's Decision in *Ernest Francis Mtingwi v Republic of Malawi*, in which it 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 or similar Courts".[1]

34. The Applicants rebut this allegation and rely on the Court's decisions in *Alex Thomas v United Republic of Tanzania*[2] and *Peter Joseph Chacha v United Republic of Tanzania,*[3] in both of which the Court held that as long as the rights allegedly violated are protected by the Charter or any human rights instrument ratified by the Respondent State, the Court shall have jurisdiction.

35. This Court reiterates its position as affirmed in *Ernest Mtingwi v Republic of Malawi*[4] that it is not an appeal 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 the Respondent State is a Party.[5] In the instant case, this Court has jurisdiction to examine whether the domestic courts' proceedings relating to the Applicant's criminal charges that form the basis of their Application before this Court were conducted in accordance with

1 Application No. 001/2013.Decision of 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi.* para 14.

2 Application No.005/2013.Judgment of 20/11/2015, Alex *Thomas v United Republic of Tanzania.* para 130.

3 Application No. 003/2012.Ruling of 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania.* para 114.

4 Application No. 001/2013. Decision of 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi.* para 14.

5 Application No. 005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania*, para 130 and Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania.* para 29.

the international standards set out in the Charter and the Covenant. Consequently, the Court rejects the Respondent State's objection that the Court is acting in the instant matter as a court of first instance and as an appellate court and finds that it has material jurisdiction to hear the matter.

36. Furthermore, regarding the allegation that the Application calls for the Court to sit as a court of first instance, the Court notes that since the Application alleges violations of provisions of some of the international instruments to which the Respondent State is a Party, it has material jurisdiction. This is in accordance with Article 3(1) of the Protocol, which provides that the jurisdiction of the Court "shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

37. Consequently, the Court rejects the Respondent State's objection that the Court is acting in the instant matter as a court of first instance and as an appellate court and finds that it has material jurisdiction to hear the matter.

B. Other aspects of jurisdiction

38. The Court notes that its personal, temporal and territorial *jurisdiction has not been contested by the Respondent State, and nothing* in the pleadings **i**ndicate that the Court does not have jurisdiction. The Court thus holds that:

i. it has jurisdiction *ratione personae* given that the Respondent State is a Party to the Protocol and has deposited the Declaration required under Article 34 (6) thereof, which enabled the Applicant**s** to access the Court in terms of Article 5(3) of the Protocol;

ii. it has jurisdiction *ratione temporis* on the basis that the alleged violations are continuous in nature since the Applicants remain convicted on the basis of what they consider an unfair process;

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

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

VII. Admissibility of the Application

40. In terms of Article 6(2) of the Protocol, "the Court shall rule on

the admissibility of cases taking into account the provisions of Article 56 of the Charter."

41. 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."

42. 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 in unduly prolonged;
> 6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> 7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

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

A. Conditions of admissibility in contention between the Parties

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

44. 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.

45. The Respondent State maintains that local remedies were not

exhausted because the following allegations are being raised by the Applicants before this Court for the first time:

> "i. That, after being taken to Urafiki Police Station, the 2nd Appellant, together with his two brothers, were harassed and later transferred to Magomeni Police Station where they found their father who is the 1st Applicant, locked up in a cell which had poor sanitary conditions for a human being.
>
> ii. That when the Applicants were arrested, they were not informed of what charges they were being arrested for and they were put under restraint for four days *incommunicado* and denied a right to call a lawyer or to be visited by anybody.
>
> iii. That whilst still in police custody, they were mistreated by police officers and that at one time they were called by a group of police officers who insulted them and read to them a charge of rape and later taken back to the police cell."

46. The Respondent State further submits that the Applicants, who were assisted by Counsel, could have raised these allegations before the Magistrate's Court pursuant, to Section 9(1) of the Basic Rights and Duties Enforcement Act (Cap.3) and they could also have instituted a constitutional petition before the High Court of Tanzania for reparation of the alleged violations.

