William v Tanzania (merits) (2018) 2 AfCLR 426

Application 016/2016, *Diocles William v United Republic of Tanzania*

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

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant had been convicted and sentenced for rape of a minor. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court found that the Applicant's fair trial guarantees had been violated by not facilitating the hearing of the Applicant's witnesses, failure to undertake DNA test and inadequate evaluation of witness testimony. The Court further held that the failure to provide the Applicant with free legal representation violated the African Charter.

Jurisdiction (fair trail, 28)

Admissibility (exhaustion of local remedies, extraordinary remedy, 42; submission within reasonable time, 52)

Fair trial (evidence, facilitiation of hearing of defence witnesses, 64-66, DNA testing, 76, evaluation of witness testimony, 77; defence, free legal represnetation, 86, 87)

Reparations (not appellate court, 100, release, 101, 104)

I. The Parties

1. The Applicant, Mr Diocles William, is a national of the United Republic of Tanzania, convicted of raping a twelve (12) year old minor and sentenced to 30-years' imprisonment.

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 to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, the Respondent State deposited the declaration prescribed under Article 34(6) of the Protocol on 29 March 2010.

II. Subject of the Application

A. Facts of the matter

3. The record before the Court indicates that on 11 July 2010, at around 16:00 hours, at Mbale Village, Missenyi District in Kagera Region, the Applicant who was twenty-two (22) years old at the time, allegedly raped a minor aged twelve (12) years.

4. In Criminal Case No. 42/2010 before the Resident Magistrate Court of Bukoba, the Applicant was found guilty and sentenced on 4 August 2010 to thirty (30) years imprisonment and twelve (12) strokes of the cane for the rape of a minor of twelve (12) years of age, under Sections 130(2)(e) and 131(2)(a) of the Tanzanian Penal Code(Revised Edition 2002) as amended by the Sexual Offences Special Provisions Act 1998 (hereinafter referred to as the "Tanzanian Penal Code").

5. The Applicant filed an appeal in Criminal Case No. 23/2011 against the judgment before the High Court of Tanzania at Bukoba (hereinafter referred to as the "High Court"), contesting the credibility of the prosecution witnesses, the consistency of the testimonies and the administration of the corporal punishment; but the appeal was dismissed on 29 May 2014.

6. Aggrieved by the High Court's decision to dismiss his appeal, the Applicant lodged an appeal before the Court of Appeal of Tanzania at Bukoba (hereinafter referred to as the "Court of Appeal") in Criminal Appeal No. 225/2014; which was dismissed the appeal on 24 February 2015 as being baseless.

B. Alleged violations

7. The Applicant alleges that he was deprived of his fundamental right to have his cause heard in a court of law, in violation of Section 231(4) of the Tanzania Criminal Procedure Act, Revised Edition, 2002, and Article 7(1)(c) of the Charter.

8. The Applicant further alleges that Section 130(2)(e), and Section 131(2)(a) of the Tanzanian Penal Code, are clearly in breach of Article 13(2) and (5) of the Constitution of Tanzania 1977.

9. In his Reply, the Applicant also alleges the violation of his right to legal aid.

III. Summary of the procedure before the Court

10. The Application filed on 8 March 2016 and served on the Respondent State by a notice dated 20 April 2016, inviting the latter

to submit a list of its representatives within thirty (30) days, and its 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. The Applicant's prayer for legal aid before this Court was not granted.

11. On 10 June 2016, following its failure to file its Response, the Registry notified the Respondent State of the Court's decision, *proprio motu,* to extend by 30 days the time for the Respondent State to file its Response.

12. On the same date, the Application was transmitted to the Executive Council of the African Union and to the State Parties to the Protocol, through the Chairperson of the African Union Commission in accordance with Rule 35(3) of the Rules.

13. On 9 August 2016, the Respondent State filed its Response, explaining that the delay in doing so had been due to the fact that it needed to collect information from the various entities involved in the proceedings.

14. The Registry transmitted the Respondent State's Response to the Applicant on 17 August 2016, enjoining the latter to file its Reply within thirty (30) days of receipt thereof.

15. The Applicant submitted his Reply on 22 September 2016, and this was served on the Respondent State by a notice dated 4 October 2016.

16. At its 43rd Ordinary Session held from 31 October to 18 November 2016, the Court decided to close the written procedure.

17. On 26 January 2017, the Registry notified the Parties of the closure of the written procedure as from 14 November 2016.

18. On 6 April 2018, the Parties were informed that the Court would not hold a public hearing and indicated that written submissions and the evidence on file are sufficient to determine the matter.

