Onyachi and Njoka v Tanzania (merits) (2017) 2 AfCLR 65

Application 003/2015, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania*

Judgment, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA and MATUSSE

Two Kenyan men were tried, convicted and sentenced in Tanzania to 30 years imprisonment for armed robbery after being handed over to Tanzania by Kenyan authorities. The two men complained of human rights violations committed in both Kenya and Tanzania. The Court held that it did not have jurisdiction over possible violations committed in Kenya. With regard to the alleged violations in Tanzania, the Court held that procedural irregularities in relation to an identification parade, reliance on a single witness, lack of free legal representation, unjustified delay in delivering copies of the judgment and re-arrest on same facts after acquittal violated the African Charter.

Jurisdiction (material jurisdiction – no need to specify articles of the African Charter, 36; evaluation of facts, 37, 38; constitutionality, 39; personal jurisdiction – allegations against third state, 45, 124)

Admissibility (exhaustion of local remedies, 54-57; submission within reasonable time, receipt of judgment, lay, incarcerated, indigent, 61-69)

Fair trial (extradition, 79; identification parade, 86-88; defence – alibi, 95; legal aid, 104-112; timely delivery of copies of judgment, 118-121)

Personal liberty and security (arbitrary arrest after acquittal, 132-137)

Cruel, inhuman or degrading treatment *(incommunicado* detention, burden of proof, 142-146)

I. The Parties

1. The Applicants, Mr Kennedy Owino Onyachi and Mr Charles John Mwaniki Njoka, are citizens of the Republic of Kenya. They are convicted prisoners who are currently serving a sentence of thirty (30) years' imprisonment for the crime of aggravated robbery at the Ukonga Central Prison in Dar es Salaam, United Republic of Tanzania.

2. The Respondent is the United Republic of Tanzania. The Respondent became a State Party to the African Charter on Human and Peoples' Rights (hereinafter, referred to as "the Charter") on 18 February 1984, and the Protocol on 7 February 2006; and deposited the declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organizations on 29 March 2010.

II. Subject matter of the Application

3. The Application was brought by the Applicants on 7 January 2015. The Application reveals that the Applicants were first arrested in Kenya on 30 November 2002, on suspicion of having committed robbery in the United Republic of Tanzania. They remained in custody until 20 December 2002, when they were arraigned before the Resident Magistrate at the Nairobi Law Courts on charges of armed robbery.

4. Following a request in 2002 for the Applicants' extradition to Tanzania, the Resident Magistrate at the Nairobi Law Courts ordered on 21 March 2003, that the Applicants be extradited to the United Republic of Tanzania to answer armed robbery charges against them. The Resident Magistrate then granted the Applicants leave to appeal the order within 14 days.

5. On 22 March 2003, before the expiry of the 14 days' time for appeal against the order, the Applicants were bundled by Kenyan and Tanzanian police straight into waiting Police cars and transported to Tanzania. However, the relatives of the Applicants appealed on their behalf against the decision of the Resident Magistrate, to the High Court of Kenya. According to the Applicants, the Appellate Judge later delivered his ruling on this application on 30 July 2003. The Applicants did not avail the ruling of the appeal to this Court despite being requested to do so.

6. On arrival at the Namanga border post, the Applicants were received by a contingent of Tanzanian Police and media personnel from the Independent Television Limited (ITV) and Tanzania Television (TVT). The Applicants also allege that they were then immediately taken to the Dar es Salaam Central Police Station on 22 March, 2003, where identification parades were conducted on 25 March, 2003, by which time their images were already published in various local newspapers and television channels. The Applicants aver that this made it easier for witnesses to identify them, as the latter had already seen them in the local media.

7. On 26 March 2003 the Applicants were arraigned at the Kisutu Resident Magistrate's Court in Dar es Salaam and charged with two counts in Criminal Case No. 111 of 2003: conspiracy to commit an offence contrary to Section 384 and crime of armed robbery contrary to Sections 285 and 286 of the Penal Code. On 30 March 2004 the case number was changed to Criminal Case No. 834 of 2002.

8. On 11 March 2005 the Applicants were tried and acquitted by the Kisitu Magistrate's Court, but the Tanzanian Police re-arrested them and detained them at the Central Police Station in Dar es Salaam. The Applicants complain that they remained in the Police cells with no food and were denied communication with anyone until 14 March

2005, when they were arraigned before Court on what they claim are "trumped up and fabricated charges". The new charges against them were of (i) stealing, contrary to Section 265 of the Penal Code in Criminal Case No. 399/2005 and (ii) Armed Robbery, contrary to Section 287 of the Penal Code in Criminal Case No. 400/2005. According to the Applicants, these two charges had already been heard and determined by the Kisutu Resident Magistrate's Court in Dar es Salaam.

9. The Respondent then lodged an appeal in Criminal Appeal No. 125/2005 in the High Court of Tanzania at Dar es Salaam against the Magistrate's decision in Case No. 834/2002, challenging the Applicants' acquittal .

10. On 19 December 2005 the High Court overturned the acquittal of the Trial Magistrate, convicted the Applicants and sentenced them to 30 years' imprisonment. The Applicants then lodged an appeal against the conviction and sentence in Criminal Appeal No. 48 of 2006, in the Court of Appeal. The Court of Appeal affirmed the conviction and dismissed the appeal on 24 December 2009.

11. The Applicants were served copies of the judgment of the Court of Appeal on 2 November 2011, almost 2 years after the dismissal of their appeal.

12. On 9 June 2013, the 2nd Applicant filed at the Court of Appeal for a request for extension of time to file for a review of both the conviction and sentence in the Court of Appeal. The Applicant alleges that his Application for extension of time to file the Application for review was dismissed on 9 June 2014 on the ground that the review should have been filed within 60 days from the date of judgment. This was in spite of the fact that the Applicants received copies of the appeal Judgment almost 2 years after the Court of Appeal delivered the judgment.

III. Alleged violations

13. On the basis of the aforementioned, the Applicants make the following allegations:

"i. That they were held in custody for 3 weeks by the authorities in the Republic of Kenya, in violation of their basic rights, before being arraigned in Court.

ii. That they were deprived of their right of Appeal as the Kenyan and Tanzanian Police transported them to Tanzania on 22 March 2003 before they appealed to the Kenyan High Court.

iii. That at the time the two Applicants were being extradited to the United Republic of Tanzania, the Republic of Kenya and the United Republic of Tanzania did not have an

extradition treaty between them.

iv. That the Kenyan Government, violated all accepted principles of human rights and international law.

v. That the Respondent violated all accepted principles of human rights and international law.

vi. That the Applicants were deprived of their liberty after they were acquitted on 11 March 2005 in Case No. 834/200 at the Kisutu Resident Magistrate's Court in Dar es Salaam by the authorities of the Respondent. That they were detained at the Central Police Station in Dar es Salaam by the authorities of the Respondent from 11 March 2005 to 15 March 2005 without food and denied communication with anyone."

That the conviction and sentence of thirty (30) years' imprisonment was unconstitutional and is contrary to Article 7(2) of the African Charter on Human and Peoples' Rights.

IV Summary of the procedure before the Court

14. The Application was filed on 7 January 2015.

15. On 25 February 2015, the Registry, pursuant to Rule 35(2) and (3) of the Rules of Court (hereinafter, referred to as "the Rules") transmitted the Application to the Respondent State, the Chairperson of the African Union Commission and to the Executive Council of the Union, as well as to all the other States Parties to the Protocol.

16. The Registry also sent a copy of the Application to the Minister of Foreign Affairs of the Republic of Kenya, pursuant to Rule 35(4)(b) of the Rules, and invited the latter, should it wish to intervene in the proceedings, to do so within thirty (30) days of receipt.