47. Lastly, the Respondent State reiterates that the principle of exhaustion of local remedies is crucial in preventing Applicants from inundating the Court with petitions which could have been resolved at the national level.

48. In their Reply to the Respondent State's Response, the Applicants aver that local remedies were exhausted and that any other conceivable measure can only be an "extraordinary measure". They contend that the Court of Appeal being the highest Court of the land, they were under no obligation to resort to extraordinary measures.

49. The Applicants submit that the Court has jurisdiction to hear the instant Application because all local remedies have been exhausted.

50. The Applicants further submit that it would have been unreasonable to require them to resort to extraordinary measures by filing a new Application on their right to a fair trial before the High Court, which is a lower Court in relation to the Court of Appeal.

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

52. 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.[6]

53. With regard to the issues that the Applicants did not raise during domestic procedures but chose to bring before the Court for the first time, the Court, in accordance with the Judgment rendered in *Alex Thomas v Tanzania***,** affirms that these allegations happened in the course of the domestic judicial proceedings that led to the Applicants' conviction and sentence to thirty (30) years' imprisonment. They all form part of the "bundle of rights and guarantees" in relation to the right to a fair trial that were related to or were the basis of their appeals. The domestic judicial authorities thus had ample opportunity to address these allegations even without the Applicants having raised them explicitly. It would therefore be unreasonable to require the Applicants to file a new application before the domestic courts to seek redress for these claims.[7]

54. Accordingly, the Court finds that, the Applicants exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 40(5) of the Rules. The Court therefore overrules this preliminary objection to the admissibility of the Application.

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

55. The Respondent State contends that the Application does not meet the admissibility conditions stipulated under Articles 56(6) of the Charter and Rules 40(6) of the Rules because it was not filed within a reasonable time after all local remedies were exhausted.

56. The Respondent State contends that though the Court of Appeal rendered its decision on the Applicants' appeal on 11 February 2010, the relevant period in this regard is between 29 March 2010 when the Respondent State deposited the Declaration required under Article 34(6) of the Protocol as read together with Article 5(3) thereof and 6 March, 2015 when the Applicants filed their Application before the

6 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania,* paras 60 to 62; Application No.007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania.* paras 66 to 70; Application No.011/2015. Judgment of 28/9/2017, *Christopher Jonas v United Republic of Tanzania.* para 44.

7 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania*. paras 60 to 65.

Court, that is, four (4) years and eleven (11) months after Tanzania deposited the afore-mentioned Declaration.

57. The Applicants in their Reply to the Respondent State's Response contest the Respondent State's interpretation of what constitutes reasonable time under Rule 40(6) of the Rules. They argue that, given their circumstances, their Application was filed within a reasonable period after the exhaustion of local remedies, adding in this regard that, at all material times they were both lay, indigent, incarcerated persons without the benefit of legal advice. They do not dispute that the Respondent State's Court of Appeal rendered a Judgment on 11 February 2010 and that their Application before this Court is dated 11 February 2015. However, the Applicants submit that their circumstances warrant the Court to admit their Application as there are sufficient reasons to explain why they filed their Application at the time they did.

58. In determining whether the Application was filed within a reasonable time, the Court is of the view that although the process of exhaustion of ordinary remedies stops with the appeal at the Court of Appeal whose decision was rendered on 11 February 2010, the Applicants should not be penalised for choosing to pursue a review of this decision. The Applicants' Application for Review having been dismissed by the Court of Appeal on 13 November 2013, the assessment of reasonableness will be based on the time between this date and 6 March 2015 when they filed their Application.[8]

59. The Court notes that the Applicants filed the Application one (1) year, three (3) months and twenty-one (21) days after the Court of Appeal dismissed their Application for Review.

60. In the Matter of *Beneficiaries of late Norbert Zongo, and Others v. Burkina Faso*, the Court established the principle that "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."[9]

61. Considering the Applicants' situation, that they are lay, indigent and incarcerated persons, without counsel or legal aid, and as the records show, the time expended in providing them access to Court records, their attempt to use extraordinary remedies through the

8 Application No. 003/2015. Judgment of 28/9/2017, *Kennedy Owino Onyachi and Another v United Republic of Tanzania.* para 65.