IV. Prayers of the Parties

19. The Applicant prays the Court to:

"i. admit his Application and review all the proceedings in the Respondent State's courts, including the issue of Constitutional petition[1] raised in the Application;

ii. quash the conviction and order his release from prison;

iii. issue such other order(s) or relief(s) as it may deem fit in the circumstances;

1 Petition to the High Court against violations of the fundamental rights and duties provided for in Articles 12 to 29 of the Tanzanian Constitution.

iv. provide him with free legal assistance in accordance with Rule 31 of the Rules and Article 10(2) of the Protocol."

20. The Respondent State prays the Court to declare that:

"i. it lacks jurisdiction to hear the case;

ii. the Application does not meet the admissibility conditions set out in Rule 40(5) and (6) of the Rules;

iii. the Application is inadmissible."

21. The Respondent State also prays the Court to :

"i. declare that it has not violated the Applicant's rights under Articles 2, 3(2) and 7(1)(c) of the Charter;

ii. dismiss the Applicant's prayers;

iii. declare that the Applicant should continue to serve the sentence;

iv. reject the Application for lack of merit;

v. order that the costs are to borne by the Applicant."

22. In his Reply, the Applicant also prays the Court to dismiss the objections to its jurisdiction and reject the contention of the Respondent State contention on the merits of the case.

V. Jurisdiction

23. Pursuant to Rule 39(1) of its Rules: "The Court shall conduct preliminary examination of its jurisdiction..."

A. Objections to material jurisdiction

24. The Respondent State alleges that the Applicant's prayer that the Court should review the evidence adduced before and reviewed by its courts up to the highest judicial level amounts to asking the Court to act as an appellate jurisdiction, which the Respondent State maintains, is not within the purview of the Court.

25. The Respondent State also claims that the Court's mandate is only limited to interpreting and applying the Charter and other relevant human rights instruments in accordance with Article 3(1) of the Protocol, Rules 26 and 40(2) of the Rules, mirroring its own decision in Application No. 001/2013*: Ernest Francis Mtingwi v Republic of Malawi*.

26. The Respondent State further submits that it is the first time that the Applicant raises the issue of alleged violation of Article 13(2) and (5) of the Constitution; Section 130(2) and Section 131(2) of the Tanzanian Penal Code, as well as the violation of Article 7(1)(c) of the Charter concerning legal aid. It maintains that by failing to raise these issues before the domestic courts, the Applicant would be asking this

Court to act as a court of first instance, for which it lacks jurisdiction. The Respondent State emphasises that the Court is not a court of first instance to deal with the question of unconstitutionality.

27. The Applicant refutes the Respondent State's argument that the Court lacks jurisdiction, maintaining that it has jurisdiction over an Application whenever there is a violation of the Charter and other relevant human rights instruments. Therefore, the Court is empowered to review decisions rendered by domestic courts, assess the evidence, and set aside the sentence and acquit the victim, as was the case in its decision in Application No. 005/2013 - *Alex Thomas v United Republic of Tanzania.*

28. On the first objection of the Respondent State that the Court is being asked to act as an appellate court, this Court reiterates its position in *Ernest Mtingwi v Republic of Malawi*[1] that it is not an appeal court with respect to decisions rendered by national courts. However, this does not preclude the Court 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.[2] In the instant case, this Court has jurisdiction to determine whether the domestic courts' proceedings with respect to the Applicant's criminal charges that form the basis of his Application before this Court, have been conducted in accordance with the international standards set out in the Charter.

29. Furthermore, concerning 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 the provisions of the human rights international instruments to which the Respondent State is a Party, it has material jurisdiction by virtue of 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."

30. Consequently, the Court dismisses the Respondent State's objection that the Applicant is requesting the Court to act as an appellate court and as a court of first instance; and holds that it has material jurisdiction to hear the matter.

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 (*hereinafter referred to as "*Alex Thomas v Tanzania Judgment"),* para 130 and Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania (*hereinafter referred to as "*Mohamed Abubakari v Tanzania Judgment"),* para 29. Application No. 032/2015. *Kijiji Isiaga v Tanzania*, paras 34 and 35.

B. Other aspects of jurisdiction

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

i. it has personal jurisdiction 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 to access the Court in terms of Article 5(3) of the Protocol;

ii. it has temporal jurisdiction in as much as the alleged violations are continuous in nature, since the Applicant remains convicted on the basis of what he considers an unfair process;

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

32. In view of the foregoing, the Court declares that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

33. 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".

34. Pursuant to Rule 39(1) of its Rules, "the Court shall undertake a preliminary examination of (…) the admissibility of the Application in accordance with both Article 50 and Article 56 of the Charter and Rule 40 of the Rules".

35. Rule 40 of the Rules, which in essence restates 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:
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> "1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
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> 2. comply with the Constitutive Act of the Union and the Charter;
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> 3. not contain any disparaging or insulting language;
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> 4. not be based exclusively on news disseminated through the mass media;
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> 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."