17. The Respondent filed its response on 31 July 2015.

18. During its 36th Ordinary Session held from 9 to 27 March 2015, the Court instructed the Registry to request the Pan-African Lawyers` Union (PALU) to provide legal assistance to the Applicants. By a letter dated 16 April 2015, the Registry requested PALU to offer legal representation to the Applicants.

19. By a letter dated 30 June 2015, PALU notified the Registrar and the Respondent that PALU would represent the Applicants and by a letter dated 4 August 2015, the Registrar transmitted a copy of the case file to PALU.

20. By letter dated 25 February 2016, PALU filed the Reply to the Response out of time and requested the Court to deem it as properly filed, stating that the delay was caused by various unforeseen and inevitable circumstances.

21. During its 41st Ordinary Session, held from 16 May to 3 June 2016, the Court granted leave to PALU as requested.

22. On 29 July 2016, the Registry transmitted a copy of the Reply to the Respondent for information and advised the Parties that pleadings were closed.

V. Prayers of the Parties

23. In their respective submissions, the Parties made the following prayers.

On behalf of the Applicants,

The Applicants seek the following orders from the Court:

"1. A declaration that the Respondent State has violated the Applicants` rights guaranteed under the Charter, in particular, Articles 1 and 7

2. A declaration that the Applicants` right to a fair trial was violated when their images were shown on television and in newspapers before the identification parade was held.

3. A declaration that the testimony tendered by Prosecution Witness (PW 8) was unlawful as evidence from the identification parade should have been dismissed in its entirety.

4. A declaration that the Respondent State violated Article 7 of the Charter by not providing legal aid at the Court of Appeal.

5. An order that the Respondent State takes immediate steps to remedy the violations throughout the trial especially at the Appeal.

6. A declaration that the extradition process violated international standards of the right to a fair trial by not affording the Applicants the opportunity to appeal the primary Court`s Extradition Order.

7. An order for reparations

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

On behalf of the Respondent State,

The Respondent prays the Court to order as follows, in respect of jurisdiction and admissibility of the Application:

"I. That the Court has no jurisdiction to adjudicate over this Application.

II. That the Applicants have no locus to file the Application before the Court and hence, should be denied access to the Court as per Articles 5(3) and 34(6) of the Protocol.

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

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

24. With regard to the merits, the Respondent requests the Court to rule that

"i. the Government of the United Republic of Tanzania has not violated accepted principles of Human Rights and International law;

ii. the Government of the United Republic of Tanzania abided by the rule of law during the extradition process.

iii. the Government of the United Republic of Tanzania has not violated Article 3 of the Charter.

iv. the Government of the United Republic of Tanzania has not violated Article 6 of the Charter.

v. the Government of the United Republic of Tanzania has not violated Article 7(1) of the Charter.

vi. the Government of the United Republic of Tanzania has not violated Article 7(2) of the Charter.

vii. the Applicants request for Reparations be denied.

viii. this Application be dismissed in its entirety.

ix. the Applicants are denied all reliefs sought."

VI. Jurisdiction of the Court

25. Pursuant to Rule 39(1) of the Rules, the Court "shall conduct preliminary examination of its jurisdiction …"

26. In its submissions, the Respondent raised objections to the material and personal jurisdiction of the Court. Accordingly, the Court shall first address these preliminary objections to establish its competence to examine the instant matter.

A. Objections to material jurisdiction

i. Respondent's submissions

27. The Respondent objects to the material jurisdiction of the Court averring that neither Article 3(1) of the Protocol nor Rule 26(1)(a) of the Rules allows the Court to sit as a court of first instance or as an Appellate Court. The Respondent argues that the instant Application contains allegations that require this Court to sit both as a first instance and an appellate court.

28. The Respondent submits that, the Applicants are raising the following allegations for the first time before this Court and, their determination would require the Court to sit as a court of first instance:

"i. The allegation that the Tanzanian Government through all its official actions violated all accepted principles of human rights and international law;

ii. The allegation that the Respondent State violated Article 3 of the Charter;

iii. The allegation that the Respondent State violated Article 6 of the Charter by re-arresting the Applicants on 11 March 2005, after their acquittal by the trial Magistrate, of charges of armed robbery and conspiracy to commit crimes, and by detaining them *incommunicado* in a police cell at the Central Police Station in Dar es Salaam for four days without food;

iv. The allegation that the conviction and sentencing of the Applicants to 30 years imprisonment by the High Court is unconstitutional and contrary to Article 7(2) of the Charter."

29. The Respondent also avers that the allegation of the Applicants that the identification parade was flawed with procedural irregularities is a matter requiring the Court to sit as a "supreme appellate court". The Respondent argues that the Applicants are asking the Court to adjudicate on an issue of evidence, which was already addressed and concluded by the Court of Appeal of Tanzania.

30. Finally, the Respondent challenges the material jurisdiction of the Court contending that the Applicants' allegation that it "violated all acceptable principles of human rights" is vague and does not disclose any particular article alleged to have been violated.

ii. Applicants' submissions

31. On their part, the Applicants argue that the Court has material jurisdiction to deal with this Application. In this regard, the Applicants contend that there have been violations of their fundamental human rights as provided in the Constitution of the Respondent and the Charter to which the Respondent is a State Party.

32. Responding to the Respondent's objection that the Application requires the Court to go beyond its jurisdiction and sit as an Appellate Court, the Applicants submit that as long as the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the Respondent, the Court has jurisdiction.

iii. The Court's assessment

33. In order to ascertain its material jurisdiction, the Court will consider three of the preliminary objections raised by the Respondent: the allegation that the conviction and sentence of the Applicants to 30 years' imprisonment was unconstitutional and contrary to Article 7(2) of the Charter; the allegation that the identification parade was flawed with procedural irregularities is a matter that requires this Court to sit as a "Supreme Appellate Court"; and the allegation that the Respondent violated 'all accepted principles of human rights' "is vague" and does not disclose any particular article alleged to have been violated.[1]

34. The Court notes that Article 3(1) of the Protocol provides that 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."

35. In this regard, the jurisprudence of the Court has, in the judgment of *Peter Chacha v The United Republic of Tanzania*, established that:

> "As long as the rights allegedly violated fall under the aegis of the Charter or any other human rights instrument ratified by the State concerned, the Court can exercise its jurisdiction over the matter."[2]

36. The instant Application contains allegations of violations of human rights protected by the Charter and other international human rights instruments ratified by the Respondent, specifically, ICCPR.

1 The Court notes that the other preliminary objections of the Respondent concerning the jurisdiction of the Court are pertinent to the admissibility of the Application and hence, will be addressed in the admissibility section on admissibility.

2 *Peter Joseph Chacha v The United Republic of Tanzania,* Application No. 003/2014 judgment of 8 March 2014 (hereinafter referred to as *Peter Chacha* case), para 114

As such, the substance of the Application falls within the ambit of the material jurisdiction of the Court. Accordingly, the preliminary objection of the Respondent that the Application contains a vague allegation disclosing no particular article of the Charter does not oust the subject matter jurisdiction of the Court to examine the instant Application.

37. Regarding the argument of the Respondent that the Application raises issues involving evaluation of evidence and challenges to the length of penalty specified in the domestic law, matters which require the Court to sit as a "Supreme Appellate Court", this Court, in the matter of *Abubakari v Tanzania*, held that:

> "As regards, in particular, the evidence relied on in convicting the Applicant, the Court holds that, it was indeed not incumbent on it to decide on their value for the purposes of reviewing the said conviction. It is however of the opinion that, nothing prevents it from examining such evidence as part of the file evidence laid before it so as to ascertain in general, whether consideration of the said evidence by the national Judge was in conformity with the requirements of fair trial within the meaning of Article 7 of the Charter in particular."[3]

38. Consequently, in the instant case, the Court has the power to examine whether the evaluation of facts or evidence by the domestic courts of the Respondent was manifestly arbitrary or resulted in a miscarriage of justice to the Applicants. The Court also has the jurisdiction to investigate the manner in which the particular evidence that resulted in the alleged violation of human rights of the Applicants was collected and whether such process was carried out with adequate safeguards against arbitrariness.