9 Application No. 013/2011. Judgment of 28/3/2014, *Beneficiaries of late Norbert Zongo and Others v Burkina Faso.* para 92. See also: Application No.005/2013. Judgment of 20/11/2015, Alex *Thomas v United Republic of Tanzania*. para 73; Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania*. para 91; Application No.011/2015. Judgment of 28/9/2017, *Christopher Jonas v United Republic of Tanzania.* para 52.

Application for Review of the Court of Appeal's Decision, the Court finds that these constitute sufficient justification as to why the Applicants filed the Application one (1) year, three (3) months and twenty-one (21) days after the Court of Appeal's decision on the request for review.

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

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

63. The conditions regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence, and the principle that an Application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules) are not in contention between the Parties.

64. For its part, the Court also notes that nothing on the record which the Parties have submitted suggests that these conditions have not been met in the instant case. The Court therefore holds that the requirements under those provisions are fulfilled.

65. 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.

VIII. Merits

A. Alleged violations of the rights to the respect of the dignity and integrity of the person under Article 5 of the Charter

66. The Applicants contend that they were ill-treated by police officers who, at one time, called them and insulted them and then took them back to the police. They also allege that they were held there *incommunicado* for four (4) days.

67. As indicated above, the Applicants further contend that, after being taken to Urafiki Police Station, the Second Applicant, together with his two brothers, the Third and Fourth accused in Criminal

Case No. 555 of 2003, were molested and subsequently transferred to Magomeni Police Station where they found their father, the First Applicant, locked up in a cell which had unbearable sanitary conditions. The Applicants maintain that this conduct by the Respondent State is a violation of Article 5 of the Charter.

68. The Respondent State avers that all Police Stations in its territory have basic facilities and where sanitation is lacking, the matter is addressed under Order 353(14) of the Police General Orders. The Respondent State maintains that the other allegations were never raised before the domestic courts.

69. Article 5 of the Charter provides as follows:

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

70. In the circumstances of this case, before the Court determines whether the Respondent State's conduct is a violation of Article 5 of the Charter as alleged by the Applicant**s**, it must first establish who should discharge the burden of proof in this regard.

71. In its previous judgment in the Matter of *Kennedy Owino Onyachi and Another v United Republic of Tanzania*, the Court has held as follows that: "it is a fundamental rule of law that anyone who alleges a fact shall provide evidence to prove it. However, when it comes to violations of human rights, this rule cannot be rigidly applied. By their nature, some human rights violations relating to cases of *incommunicado* detention … are shrouded with secrecy and are usually committed outside the shadow of law and public sight. The victims of human rights may thus be practically unable to prove their allegations as the means to verify their allegation are likely to be controlled by the State".

72. In the same above-mentioned case, the Court, relying on the jurisprudence of the International Court of Justice[10] also held that "In such circumstances, 'neither party is alone in bearing the burden of proof and the determination of the burden of proof depends on the type of facts which it is necessary to establish for the purposes of the decision of the case'. It is therefore for this Court to evaluate all the circumstances of the case with a view to establishing the facts**"**.

73. In the instant case, the Applicants simply assert that they were ill-treated and held in a police cell *incommunicado* for four (4) days. In addition, they state that the First Applicant was held in a cell with

10 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo),* International Court of Justice, Judgment of 30 November 2010, para 56.

unsanitary conditions. The Applicants have not submitted any *prima facie* evidence to support their allegations which could enable the Court to shift the burden of proof to the Respondent State.