A. Conditions of admissibility in contention between the Parties

36. The Respondent State raised objections in relation to the exhaustion of local remedies and as to whether the application was filed within a reasonable time.

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

37. The Respondent State contests the admissibility of the Application on the grounds that the Applicant cannot plead before this Court the violation of his right to a fair trial under Article 13(6)(a) of the Tanzanian Constitution and 7(1)(c) of the Charter, as he has failed to exhaust available local remedies within its jurisdiction, especially that of filing a constitutional petition, as provided by Article 30(3) of the Tanzanian Constitution and in the Basic Rights and Duties Enforcement Act, as revised in 2002.

38. In this regard, citing the jurisprudence of the Commission,[3] the Respondent State alleges that the Applicant failed to comply with Rule 40(5) of the Rules arguing that at no time was the issue of legal aid raised at the domestic courts, notwithstanding the fact that both Section 3 of Criminal Procedure Act and Rule 31 of the 2009 Rules of Procedure of the Court of Appeal provides for legal aid.

39. The Applicant refutes the objection of the Respondent State to the admissibility of his Application on the grounds that he did not lodge a constitutional petition for he was not obliged to exhaust this remedy.

40. Concerning the question of legal aid, the Applicant contends that, pursuant to the provisions of Section 3 of the Criminal Procedure Act and Rule 31 of the Rules of Procedure of the Court of Appeal, the only condition required for an accused to be afforded legal aid is when,

3 African Commission on Human and Peoples' Rights Communication 263/02 - *Kenyan Section of the International Commission of Jurists, Law Society of Kenya and Kituo Cha Sheria v Kenya.*

in the interests of justice, the judicial authorities deem it desirable to provide such legal aid.

41. The Court notes that the Applicant filed an appeal and had access to the highest court of the Respondent State, namely, the Court of Appeal, for determination of the various allegations, especially those relating to violation of the right to a fair trial.

42. Concerning the filing of a constitutional petition for violation of the Applicant's rights, the Court has repeatedly stated that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust prior to seizing this Court.[4]

43. With regard to the allegation that the Applicant did not raise the legal aid issue during domestic proceedings but chose to bring it before this Court for the first time, the Court, in line with its Judgment in A*lex Thomas v United Republic of Tanzania*, takes the view that this complaint forms part of the "bundle of rights and guarantees" enshrined in the appeal procedures at domestic level which upheld the guilty verdict against the Applicant and the sentence to thirty (30) years' imprisonment. The Court stresses that legal aid forms part of the "bundle of rights and guarantees" in respect of the right to a fair trial, which is the basis and substance of the Applicant's appeal. The domestic judicial authorities thus had ample opportunity to address that allegation even without the Applicant having raised it explicitly. It would therefore be unreasonable to require the Applicant to file a new application before the domestic courts to seek redress for these complaints.[5]

44. Accordingly, the Court finds that the Applicant has exhausted local remedies as envisaged in Article 56(5) of the Charter and Rule 40(5) of the Rules. The Court therefore overrules this objection to the admissibility of the Application.

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

45. The Respondent State argues that, should the Court take the view that the Applicant has exhausted local remedies, the fact would still remain that he did not file his Application within a reasonable time from the date the domestic remedies were exhausted.

46. The Respondent State further asserts that even if Rule 40(6)

4 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 – 62; *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 66 – 70; Application No. 011/2015. Judgment of 28/9/20l7, *Christopher Jonas v United Republic of Tanzania*, para 44.

5 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 – 65.

of the Rules is not specific on what constitutes a reasonable time, international human rights jurisprudence has established that six (6) months is considered a reasonable time, invoking in particular the decision in respect of Communication No. 308/05, in *Michael Majuru v Zimbabwe,* wherein the Commission is claimed to have applied that timeframe.

47. The Respondent State argues that eleven (11) months elapsed between the decision of the Court of Appeal (24 February 2015) and the date the Court was seized (8 March 2016), thus exceeding the period of six (6) months that is considered reasonable, whereas nothing prevented the Applicant from filing his Application earlier.

48. In his Reply, the Applicant refutes the Respondent State's submission that the deadline for filing an appeal before the Court is six months after exhaustion of local remedies, claiming that reasonableness of a deadline depends on the circumstances of each case. In this regard, the Applicant quotes the Court's ruling in Application 013/2011 – *Beneficiaries of Late Norbert Zongo and Others v Burkina Faso.*

49. The Court is of the opinion that the question that arises at this juncture is whether the period that elapsed between the exhaustion of local remedies and the time within which the Applicant seized the Court, is reasonable within the meaning of Rule 40(6) of the Rules.