39. With regard to the Applicants' submission that the penalty imposed by the domestic legislation for armed robbery violates the Constitution of the Respondent and the rights enshrined in Article 7(1) of the Charter, the Court observes that it does not have jurisdiction to examine the constitutionality of domestic legislation. However, the Court can examine the extent to which such legislation violates the provisions of the Charter or other international human rights instrument ratified by the Respondent. Doing so would not require this Court to sit as a Supreme Court of Appeal because the Court is not applying "the same law as the Tanzanian national courts, that is, Tanzanian law."[4] The Court rather applies exclusively "the provisions of the Charter and any other relevant human rights instrument ratified by the State

3 *Mohamed Abubakari v The United Republic of Tanzania*, Application No. 007/2013 judgment of 20 May 2016, para. 26 (hereinafter referred to as *Abubakari* case)

4 *Ibid*, para 28.

concerned".[5]

40. In view of the above, the Respondent`s preliminary objection to the material jurisdiction of the Court on these grounds is dismissed and therefore, the Court finds that it has material jurisdiction to examine this Application.

B. Personal jurisdiction

i. Respondent's submissions

41. The Respondent challenges the Court's personal jurisdiction stating that the Application contains allegations against a State, the Republic of Kenya, which has not made the declaration accepting the Court's competence to receive complaints from individuals and NGOs as required by Article 34(6) of the Protocol.

ii. Applicants' submissions

42. On their part, the Applicants argue that the Application is not filed against Kenya, and that the allegations against the Republic of Kenya are made to provide a full narrative of events as they unfolded in relation to the case.

iii. The Court's assessment

43. The Court notes that the Application is brought against the Republic of Tanzania, which is a State Party to the Charter and the Protocol, and which deposited the declaration in terms of Article 34(6) of the Protocol on 29 March 2010, accepting the competence of the Court to receive cases from individuals and NGOs filed against the Respondent.

44. Concerning those allegations that implicate the Republic of Kenya, the Court observes that the Republic of Kenya has not made the declaration required under Article 34(6) of the Protocol allowing individuals to directly file an application before this Court. In this regard, the Court notes that the Registry of the Court has, in accordance with Rule 35(2)(b) and (4)(b) of its Rules, invited the Republic of Kenya to intervene in the case, if it so wishes, since the Applicants are its nationals, but the Republic of Kenya did not do so and in these circumstances, the Court lacks personal jurisdiction to entertain

5 *Ibid*.

allegations against Kenya.

45. The Court observes that its lack of competence on some allegations of the Applicants directed to the Republic of Kenya does not prevent it from proceeding with the examination of this Application and address those allegations raised against the Respondent. Articles 5(3) and 34(6) of the Protocol empower the Court to examine allegations brought before it in so far as these allegations involve the Respondent, which has deposited the required declaration.

46. In view of the above, the Respondent`s preliminary objection to the competence of the Court on the basis that the present Application contains allegations which implicate the Republic of Kenya is dismissed and the Court finds that it has personal jurisdiction to examine the allegations against the Respondent in the instant Application.

C. Other aspects of jurisdiction

47. With regard to the other aspects of its jurisdiction, the Court notes:

> "i. that it has temporal jurisdiction since the alleged violations are continuous in nature, the Applicants having remained convicted on grounds which they believe are flawed by irregularities [see the Court's jurisprudence in the *Zongo* case];[6]
>
> ii. that it has territorial jurisdiction in as much as the facts of the case occurred on the territory of a State Party to the Protocol, ie the Respondent State."

48. In view of the foregoing observations, the Court finds that it has jurisdiction to examine this Application.

VII. Admissibility of the Application

49. The admissibility requirements before the Court are provided in Articles 50 and 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules. These provisions mandate the Court to conduct a preliminary examination of an Application in accordance with Article 50 and 56 of the Charter. Rule 40 of the Rules provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter… 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 African Union or the

6 See African Court especially in the Matter of *Zongo and Others v Burkina Faso* **(**Preliminary Objections**)** Judgment of 21 June 2013, paras 71 to 77.

Charter;

3. do not contain any disparaging or insulting language;
4. are not based exclusively on news disseminated through the mass media;
5. are filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. are filed within a reasonable period from the time 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. do 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 other legal instrument of the African Union".

50. In its Response, the Respondent raises objections concerning two of the above conditions, namely, the requirements of exhaustion of local remedies and the time limit for seizure of the Court.

A. Objection based on non-exhaustion of local remedies

i. Repondent's submission

51. The Respondent argues that this Application fails to meet the requirement of Article 56(5) of the Charter. It contends that all allegations of violation of the rights of the Applicants are being raised and brought to its notice for the very first time in the instant Application, although local avenues of redress existed.

52. In this regard, the Respondent asserts that the Applicants had the possibility of lodging a petition regarding the alleged violations of their constitutional rights before the High Court pursuant to the Basic Rights and Duties Act No.9, Chapter 3, 2002. According to the Respondent, the Applicants should have utilised these available local avenues before approaching the Court. The Respondent adds that the Court is not a Court of first instance, but a Court of last resort.

ii. Applicant's submission

53. The Applicants, in their Reply, argue that the local remedies indicated by the Respondent are extra-ordinary remedies, which, pursuant to the jurisprudence of the Court, need not be exhausted.

iii. The Court's assessment

54. The Court notes that six of the allegations made by the Applicants relating to: the alleged violation of 'all accepted principles of international law'; alleged violation of the right to equality before the law and equal protection of the law; the re-arrest of the Applicants after their acquittal; the *incommunicado* detention of the Applicants following their re-arrest; the failure of the Respondent to give copies of judgments of national courts in due time and the non-provision of legal assistance were not explicitly raised in the domestic proceedings. These are matters that are being raised for the first time in this Court. However, 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" that were related to or were the basis of their appeals. The domestic authorities thus had ample opportunities to address these allegations even without the Applicants having raised them explicitly. It would therefore be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek redress for these claims[7]

55. With regard to the other two claims relating to the procedural irregularities claimed to have existed in the identification parade and the alleged violation of the Applicants' presumption of innocence contrary to Article 7 of the Charter, the records available before the Court show that the Applicants raised these matters before the domestic courts.[8] Therefore, the Applicants have exhausted local remedies with respect to such claims.

56. Furthermore, the jurisprudence of this Court has established that the requirement of exhaustion of local remedies is applicable only with respect to ordinary, available and efficient judicial remedies but not extraordinary or non-judicial remedies. In this regard, the Respondent alleges that the Applicants could have filed a constitutional petition to the High Court before they bring their matter to this Court. On this issue, this Court has held that the said constitutional review is "not common, that it is not granted as of a right and that it can be exercised only exceptionally … and is available as extraordinary remedy" in the Respondent State, thus, the Applicant was not required to pursue it.[9]

7 *Alex Thomas v The United Republic of Tanzania*, Application No. 005/2013, Judgment of 20 November 2015 (hereinafter referred to as *Alex Thomas* case), paras 60-65.

8 Judgment of High Court of Tanzania, p 250.

9 *Abubakari* Case, para 72.

In the same vein, it was not necessary for the Applicants in the instant Application to approach the High Court to seek constitutional redress for the violations of their rights because such remedy was extraordinary.

57. In view of the foregoing, the Court therefore decides that the requirement of exhaustion of local remedies is satisfied in the instant Application in terms of Article 56(5) of the Charter.