74. In view of the foregoing, the Court finds that these allegations lack merit and the Court therefore dismisses them.

B. Alleged violations of the right to a fair trial under Article 7(1) of the Charter

75. The Applicants have raised several allegations that fall under the aegis of Article 7(1) of the Charter which reads as follows:

> "Every individual shall have the right to have his cause heard. This comprises:
>
> 1. 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;
> 2. The right to be presumed innocent until proved guilty by a competent court or tribunal;
> 3. The right to defence, including the right to be defended by counsel of his choice;
> 4. The right to be tried within a reasonable time by an impartial court or tribunal."

i. Allegations that the Applicants were not promptly informed of the charges against them and they were denied the right to call a Counsel

76. In their Reply to the Respondent State's Response to the Application, the Applicants contend that they were not informed of the charges brought against them, at the time of their arrest and they were denied their right to call a Counsel or to be visited by anybody.

77. The Respondent State for its part contends that the foregoing allegations were never raised before the local courts,and are therefore an afterthought and that they are baseless and should consequently be dismissed.

78. The requirements for an accused person to be informed of the charges they are facing and to be allowed to call a Counsel is to enable them to prepare an effective defence. In accordance with Article 14(3)(a) of the Covenant**,** this is to be done promptly. Article 14(3)(a) of the Covenant provides:

> "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the

nature and cause of the charge against him."

79. The Court notes that strictly speaking, the Respondent State has not challenged the veracity of the Applicants' allegations in this regard.

80. The record before this Court shows that the Applicants were informed of the charges against them on 16 October 2003 when they were taken before the Resident's Magistrate's Court of Kisutu, that is, four (4) days after they were arrested. In the view of this Court, in the specific circumstances of this case where there were allegations of the rape of children of tender age and the possible need for further investigations, the Applicants were informed promptly of the charges against them and therefore there was no violation of Article 7(1)(c) of the Charter in this regard.

81. With regard to the Applicants' denial of the right to call a Counsel, the judgment of the Court of Appeal shows that the Applicants were represented by Advocate Mabere Marando during their appeal at the Court of Appeal and the Ruling on their application for review shows that this same Counsel represented them in those proceedings. There is no record of proceedings at the Resident's Magistrate's Court to enable the Court verify whether the Applicants had access to Counsel when the charges were read to them and in the course of the trial. In these circumstances, the Court finds that this allegation has therefore not been proven.

82. From the foregoing, the Court concludes that the allegations under consideration are dismissed.

ii. Allegation that the identification of the Applicants was not done properly

83. In their Reply to the Respondent State's Response to the Application, the Applicants elaborated on the claim regarding the methods used in identifying them.

84. The Applicants contend that during the hearing of Criminal Case No. 555 of 2003, the Trial Magistrate simply asked the witnesses to point to the accused persons in the dock after changing their sitting positions.

85. The Applicants allege that the informal manner in which they were identified violated their rights under Article 7(1) of the Charter and that given the gravity of the offences and punishment that they were facing, a formal identification parade ought to have been conducted following the appropriate procedures, with proper checks as required to satisfy the requirements of a fair trial. The Applicants aver that a formal identification parade was crucial to ascertain whether the victims, who

were all under the age of eight (8) at the time, knew the perpetrators of the alleged offences.

86. The Applicants maintain that, at the time of their arrest, the police officers even went with some of the alleged victims to the scene of the crime, and that it is on this basis that the alleged victims saw the Applicants while they were being arrested and also while in remand. They contend further that, although the alleged victims could not identify Papi Kocha, the Second Applicant and instead, they had identified both Nguza Mbangu and Francis Nguza as being Papi Kocha, the Trial Magistrate decided that an identification parade was not necessary.

87. The Respondent State did not respond to these allegations that the Applicants raised in their Reply to the Respondent State's Response.

88. The issue that this Court needs to determine is whether the manner in which the Applicants were identified is in accordance with Article 7(1)(c) of the Charter.

89. The Court is of the view that the decision on evidence to be adduced regarding the form of identification of accused persons is to be left to national courts since they determine the probative value of such evidence and they enjoy a wide discretion in this regard. This Court generally would therefore defer to the national Court's determination in this regard, so long as doing so, will not result in a miscarriage of justice.