B. Objection based on the alleged failure to file the Application within a reasonable time

i. Respondent's submission

58. The Respondent submits that the Application should be found to be inadmissible on the ground that it was not filed within a reasonable time after exhaustion of local remedies. The Respondent contends that the Applicants received the Court of Appeal's judgment on 19 December 2005 (*sic*) and the Respondent deposited the declaration in terms of Article 34(6) of the Protocol on 29 March 2010. According to the Respondent, reckoned from the date when the Respondent deposited its declaration, it was after four (4) years and two (2) months that the Application was filed before the Court on 7 January 2015.

59. With regard to the second Applicant, the Respondent argues that the decision on his Application for review of the Court of Appeal's judgment was delivered on 12 June 2013 and as the Respondent had already accepted the individual complainant mechanism under Article 34(6) of the Protocol on 29 March 2010, this date, that is, 12 June 2013, should be the relevant date to calculate the time under Article 56(6) of the Charter. On this basis, the Respondent submits that three (3) years and two (2) months lapsed when the Application was filed, which according to the Respondent is not a reasonable time.

ii. Applicants' submission

60. On their part, the Applicants argue that the Court of Appeals' judgment was delivered on 24 December 2009, but the copies of the judgment were served on them about two years later, on 2 November 2011. Relying on the Court's jurisprudence,[10] the Applicants contend that the assessment of reasonableness of the time under Article 56(6) of the Charter depends on the circumstances of each case, and in the present case, given that the Applicants are both lay, indigent,

10 *Zongo and others* case (Preliminary Objections), para 121.

and incarcerated persons without the benefit of legal education or assistance, their particular circumstances provide sufficient grounds for this Application to be admissible.

iii. The Court's assessment

61. The Court notes that Article 56(6) of the Charter does not indicate a precise timeline in which an Application shall be brought to this Court. Its mirror provision in the Rules, that is, Rule 40(6) simply provides for "reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized of the matter." It is therefore within the discretion of the Court to determine the reasonableness of the time in which an Application is filed.

62. On several occasions, this Court has emphasized that "whether an Application has been filed within reasonable time after exhaustion of local remedies is decided on a case by case basis depending on the circumstances of each case."[11] The Court has also held that when domestic remedies were exhausted before a State made its declaration under Article 34(6) of the Protocol, reasonable time under Article 56(6) of the Charter shall be reckoned from the date the Respondent deposited the instrument of its declaration.[12]

63. In the instant case, the Court notes that the judgment of the Court of Appeal in Criminal Appeal No. 48 of 2006 was delivered on 24 December 2009 and that the Applicants received the decision of the Court of Appeal only on 2 November 2011. The Court also notes that the second Applicant's application for review of the Court of Appeal decision was dismissed by the Court of Appeal on 9 June 2014. There is no evidence on record showing that the first Applicant also pursued a similar Application for review.

64. Although the judgment of the Court of Appeal was rendered on 24 November 2009 both Applicants received the copies of the judgment only on 2 November 2011. With respect to the first Applicant, the relevant time should thus run from this date when he received copies of the judgment. From this date until the date the Court was seized of the matter, that is, 7 January 2015, about three (3) years and two (2) months had lapsed for the first Applicant.

65. On the other hand, as the second Applicant opted to pursue the application for review proceeding in the Court of Appeal, the date on which his Application for review was dismissed, that is, 9 June 2014,

11 *Ibid*, see also *Peter Chacha* case, para 141, *Abubakari* case, para 91.

12 *Alex Thomas* case, para 73.

should be the relevant date to assess reasonableness under Article 56(6). Accordingly, from this date, about seven months had lapsed until the date when the Application was filed before the Court.

66. The key issue for the Court to determine is whether the three years and two months period for the first Applicant and the seven months' time for the second Applicant are, in view of the circumstances of the case, to be considered as reasonable in terms of Rule 40(6) of the Rules.

67. With respect to the second Applicant, given that he is lay, incarcerated and indigent person with no legal assistance, the Court holds that seven months period is not unreasonable.

68. Regarding the first Applicant, the Court observes that three years and two months' time is relatively long to bring an Application to the Court. However, like the second Applicant, he is also lay, incarcerated and indigent person without the benefit of legal education and legal assistance until this Court assigned PALU to provide him with *pro bono* legal representation services. In view of this, with respect to the first Applicant, too, the Court finds that the time in which the Application was filed is reasonable.

69. The Court thus, finds that the filing of the Application was done within a reasonable time in terms of Article 56(6) of the Charter as restated in Rule 40(6) and therefore, that the Application meets this criterion.

C. Admissibility requirements that are not in contention between the Parties

70. The requirements regarding the identity of Applicants, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence and the *non bis in idem* principle (Rule 40(1), 40(2), 40(3), 40(4), 40(7) of the Rules) are not in contention between the Parties.

71. The Court also notes, for its part, that nothing in the records submitted to it by the Parties suggests that any of the above requirements has not been met in the instant case.

72. Consequently, the Court holds that the requirements under consideration in this regard have been fully met and concludes that the Application is admissible.

VIII. On the merits

73. The Applicants` allegations relate to violations of Articles 1, 3, 5, 6 and 7 of the Charter. The Court now makes an assessment of each of these alleged violations, the Respondent's responses thereto and

the merits of the Parties' claims. In line with the sequence of events which gave rise to the various alleged violations, the Court deems it appropriate to examine first those allegations relating to Article 7 of the Charter.

A. Allegations of violations of the right to a fair trial under Article 7 of the Charter

74. In relation to Article 7, of the Charter, the allegations of the Applicants have several prongs, which are treated separately below.

i. Allegation regarding illegal extradition

a. Applicants' submissions

75. The Applicants submit that they were extradited from Kenya unlawfully as there was no extradition treaty between Kenya and Tanzania. They also allege that they were prevented from exercising their rights of appeal following the order of extradition issued by the Nairobi Law Court on 22 March 2003 as they were immediately taken to the United Republic of Tanzania by a contingent of both Kenyan and Tanzanian police.

b. Respondent's submissions

76. On its part, the Respondent avers that the extradition of the Applicants was not illegal as it was carried out in accordance with the Extradition Acts of both countries on a reciprocal basis. The Respondent annexed a document titled the "Extradition Act, 1965" showing an extradition agreement between the Respondent and the Republic of Kenya. On this basis, the Respondent contends that this allegation lacks merit and that it should be dismissed.

c. The Court's assessment

77. The Court notes that the Applicants` complaint in respect of their extradition has two related facets: first, the claim that the Applicants were extradited without a pre-existing extradition agreement between the Respondent and the Republic of Kenya. Second, the allegation that the Applicants were denied their right to appeal against the extradition order because of the swift implementation of the order by a joint Kenyan and Tanzanian Police force.

78. However, the Court recalls its earlier finding that its jurisdiction

is only limited to allegations involving the responsibility of the Respondent, as the Republic of Kenya has not made a declaration allowing individuals and NGOs to access this Court and is not party to these proceedings.

79. The Court observes that it is the Republic of Kenya which extradited the Applicants and the Respondent may not be held responsible for the conduct of the Republic of Kenya in the course of the extradition. Therefore, the allegation of the Applicants that they were extradited unlawfully and that their extradition violated their right to appeal under Article 7(1)(a) of the Charter is hereby dismissed.

ii. Alleged violations relating to the identification parade

a. Applicants' submissions

80. The Applicants allege that the identification parade exercise of 25 March 2003, was carried out after their pictures and descriptions taken by ITV and TVT media, the day before at the Namanga border, were in most of the local newspapers and had been aired by different TV channels in Tanzania. The Applicants contend that this made it easier for some witnesses to identify them, and therefore, the identification parade was null, as it was not carried out following standard procedures.

b. Respondent's submissions

81. On its part, the Respondent argues that the identification evidence was highly scrutinized by the Court of Appeal in Criminal Appeal No. 48 of 2006, that the Court of Appeal discarded any evidence that was not watertight, and only admitted the identification evidence that met the standard of "proof beyond reasonable doubt". The Respondent submits that this allegation lacks merit and should be dismissed.

c. The Court's assessment

82. Article 7(1) of the Charter provides as follows:

> "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 defence, 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."