90. In the instant case, this Court notes from the record that in the course of domestic proceedings, the Magistrate's Court considered the testimony of witnesses regarding the identification of the Applicants and being satisfied on this, proceeded with the trial. The Court finds that, on the whole, there is nothing on the record to indicate that this specific aspect of proceedings occasioned a miscarriage of justice. The Court consequently holds that there is no violation of Article 7(1)(c) of the Charter.

iii. Allegation that the Applicants were not given copies of Prosecution Witness statements and the material witnesses were not called for cross-examination.

91. The Applicants allege that their request for copies of witness statements during the trial was denied by the Trial Court and this, in their view, violated their right to a fair trial. They further allege that this violated their right to a fair trial because the Prosecution failed to disclose relevant evidence which could have buttressed their defence.

92. The Applicants contend that there was a deliberate failure on the part of the Trial Magistrate to discharge her duty to ensure that material witnesses are called. They state that the persons who ought to

have been called as material witnesses are Selina John, who claimed to have first informed Candy David Mwaivaji (Prosecution Witness 1) about Gift Kapapwa (Prosecution Witness 2) allegedly taking money from the First Applicant; Cheupe Dawa, who was accused of abducting the children and taking them to the First Applicant; Zizel, the First Applicant's grandson and Mangi, who was the owner of the container shop located near the First Applicant's house.

93. According to the Applicants, the effect of this omission was the abuse of the principle of equality of arms. The Applicants maintain that the failure to call the afore-mentioned four (4) persons as witnesses meant that though the Prosecution relied on the information they provided, the defence was unable to cross-examine them because they were never called to testify.

94. The Applicants submit that "equality of arms" is a principle of common law which provides that there must be a fair balance between the Parties. They argue that it is a cardinal tenet of the right to a fair trial and an intrinsic aspect of the right to adversarial procedures. They maintain that each Party must be afforded a reasonable opportunity to present its case especially its evidence, under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent.

95. The Applicants further contend that this principle imposes an obligation on the Prosecution to disclose any material in its possession which may assist the accused in defending himself.

96. The Respondent State submits that, the Applicants must substantiate the allegation that the afore mentioned four (4) persons were not called as witnesses to enable the Applicants cross-examine them. The Respondent State avers that only the victims, and no other persons were better placed to testify to the facts, particularly because the Prosecution has the onus to establish that the victims were familiar with the crime scene.

97. The Court notes that the Respondent State has not challenged the allegation that the Applicants were not provided with the witness statements and that the four witnesses above were not called and were therefore not cross-examined by the Applicants.

98. The Court recalls that in accordance with Article 7(1)(c) of the Charter everyone has a right to defence, and that according to Article 14(3)(b) of the Covenant, in the determination of any criminal charge against him, "everyone shall be entitled … (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing". The Court also notes that Article 14(3)(e) of the Covenant provides that "in the determination of any criminal charge against him, everyone shall be entitled… to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as

witnesses against him".

99. The Court is of the view that in the instant case, the Applicants should have been provided copies of the Prosecution Witness' statements in order to facilitate them to prepare their defence. By this not having been done, the Applicants were placed at a disadvantage vis-à-vis the Prosecution, contrary to the principle of equality of arms. Similarly, by not calling the four (4) afore-mentioned persons to testify, the Applicants were denied the opportunity to cross-examine them and this also placed them at a disadvantage.

100. Consequently, the Court holds that the Applicants' denial of access to the Prosecution's witness's statements and denial of an opportunity for the Applicants to cross-examine persons who would have been material witnesses, was a violation Article 7(1)(c) of the Charter by the Respondent State.

iv. Allegation that the Applicants' alibi defence was unduly rejected

101. In their Reply to the Respondent State's Response to Application, the Applicants contend that the Trial Court rejected their alibi defence and that, by so doing, it violated their rights under Article 7(1)(b) of the Charter. They further submit that the house in which the alleged crimes they were charged with took place was always occupied by members of the *Achigo* Band who did music rehearsals there, making it impossible for the alleged crimes to be committed.