83. From the submissions of both Parties, the main issue for determination is whether the identification parade that led to the conviction of the Applicants was conducted in manner contrary to the Charter or other international human rights standards.

84. From the records available before it, the Court notes that the only evidence on which the Court of Appeal relied to sustain the conviction of the Applicants by the High Court is the testimony given by an eye witness (PW 8) who claimed to have identified the Applicants during the identification parade.[13]

85. The Court also notes that the witnesses who participated in the identification parade have, while providing their testimony, indicated that they did not see the Applicants on TV before the date of the said parade. However, the Applicants further allege that their images were disseminated not only on TV but also through newspapers before the parade, which the Respondent has not directly refuted.

86. It is a matter of common sense that in criminal proceedings, identification parade is not necessary and cannot be carried out if witnesses previously knew or saw a suspect before the identification parade. The Court notes that this is also the practice in the jurisdiction of the Respondent State.[14]

87. In the instant case, the records of both the High Court and the Court of Appeal do not show that this requirement was fulfilled. Although some of the witnesses provided affidavits stating that they had not watched TV before the identification parade, neither of them (including PW 8 whose only testimony was used to sustain conviction) clearly stated that he/she did not see the images of the Applicants before the said parade in local newspapers. This implies that the identification parade was conducted despite the fact that the witnesses may have had a chance to see the Applicants in local newspapers.

88. In this regard, the Respondent has not supplied evidence showing that the domestic courts took measures to verify whether or not the witnesses read newspapers.[15] In light of the probability that witnesses may have seen the Applicants on local TV channels and

13 Appeal judgment, Court of Appeals, p. 20

14 *Republic v Mwango Manaa* (1936) 3 East African Court of Appeals 29. See also the Police General Order (PGO) No. 232 of Tanzania. One of the conditions to be satisfied for a proper identification parade is that the witnesses shall not see the accused before the parade.

15 Rejoinder, p.9.

newspapers, the safeguards which applied in the assessment of the evidence were inadequate.[16] Given that the conviction of the Applicants depended only on evidence from a single witness testimony obtained during this identification parade, there is an additional reason to doubt the context in which they were convicted. In these circumstances, the Court concludes that the procedural irregularities in the identification parade affected the fairness of the Applicants' trial and conviction.

89. The Court, therefore, holds that there was a violation of the right to a fair trial of the Applicants under Article 7(1) of the Charter.

iii. The allegation concerning the defence of alibi

a. Applicants' submission

90. The Applicants argue that their right to respect for the presumption of innocence under Article 7(1)(b) of the Charter (*sic*) was violated because both the Court of Appeal and the High Court arbitrarily rejected their defence of alibi.[17]

91. The Applicants complain that they submitted evidence attesting that they had never been to Tanzania before their extradition and they were in Kenya on the day and at the time the crime allegedly was committed. The Applicants assert that both the High Court and the Court of Appeal also acknowledged, in their respective judgments, that the passports of the Applicants show nothing suggesting their travel to Tanzania on the day of the crime. The Applicants allege that, this notwithstanding and even though no corroborating evidence was adduced, both Courts disregarded their defence of alibi on a wrong assumption that the Applicants could have used illegal routes ("panya routes") (to enter Tanzania and this would not have been reflected on their passports.

b. Respondent's submission

92. The Respondent has not made any submissions on this allegation.

c. The Court's assessment

93. The Court notes that an alibi is an important instrument of

16 In the same sense, *Abubakari* case, paras 181- 184.

17 Rejoinder p. 9

evidence for one's defense. The defence of alibi is implicit in the right of a fair trial and should be thoroughly examined and possibly set aside, prior to a guilty verdict.[18] In its judgment in *Mohamed Abubakari v Tanzania*, this Court observed that:

> "Where an alibi is established with certitude, it can be decisive on the determination of the guilt of the accused. This issue was all the more crucial especially as, in the instant case, the indictment of the Applicant relied on the statements of a single witness, and that no identification parade was conducted."[19]

94. In the present case, the records of the domestic judicial proceedings clearly evince that the Applicants had invoked an alibi during their trial, and the domestic Courts of the Respondent indeed considered the issue. The Court of Appeal specifically addressed the matter and rejected the defence after weighing it up *vis-à-vis* the testimony given by the witness PW 8 and found that this witness's testimony was strong enough to dispel the defence of alibi raised by the Applicants.[20]

95. The Court however recalls its finding above that the testimony of the single Prosecution Witness (PW8) was obtained following an identification parade which was marred by procedural irregularity. Therefore, the conviction of the Applicants relying solely on this single witness (PW8)'s testimony and on the basis of an uncorroborated assumption that the Applicants might have used other illegal ("panaya") routes to enter Tanzania did not amount to due and serious consideration of the Applicants' alibi defence and thus, violated their right to defence under Article 7(1)(c) of the Charter.

iv. The allegation relating to the Applicants' conviction and sentencing to 30 years' imprisonment

a. Applicants' submissions

96. The Applicants allege that their conviction and sentencing to a 30-years imprisonment term was unconstitutional and contrary to Article 7(2) of the Charter.

18 *Abubakari* judgment, para 192.

19 *Ibid*, para 191.

20 See Court of Appeals Judgment, pp 20-22.

b. Respondent's submissions

97. The Respondent denies the Applicants' allegations and submits that the conviction and sentencing of the Applicants was based on Sections 285 and 286 of the Respondent's Penal Code Cap 16 (which define the offences of robbery and armed robbery), and the Minimum Sentences Act of 1972 as amended by Act No 10 of 1989 and later by Act No. 6 of 1994 (which provides the punishment of the offences of robbery and armed robbery). It submits that the conviction and sentencing of the Applicants were done according to the Respondent's applicable laws and therefore not contrary to the Constitution and Article 7(2) of the Charter. The Respondent also adds that, if the Applicants are complaining of the length of penalty for armed robbery, the Court does not have the authority to examine the constitutionality of the length of a punishment stipulated for a crime in its domestic legislation.

c. The Court's assessment

98. The Court observes from the particulars of the case, that with regard to the length of the imprisonment imposed on them, the Applicants simply assert that their sentence to 30 years imprisonment violates the Constitution of the Respondent and Article 7(2) of the Charter. Article 7(2) of the Charter provides that:

> "No one may be condemned for an act of 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."

99. It emerges from the file that the relevant question at stake is whether the penalty to which the Applicants were sentenced on 19 December 2005 and upheld on 24 December 2009 was not provided for in the law.

100. The records before this Court indicate that the armed robbery for which the Applicants were convicted was committed on 5 November 2002. Following their extradition to the Respondent on 24 March 2003, the Applicants were charged at the Resident Magistrate`s Court of Dar es Salaam at Kisutu for crimes of armed robbery and conspiracy to commit crimes contrary to Sections 285 and 286 of the Penal Code as amended by Act No. 10 of 1989. Both crimes were defined in the Penal Code and the amending Act. According to Section 286 of this Penal Code a person convicted of armed robbery is liable to a penalty of life imprisonment with or without corporal punishment. Section 5(b) of the Minimum Sentences Act of 1972 as amended by the 1994 Written

Laws Amendment, also prescribes that the minimum sentence for the said offence is thirty (30) years. The two provisions read together show that the applicable penalty for armed robbery is a minimum of thirty (30) years imprisonment.