102. The Second Applicant further contends that he was out of Dar-es-Salaam promoting his album at the time the crimes were alleged to have been committed and he could not therefore have been at the alleged crime scene.

103. For its part, the Respondent State submits that in examining the Applicants' guilty verdict, the Court of Appeal reassessed all the evidence, the defence arguments and the *alibi* on each count and made its own findings thereon.

104. In its previous Judgment in the Matter of *Mohamed Abubakari v Tanzania*, this Court held that:

> "Where an alibi is established with certitude, it can be decisive on the determination of the guilt of the accused."[11]

105. In the instant case however, the records of the domestic judicial proceedings show that the Applicants' evidence of an alibi was considered and rejected by the Respondent State's Trial and Appellate

11 Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania*. para. 191.

Courts. The record of proceedings reveals that the High Court and the Court of Appeal specifically addressed the alibi defence and rejected it after weighing it against the testimony of the witnesses, finding that the witnesses' testimony was sufficiently reliable to set aside the Applicants' alibi defence. The Court finds that, on the whole, there is nothing on the record to indicate that the setting aside of the Applicants' alibi defence occasioned a miscarriage of justice.

106. Consequently, the Court holds that the Respondent State has not violated the Applicants' right to defence as enshrined in Article 7(1)(c) of the Charter and thus dismisses the allegation.

v. Allegation that the Applicants' urine and blood tests were not tendered and the First Applicant's request for an impotence test was unduly rejected.

107. In the Reply to the Respondent State's Response to the Application, the Applicants contend that they were taken to hospital on 14 October 2003 where their urine and blood samples were taken for testing. They further contend that the results of the tests were not tendered in evidence, despite the fact that the Second Applicant raised the issue during the trial of Criminal Case No. 555 of 2003.They maintain that they were convicted by the Trial Magistrate, who did not consider or attach due weight to all the available evidence.

108. The Applicants also state that on 14 October 2003, the First Applicant requested to be taken to a doctor for a test to prove his impotence, but his request was rejected whereas the Court ought to have facilitated this test. They maintain that the First Applicant repeated this request in the course of the trial but it was also rejected by the Court. They argue that the Judgment of the Trial Court shifted the burden of proof to them contrary to the well-established principle that the prosecution bears the burden of proof. The Applicants contend that the Respondent State's interpretation of Section 114(1) of the Law of Evidence Act (Cap 6 RE 2002) is inconsistent with the provisions of Section 3(2)(a) of the same Act.[12]

109. The Respondent State, for its part, argues that the foregoing defence was not raised by the Applicants when they filed an Appeal before the High Court in Criminal Appeal No. 84 of 2004; and less

12 Section 3(2)(a) of the Law of Evidence Act provides that in criminal matters, the prosecution must prove the case beyond reasonable doubt; Section 114(1) thereof provides that the accused bears the burden of proof where he or she claims that there are circumstances bringing the case under an exception to the operation of the law creating the offence and this burden can be discharged when there is evidence from the prosecution in this regard.

so, in their Appeal at the Court of Appeal in Criminal Appeal No. 56 of 2005. It notes that the Trial Court found that none of the victims tested positive for HIV, VDRL or HVS, according to the deposition of the doctor (Prosecution Witness 20) who examined the victims, therefore the blood and urine tests results became irrelevant.

110. The Respondent State contends further that, neither the Trial Court, the High Court, nor to a lesser extent, the Court of Appeal of Tanzania, based their guilty verdicts against the Applicants on the results of the blood and urine tests.

111. The Respondent State also affirms that the issue as to whose responsibility it was to establish the First Applicant's sexual impotence was definitively settled by the Court of Appeal which held that it was up to the Applicant to adduce evidence to prove his lack of virility.

112. The Respondent State contends that the First Applicant raised the issue of his impotence and inability to have an erection only when he was being cross-examined by the Prosecution and that the allegations were therefore an afterthought on the Applicants' part.

113. The Respondent State further states that the Court of Appeal determined the matter taking into account the available evidence, namely, that the victims testified that they were raped and their medical reports corroborated their testimony.

114. The Applicants allege here the violation of Articles 2 and 3 of the Charter which protects the right not to be discriminated against and equality before and equal protection of the law, respectively. The Court will however consider this allegation under Article 7(1)(c) of the Charter, as it actually relates to the right to defence.

115. The Court notes that all material evidence impacting on an accused person's defence should be considered and reasons for its exclusion provided. This is because their liberty is at stake.

116. The Court notes that the Applicants' blood and urine test results, which in the Applicants**'** view, would have bolstered their defence, were not tendered in evidence at the Trial Court therefore denying them the opportunity to tender material evidence in their defence**.** The Court also however notes that in the circumstances of the case, neither the High Court nor the Court of Appeal based their guilty verdicts on the results of the blood and urine tests. Therefore, the Applicants' right to defence was not violated in this respect.

117. On the other hand, as regards the impotence test, the Court is of the view that, once the First Applicant raised the issue, the Respondent State should have facilitated the test to be done, since the outcome thereof would determine whether the First Applicant could have committed the crime. Consequently, the Court holds that, to the extent that the Trial Court rejected the First Applicant's prayer to be tested on his impotence, the Respondent State has violated his right provided in

Article 7(1)(c) of the Charter.

vi. Allegation that the trial judge was biased and that some of the Applicants' submissions and evidence were not duly considered and taken into account

118. In the Reply to the Respondent State's Response, the Applicants contend that the Trial Magistrate was biased and did not accord their evidence the weight it deserved. They maintain that although some of the issues were treated by the Court of Appeal, other grounds of appeal were not addressed.

119. The Applicants further contend that the right to a fair trial encompasses the obligation for a court of law to render reasoned judgments and that, in the instant case, the Trial Court's judgment revealed prejudice and contained unjustified remarks about the defence witnesses, suggesting that the Trial Magistrate was biased and had formed her own opinion about the case.

120. For its part, the Respondent State reiterates that the Court of Appeal remedied the alleged infringements when it assessed each of the twenty-one (21) counts on which the Applicants were found guilty of by the Trial Court and as affirmed by the High Court. The Respondent State maintains that after the examination of each count, the Court of Appeal found the Applicants guilty of only the four (4) counts in respect of which they were sentenced. These are, two (2) counts of the rape of two (2) different victims against the First Applicant and two (2) counts each of gang-rape of two (2) victims against both Applicants and that the examination of the arguments and evidence adduced by the defence was an integral part of this assessment.

121. The Court recalls again that at the Trial Court, there were five accused persons, including the Applicants, facing twenty-one (21) counts, ten (10) of rape and eleven (11) of unnatural offence. The Fifth accused, the teacher, was acquitted by the Trial Court while the rest of the accused persons were convicted and sentenced to life imprisonment. The High Court affirmed the Trial Court's conviction of the First, Second, Third and Fourth accused on the ten (10)-count charge of rape but substituted the convictions on eleven (11) counts of unnatural offence with that of gang-rape.

122. The record before this Court shows that the Court of Appeal examined each count and in the end acquitted the Third and Fourth accused, reducing the number of counts that were proven against the Applicants to four (4) as against the original twenty-one (21).

123. In a previous case, this Court has stated as follows:

> "General statements to the effect that this right has been violated are not

enough. More substantiation is required".[13]

124. The Court notes however that, in the instant case, the Applicants have not provided sufficient evidence as to the alleged bias and to the possible implications of the alleged violations on the Trial Court's judgment.

125. Accordingly, the Court finds that the alleged violation has not been proven and therefore dismisses it.

C. Allegations of violation of the right to participate in the government of one's country under Article 13 of the Charter and the right to protection of the family under Article 18(1) of the Charter

126. In their Reply to the Respondent State's Response, the Applicants submit in general terms that the Respondent State violated their rights under Articles 13 and 18(1) of the Charter.

127. The Respondent State did not respond to this allegation.

128. Article 13 of the Charter provides that:

> "1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
>
> 2. Every citizen shall have the right of equal access to the public service of his country.
>
> 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

129. Article 18(1) of the Charter provides as follows:

> "The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."