101. It follows that the Applicants were convicted and punished on the basis of legislation that existed before the date of commission of the crime, that is, 5 November 2002 and the punishment imposed on them was also prescribed in the same legislation. The Applicants' allegation that their conviction and penalty violates the Charter thus lacks merit and the Court therefore finds that there was no violation of Article 7(2) of the Charter.

v. The alleged violation relating to free legal aid

a. Applicants' submissions

102. In their submissions, the Applicants aver that their rights protected under Article 7(1)(c) of the Charter were violated because they were not given legal assistance in the Court of Appeal, although they were lay, indigent and incarcerated persons facing offences carrying heavy sentences. They further claim that the non-provision of legal aid violated the rule specified in many international instruments, including soft laws, which impose obligations on the Respondent to afford legal assistance.

b. Respondents' submissions

103. The Respondent has not responded to this allegation.

c. The Court's assessment

104. The Court notes that the Charter does not explicitly provide for the right to legal assistance. However, in its previous judgment in the matter of *Alex Thomas v The United Republic of Tanzania*, this Court stated that free legal aid is a right implicit in the right to defence enshrined under Article 7(1)(c) of the Charter. In the same case, the Court identified two cumulative conditions required for an accused person to be eligible for the right of legal assistance: indigence and the interests of justice.

105. In assessing these conditions, the Court considers several factors, including (i) the seriousness of the crime, (ii) the severity of the potential sentence; (iii) the complexity of the case; (iv) the social and personal situation of the defendant and , in cases of appeal,

the substance of the appeal (whether it contains a contention that requires legal knowledge or skill), and the nature of the "entirety of the proceedings", for example, whether there are considerable disagreements on points of law or fact in the judgments of lower courts.[21]

106. The Court observes that, as long as the conditions which would warrant legal assistance exist, free legal assistance should be made available in all trial and appellate proceedings

107. In the instant case, the Court notes that the Applicants were represented by lawyers both at the trial Magistrate`s Court and the High Court, although from the records of the case file it is not clear if the lawyers were contracted by the Applicants themselves or by the Respondent.[22] Thus, it was only in the Court of Appeal that the Applicants were not represented. The issue that shall therefore be addressed is whether the conditions that justify the provision of legal assistance were available during the appellate proceedings at the Court of Appeal.

108. With regard to the first condition of indigence, the Respondent has not disputed the claim of the Applicants that they are indigent. The Court thus considers this requirement as having been met.

109. With respect to the second requirement that the interest of justice must warrant the provision of legal assistance, the Court considers that the crime of armed robbery that the Applicants were convicted of was serious and the 30 years' imprisonment that they were sentenced to was severe with grave repercussions on the right to liberty of the Applicants.

110. The case further contains numerous complex legal and factual questions (involving 22 prosecution and 10 defense witnesses) that require considerable legal knowledge and technical pleading skills, which ordinary and lay individuals, as the Applicants are, do not often have. In this regard, the Court notes that, in the course of the domestic proceedings, the trial Magistrate Court and the High Court made divergent findings both in law and fact. Whereas the trial magistrate acquitted the Applicants, the High Court reversed the acquittal and convicted the Applicants. Furthermore, although the Court of Appeal confirmed the decision and sentence of the High Court, it differed in its reasoning. All these confirm the complexity of the case.

21 *Alex Thomas v The United Republic of Tanzania* judgement, para. 118. *Abubakari* case, paras. 138-139. See also Case of *Granger v The United Kingdom* Application no. 11932/86, European Court of Human Rights, judgment of 28 March 1990, para 44.

22 Judgment of Resident Magistrate`s Court at Kisutu, Dar es Salaam, p 2, Judgment of the High Court of Tanzania, Dar es Salaam, p 2.

111. In these circumstances, the Court is of the view that the interest of justice made the provision of free legal representation particularly indispensable in the appellate proceedings of the Court of Appeal.
112. The Court thus concludes that the failure of the Respondent to provide the Applicants with free legal aid in the Court of Appeal was a violation of their right to defense under Article 7(1)(c) of the Charter.

vi. Allegation concerning the delay in the delivery of copies of the judgment

a. Applicants' submission

113. The Applicants submit that their right to a fair trial was violated by the Respondent's failure to provide them with copies of the judgment of the Court of Appeal in Criminal Appeal No. 48 of 2006 until about two years later. They contend that the delay led to their inability to file a petition for a review of the Appeal Court's judgment, and the subsequent dismissal of their Application for extension of time to file a petition for review.

b. Respondent's submissions

114. The Respondent admits that the judgment in Criminal Appeal No. 48 of 2006 was delivered on 24 December 2009 and that the Applicants received the decision of the Court of Appeal only on 2 November 2011. The Respondent also concedes that the time in which the Applicants could have lodged a request for review of the judgment had already expired when the Applicants received the copies of the said judgment.
115. Nevertheless, the Respondent argues that the reason for the dismissal of the 2nd Applicant's application for extension of time to file a review was not based on the lapse of time, but on the merits of the application, which according to the Judge of the Court of Appeal, did not warrant the granting of the extension of time.

c. The Court's assessment

116. From the submissions of the Parties, the Court deduces that the matter in dispute here is whether the delay in the delivery of copies of judgment of the Court of Appeal affected the right of the Applicants' right to request for review of the judgment and whether this constitutes a violation of their right to have one's cause heard, which is a fair trial right stipulated under Article 7(1) of the Charter.
117. The Court observes that the right of an individual to have his

cause heard includes a set of other rights listed under Article 7(1) of the Charter and other international human rights treaties ratified by the Respondent. The term "comprises" in Article 7(1) of the Charter predicates that the list is not exhaustive and the right to be heard may also include other entitlements available for individuals both in international law and the domestic law of the concerned State. In the instant case, the Applicants have had appeals heard by the High Court and Court of Appeal of the Respondent. The national law further provides for the possibility of a review of the decision of the Court of Appeal in the event that a decision is tainted by procedural irregularities, which have caused injustice to a party.[23]

118. A party would not be in a position to lodge a meaningful application for a review of a particular judgment unless it is in possession of copies of the judgment that it seeks to get reviewed. In this regard, the timely delivery of copies of a judgment is an important consideration especially in circumstances where a considerable delay affects the right of individuals to pursue possible redress available in the domestic system. In *Alex Thomas v. the United Republic of Tanzania*, this Court held that:

> "It was the responsibility of the Courts of the Respondent to provide the Applicant with the Court record he required to pursue his appeal. Failure to do so and then maintain that the delay in the hearing of the Applicant's appeal was the Applicant's fault is unacceptable. …, the Applicant made several attempts to obtain the relevant records of proceedings but the judicial authorities unduly delayed in providing him with these records."[24]

119. The Court notes that in *Alex Thomas v Tanzania*, the delay was related to the provision of court records to pursue an appeal. In contrast, in this instant case, the delay relates to the provision of copies of judgments to enable the Applicants to pursue an application for review. The Court considers that the principle laid down in *Alex Thomas v Tanzania* equally applies in this case in that the right of Applicants to pursue possible redress available in the domestic system was affected by the delay in providing them with copies of the judgment.

120. The Court accordingly considers that the failure of the Respondent to provide the Applicants with copies of the judgment of the Court of Appeal for almost two years, without adducing any justification, is an inordinate delay. The Court also holds that the delay certainly affected the right of the Applicants to request for review within the time specified

23 See Section 66(1) of the Court of Appeal Rules of the Court of Appeal of Tanzania.

24 *Alex Thomas* case, para 109. It is within this general spirit that the African Commission on Human and Peoples` Rights also stated that "All decisions of judicial bodies must be published and available to everyone", *a fortiori*, to the Parties of a case who have a much stake in the judgment.

under the domestic law.

121. In view of the above, the Court finds that the unjustified delay of two years to deliver the copies of the judgment to the Applicants violated their right to be heard under Article 7(1) of the Charter.

B. Allegations relating to arbitrary arrest contrary to Article 6 of the Charter

122. Under Article 6 of the Charter, the Applicants invoke the responsibility of the Respondent for the violation of their right to liberty as a result of their alleged arbitrary arrest in the Republic of Kenya before their extradition and their re-arrest by Tanzanian authorities after they were acquitted of criminal charges by the Magistrate's Court.

i. Allegation relating to the Applicants being held in custody for three weeks

123. The Applicants submit that they were held in custody for 3 weeks by the authorities of the Republic of Kenya before being arraigned in court, and that this was in violation of their basic rights. The Respondent contends that it is directed to the Republic of Kenya, which is not a party to the instant Application.

124. The Court reiterates its position that it lacks personal jurisdiction to entertain allegations against the Republic of Kenya and therefore, dismisses this allegation.

ii. Allegation relating to the re-arrest after acquittal

a. Applicants' submissions

125. The Applicants allege that their rights under Article 6 of the Charter were violated when they were re-arrested by the Police after the trial Magistrate at Kisutu acquitted them. The Applicants argue that after they were acquitted of charges of armed robbery and conspiracy to commit crimes, they were immediately re-arrested and charged before the Resident Magistrate Court of Dar es Salaam at Kisutu with the crime of stealing contrary to section 265 and armed robbery contrary to Section 287 of the Penal Code of the Respondent. They claim that the re-arrest and subsequent charges of stealing and armed robbery violated their right to presumption of innocence.

b. Respondent's submissions

126. The Respondent argues that the Applicants were lawfully re-arrested and that the second charges were subsequently withdrawn in the interest of justice and the rights of the Applicants.

c. The Court's assessment

127. From the records available before it, the Court notes that on 26 March 2003, the Applicants were arraigned at the Kisutu Resident Magistrate Court in Dar es Salaam and charged with two counts under the Penal Code, Cap 16. The first count was conspiracy to commit an offence contrary to Section 384 and the second count was armed robbery contrary to Sections 285 and 286 of the Penal Code. The particulars of the case, undisputed by the Respondent, also show that after the Kisutu Resident Magistrate's acquitted them of these counts, they were, on 14 March 2005, again arraigned before the same Court on two new charges:(i) stealing, contrary to Section 265 of the Penal Code in Criminal Case No. 399/2005 and (ii) armed robbery, contrary to Section 287 of the Penal Code in Criminal Case No. 400/2005.

128. These charges were later dropped when the appeal made on the original charge of armed robbery succeeded at the High Court, where their acquittal was set aside and substituted with conviction and a sentence of 30 years' imprisonment. It appears from this series of facts that the authorities of the Respondent issued a new charge on different sections of the Penal Code against the Applicants on the basis of the same facts as those relied upon in the original armed robbery charge and to the same trial Magistrate.

129. In view of the above, the question this Court should address is whether the re-arrest of the Applicants was contrary to Article 6 of the Charter, which provides that:

> "Everyone shall have the right to liberty and security of his person and that no one shall be deprived of his freedom except for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained."[25]

130. Under Article 6 of the Charter, the right to liberty prohibits arbitrary arrest and this generally involves the deprivation of liberty of individuals contrary to the law or against the reasons and conditions specified by

25 See also Articles 3 and 9, Universal Declaration of Human Rights (1948) Article 5, European Convention on Human Rights (1950), Article 7, Inter-American Convention on Human Rights (1969), Article XXV, American Declaration of the Rights and Duties of Man (1948), Article 14, Arab Charter on Human Rights (2004).

the law.[26] The notion of arbitrariness also covers deprivation of liberty contrary to the standard of reasonableness, that is, whether it is "just, necessary, proportionate and equitable in opposition to unjust, absurd and arbitrary.[27]

131. The established international human rights jurisprudence sets three criteria to determine whether or not a particular deprivation of liberty is arbitrary, namely, the lawfulness of the deprivation, the existence of clear and reasonable grounds and the availability of procedural safeguards against arbitrariness.[28] These are cumulative conditions and non-compliance with one makes the deprivation of liberty arbitrary.

d. The lawfulness of the detention

132. The Court notes that arrest or detention that lacks any legal basis is arbitrary.[29] Any deprivation of liberty shall have a legal basis or shall be carried out in "accordance with the law".[30]

133. In the case at hand, the Respondent generally argues that the re-arrest of the Applicants was lawful without indicating the specific law on the basis of which the re-arrest was made. Nonetheless, the Court infers from the undisputed submission of the Applicants that they were re-arrested on the basis of section 265 of the Penal Code of the Respondent. The Court thus, holds that there was an adequate legal basis for the re-arrest and that it was conducted "in accordance with the law".

e. The existence of clear and reasonable grounds

134. The Court notes that a deprivation of liberty shall also have clear and reasonable grounds. Although Article 6 of the Charter does not

26 *Ibid*.

27 See *Mukong v Cameroon,* Comm. No. 458/1991, UN Human Rights Committee adopted on 21 July 1994, para. 9.8*, Hugo van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8, *A v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997), para 9.2.

28 See Principle 1(b),African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**,** DOC/OS(XXX)247 (2001).

29 General Comment 35, Article 9 (Liberty and security of person), UN HRC, CCPR /C/GC/35 (2014), para. 11 *Essono Mika Miha v Equatorial Guinea*, Communication No. 414/1990, UN Doc. CCPR/C/51/D/414/1990 (1994), para. 6.5.

30 *Ibid*. See also Communication 368/09 *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, African Commission, (2014), paras 79-80; Principle 2, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly A/RES/43/173, 9 December 1988.

explicitly require that the grounds should be clear or reasonable, the expression "reasons and conditions" in the same implies that any arrest or detention should not be conducted without adequate or reasonable grounds.[31]

135. In the present case, the Applicants were arrested on the basis of a criminal charge. It is a trite law that the arrest or detention of individuals for purpose of criminal charge is a common and valid ground for detention recognized by both the domestic legislation of the Respondent and international human rights law.[32] However, the Court considers that the validity of a particular ground for deprivation of liberty shall also be examined in accordance with the circumstances of each case and in the light of the requirement of reasonableness. In the context of criminal proceedings, once an accused is acquitted of a particular crime by a court of law, the fundamental right to liberty and also the standard of reasonableness require that s/he shall be released forthwith and be allowed to enjoy his liberty unhindered.

136. In the instant Application, the Applicants were released in accordance with the decision of the trial Magistrate's Court acquitting them of charges of armed robbery and conspiracy to commit crimes, but re-arrested immediately and kept in detention. They were subsequently charged with another crime of stealing and armed robbery based on the same facts under different sections of the Penal code. The Respondent has not proffered any reason as to why it was necessary to charge the Applicants with a new crime of stealing and armed robbery on the basis of the same facts after a court of law had already acquitted the Applicants of similar charges.

137. The Court is of the view that it is inappropriate, unjust, and thus, arbitrary to re-arrest an individual and file new charges based on the same facts without justification *after* s/he has been acquitted of a particular crime by a court of law. The right to liberty becomes illusory and due process of law ends up being unpredictable if individuals can anytime be re-arrested and charged with *new* crimes after a court of law has declared their innocence. The Court thus finds that there was no reasonable ground for the re-arrest of the Applicants in the time between their acquittal by the Resident Magistrate`s Court and their conviction by High Court for the initial charges.

138. In view of this finding, the Court deems it unnecessary to examine the issue whether the third requirement relating to the availability of

31 Communication No. 379/09 *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, 10 March 2015, para 105,

32 Article 9 of ICCPR expressly envisages a situation where individuals may be deprived of their liberty on the basis of criminal charge. (See para 3).

procedural safeguards against arbitrariness was met.

139. The Court therefore holds that the Respondent has violated the right to liberty of the Applicants under Article 6 of the Charter by arbitrarily re-arresting and charging them with fresh crimes based on the same facts after they were acquitted of the same by a court of law.