130. On those points, the Court notes that the Applicants limited themselves to stating that their rights under Articles 13 and 18(1) have been violated by the Respondent State. They have not specified how and in what circumstances the alleged violations occurred.

131. As indicated above, this Court has stated in its previous judgments that, "General statements to the effect that the right has been violated are not enough" and that "More substantiation is required".[14]

132. In view of the aforesaid, the Court finds that the allegations

13 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v. United Republic of Tanzania*. para. 140.

14 As above.

of violation of Articles 13 and 18(1) of the Charter have not been established and, accordingly, dismisses those allegations.

D. Allegation that the Respondent State violated Article 1 of the Charter

133. In their Reply, the Applicants lastly state that the Respondent State has fallen short in its obligations by failing to give effect to the provisions of Article 1 of the Charter.

134. The Respondent State has not responded to this allegation.

135. The Court notes that in instances where an allegation of violation of Article 1 of the Charter has been raised, the Court has 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".[15]

136. In the instant case, the Court has held that the Respondent State has violated Article 7(1)(c) of the Charter with respect to some of the Applicants' allegations (supra paragraphs 100 and 117). On the basis of the foregoing observations, the Court thus finds in conclusion that, violation of the said rights entails violation of Article 1 of the Charter.

IX. Remedies sought

137. As indicated above (paragraphs 21 and 22), the Applicants have requested the Court to, *inter alia*, issue an order compelling the Respondent State to release them from prison and grant them reparations pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules.

138. As indicated above (paragraphs 23 to 26), the Respondent State has prayed the Court to order that the Applicants continue serving their sentences and deny the Applicant's request for reparations.

139. 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".

140. In this respect, Rule 63 of the Rules provides that "The Court shall rule on the request for reparation submitted in accordance with

15 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania*. para 135; Application No. 013/2011. Judgment of 28/3/2014, *Beneficiaries of late Norbert Zongo and Others v Burkina Faso.* para 199; Application No. 003/2015. Judgment of 28/9/2017, *Kennedy Owino Onyachi and Another v United Republic of Tanzania.* para 159.

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".

141. With respect to the Applicants' request to be released from prison, the Court notes that this prayer is moot, considering that, according to both Parties, the Applicants have been released by way of a Presidential Pardon.[16]

142. Concerning the other forms of reparation, the Court notes that none of the Parties made detailed submissions. It will therefore make a ruling on this question in another Judgment after having heard the Parties.

X. Costs

143. The Applicants prayed the Court to order the Respondent State to pay costs.

144. The Respondent State has not made any prayer as to costs.

145. 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".

146. Having considered the circumstances of this matter, the Court decides to deal with the question of costs when considering the other forms of reparation.

XI. Operative part

147. 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 Respondent State has not violated Article 5 of the Charter;

16 *Supra* paras 16 and 17.

vi. *Finds* that the Respondent State has not violated Article 7(1)(c) of the Charter as regards: the failure to promptly inform the Applicants of the charges against them and denying them an opportunity to call their Counsel; the manner of the Applicants' identification; the rejection of the Applicant's *alibi* defence; the failure to admit the reports of the Applicants' urine and blood tests as evidence and the alleged partiality of national courts;

vii. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter as regards: the failure to provide the Applicants copies of witness statements and to call material witnesses; the failure to facilitate the First Applicant to conduct a test as to his impotence; *consequently* finds that the Respondent State has violated Article 1 of the Charter;

viii. *Finds* that the allegations of violation of Articles 13 and 18 (1) of the Charter have not been established;

ix. *Holds* that the Applicants' prayer to be released from prison has become moot;

x. *Orders* the Respondent State to take all necessary measures to restore the Applicants' rights and inform the Court, within six (6) months from the date of this Judgment of the measures taken.

xi. *Defers* its ruling on the Applicants' prayer on the other forms of reparation, as well as its ruling on Costs; and

xii. *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.