C. The alleged *incommunicado* detention of the Applicants in contravention of Article 5 of the Charter

i. Applicants' submissions

140. The Applicants submit that, following their re-arrest by the Respondent's authorities, they were detained for four days in a police cell without food and access to the outside world. They allege that their detention was unlawful and violated their rights as guaranteed under Article 5 of the Charter.

ii. Respondents' submissions

141. The Respondent on its part denies the allegation that the Applicants were detained *incommunicado* without food, and requests that the Applicants be put to the strictest proof thereof.

iii. The Court's assessment

142. The Court notes 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 and enforced disappearances 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.[33]

143. In such circumstances, "neither party is alone in bearing the burden of proof"[34] and the determination of the burden of proof depends on "the type of facts which it is necessary to establish for the purposes

33 Inter-American Court of Human Rights case of *Velásquez-Rodríguez v Honduras*, Judgment of July 29, 1988, paras 127-136.

34 Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*), ICJ (30 November 2010), para 56.

of the decision of the case"[35] It is therefore for this Court to evaluate all the circumstances of the case with a view to establishing the facts.

144. In the instant case, the Applicants simply assert that they were detained for four days in a police cell without food and access to the external environment. Given the particular condition of their detention, the Court understands that it may be difficult for them to prove their contention.

145. Nevertheless, the Applicants have not submitted any *prima facie* evidence to support their allegation which could enable the Court to shift the burden of proof to the Respondent. The Court recalls that the Applicants had lawyers both at the Magistrate's Court and the High Court and there is nothing on record to show that they raised the matter before the courts of the Respondent or communicated the condition of their detention to their lawyers, or their government.

146. In view of the foregoing, the Court finds that the allegation lacks merit and is hereby dismissed.

D. Allegation of violation of Article 3 of the Charter

i. Applicants' submissions

147. The Applicants generally allege without providing specifics, that the Respondent has violated their right under Article 3 of the Charter.

ii. Respondent's submissions

148. The Respondent maintains that Articles 12 and 13 of the Constitution of the United Republic of Tanzania firmly guarantee these rights and that the Applicants have failed to demonstrate how these guarantees of equality were not applied to them therefore resulting in the alleged violations. The Respondent also reiterates that Section 9(1) of the Basic Rights and Duties Enforcement Act [Cap 3 RE 2002] also provides adequate safeguards against the alleged violation.

iii. The Court's assessment

149. Article 3 of the African Charter provides that:

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

35 *Ibid*, paras 54-55.

150. This provision has two limbs, namely, the right to equality before the law and the right to equal protection of the law.

151. With regard to the right to equal protection of the law, the Court notes that this is recognized and guaranteed in the Constitution of the Respondent. The relevant provisions (Articles 12 and 13) of the Constitution enshrine the right in its sacred form and content on equal par with the Charter, including by prohibiting discrimination.

152. Concerning the right to equality before the law, in their submissions, the Applicants have alleged that their right under Article 3 of the Charter has been violated by the Respondent without specifying how and under what contexts that they have been discriminated against. The Court has, in the case of *Abubakari v Tanzania*, held that "it is incumbent on the Party purporting to have been a victim of discriminatory treatment to provide proof thereof".[36] The Applicants have not indicated circumstances where they were subjected to unjustified differential treatment in comparison to other persons in a similar situation.[37] As this Court has stated in its case law of *Alex Thomas v Tanzania*, "General statements to the effect that [a] right has been violated are not enough. More substantiation is required".[38]

153. The Court therefore dismisses the Applicants' allegation that their rights under Article 3 of the Charter were violated.

E. The allegation concerning the violation of all accepted principles of human rights and international law

i. Applicants' submissions

154. The Applicants also make a general submission that both the Kenyan and the Tanzanian Governments have violated all accepted principles of human rights and international law through their actions.

ii. Respondent's submissions

155. With regard to part of the allegation directed against it, the Respondent State submits that this allegation is not clear and specific. It argues that the Applicants have not specified with precision which principles and what areas of international law have been violated. In

36 *Abubakari* Case, para 153.

37 *Ibid*, para154.

38 *Alex Thomas* case, para 140.

the opinion of the Respondent, the phrase "all accepted principles of human rights and international law" is vague and general.

iii. The Court's assessment

156. The Court has already dismissed the claim of the Applicants against the Government of Kenya for lack of personal jurisdiction as specified above (para. 44).

157. As far as the Respondent is concerned, the Court has previously decided that it can only examine a specific allegation of human rights violation only when either the facts indicating such violation or the nature of the right which was allegedly violated is adequately stated in the Application.[39] The instant allegation lacks precision in both respects. The Applicants have not clearly stated the specific right or principle of human rights or international law, which is said to be violated nor have they sufficiently indicated the factual basis of such alleged violation. As a result, the Court is unable to make a determination on the merits of the substance of the Applicants` allegation because of its generalised nature and finds no violation of a right protected in the Charter or other international human rights instruments ratified by the Respondent.

F. Allegation that the Respondent State has violated Article 1 of the Charter

158. The Applicants allege that the Respondent has breached its obligation under Article 1 of the Charter by failing to give effect to the rights enshrined in it.[40] The Respondent has not made any submission on this allegation.

159. The Court reiterates its position in the matter of *Alex Thomas v Tanzania* that Article 1 of the Charter imposes on States Parties the duty to recognize the rights guaranteed therein and to adopt legislative and other measures to give effect to these rights, duties and freedoms.[41] Accordingly, in assessing whether or not a State has violated Article 1 of the Charter, the Court examines not only the availability of domestic legislative measures taken by the State but also whether the application of those legislative or other measures is in line with the realization of the rights, duties and freedoms enshrined in the Charter, that is, the

39 See *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania*, Application No 009&011/2011, para 12, *Peter Chacha* case, paras 121. 122. 131, 134.

40 Rejoinder, p 7.

41 *Alex Thomas* case, para 135.

attainment of the objects and purposes of the Charter.[42] If 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."[43]

160. In the instant case, the Court has found that the Respondent State has violated Article 6 and Article 7 of the Charter. On this basis, the Court thus concludes that the violation of these rights also simultaneously violates Article 1 of the Charter requiring the Respondent to respect and ensure respect for the rights guaranteed thereof.

IX. Reparations

161. In their Application, the Applicants requested, among other things, the Court to grant reparations and order such other measures or remedies as it may deem fit.

162. On the other hand, the Respondent prayed the Court to deny the request for reparations and all other reliefs sought by the Applicants.

163. 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."

164. In this regard, Rule 63 of the Rules of Court provides that "the Court shall rule on the request for reparation… by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

165. In the instant case, the Court will decide on certain forms of reparation in this Judgment, and rule on other forms of reparation at a later stage of the proceedings.

X. Costs

166. In their submissions, the Applicants and the Respondent did not make any statements concerning costs.

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

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

169. For these reasons:

42 *Ibid.*

43 *Ibid.*

The Court

Unanimously,

i. *Dismisses* the Respondent's preliminary objection on the lack of personal and material jurisdiction of the Court.

ii. *Declares* that the Court has jurisdiction

iii. *Dismisses* the Respondent's preliminary objections on the admissibility of the Application for non-exhaustion of local remedies and for not having been filed within a reasonable period of time after exhaustion of local remedies.

iv. *Declares* the Application admissible.

v. *Declares* that the Respondent has not violated Articles 3, 5, 7 (1) (a), 7(1) (b) and 7(2) of the Charter.

vi. *Finds* that the Respondent violated Articles 1, 6 and 7(1), and 7(1) (c) of the Charter.

vii. *Orders* the Respondent State to take all necessary measures that would help erase the consequences of the violations established, restore the pre-existing situation and re-establish the rights of the Applicants. Such measures could include the release of the Applicants. The Respondent should inform the Court within six (6) months, from the date of this judgment of the measures taken.

viii. *Grants*, in accordance with Rule 63 of the Rules of Court, the Applicants to file submissions on the request for reparations within thirty (30) days hereof, and the Respondent to reply thereto within thirty (30) days of the receipt of the Applicant's submissions.

ix. *Reserves* its ruling on the prayers for other forms of reparation and on costs.