50. The Court notes that local remedies were exhausted on 24 February 2015, the date of the Court of Appeal's decision, and that the Application was filed at the Registry on 8 March 2016. One (1) year and thirteen (13) days had elapsed between the Court of Appeal decision and the filing of the Application with the Registry of the Court.

51. In the matter of the *Beneficiaries of late Norbert Zongo and Others v Burkina Faso,* the Court established the principle that "... the reasonableness of the timeline for referrals to it depends on the circumstances of each case and must be assessed on case-by-case basis."[6]

52. The Court notes that, in the instant case, the Applicant is a layman in matters of law, indigent and incarcerated without the benefit of legal counsel or legal assistance.[7] The Court holds that these circumstances sufficiently justify the filing of the Application one (1) year and thirteen (13) days after the Court of Appeal decision.

6 Application No. 013/2011. Ruling on preliminaries objections of 21/06/2013, *Beneficiaries of late Nobert Zongo and Others v Burkina Faso*, para 121. See also Application No. 005/2013*, Alex Thomas v Tanzania* Judgment*, op cit,* para 73; Application No. 007/2013, Judgment of 3/6/2013*, Mohamed Abubakari v Tanzania* Judgment*, op cit*, para 91; Application No. 011/2015, *Christopher Jonas v Tanzania* Judgment*, op cit,* para 52.

7 *Alex Thomas v Tanzania* Judgment*, op cit*, para 74.

53. In view of the aforesaid, the Court dismisses the objection to admissibility that the Application was not filed within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

54. The Court notes that the conditions regarding the identity of the Applicant, the language used in the Application, the nature of the evidence and the *non bis in idem* principle as set out in sub Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules, are not in contention between the Parties.

55. The Court also notes that nothing in the pleadings submitted to it by the Parties suggests that any of the above requirements has not been met in the instant case. Consequently, the Court holds that the requirements under consideration have been fully met in the instant case.

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

VII. Merits

A. Alleged violations of the right to a fair trial

57. The Applicant alleges the violations of his right to a fair trial, namely: (i) the failure to hear his witnesses, (ii) the fact that the conviction was based on insufficient evidence and conflicting statements of the prosecution witnesses, and the lack of access to legal aid.

i. Allegation that defence witnesses were not heard

58. The Applicant alleges that the trial court refused to order the attendance of his witnesses for examination. He claims, as a result, that he has been deprived of his fundamental right to have his cause heard in violation of Section 231(4) of the Criminal Procedure Act and Article 7(1)(c) of the Charter.

59. He also refutes the Respondent State's claim that the absence of his witnesses was due to his own negligence, adding that he was under arrest and the authorities did nothing to bring the witnesses in question before the court. Further, the Applicant stresses that he was not informed by the authorities that he could benefit from their assistance in producing his witnesses, prior to his decision to give up

on calling witnesses.

60. The Respondent State reiterates that the Applicant never invoked this violation before the domestic courts, notwithstanding the fact that the domestic laws provide for such right and the Applicant had, on two occasions, requested that the hearing be postponed due to the absence of his witnesses; and in the end decided to let the trial proceed without obtaining the appearance of his witnesses.

61. The Court notes that Article 7(1)(c) of the Charter states that:

> "Every individual shall have the right to have his cause heard. This comprises:
>
> c. the right to defence…"

62. The right to effective defence includes, inter alia, the right to call witnesses for the defence.[8] The question arises as to whether obtaining the attendance of witnesses before the Court is the sole responsibility of the accused or whether the competent authorities of the Respondent State also have the responsibility to ensure the presence of the witnesses whom the authorities intend to hear.

63. The Court notes that in all proceedings, more specifically, in criminal matters, a court seized of a case must hear both the prosecution as well as the defence witnesses. If it does not do so, it must provide the grounds for its decision. In this regard, the Court observes Section 231(4) of Criminal Procedure Act of the Respondent State contains provisions which allow national courts to take measures to ensure the appearance of defence witnesses where the absence of such witnesses is not due to the fault of the accused and that where the witnesses appear, there is the likelihood that they would adduce evidence in his favour.[9]

64. In the instant case, it emerges from the file that the Applicant called witnesses on three (3) occasions without success, and in the

8 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa approved by the African Commission on Human and Peoples' Rights (2003) – 6) Rights during a trial: "f) The accused has a right to examine, or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

9 Section 231(4) of the Criminal Procedure Act provides as follows: "If the accused person states that he has witnesses to call but that they are not present in Court, and the Court is satisfied that the absence of such witnesses is not due to any faults or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the Court may adjourn the trial and issue process or take other steps to compel attendance of such witness."

end, he gave up on getting them to appear.[10] However, he claims before this Court that the reason why he gave up on calling his witnesses was because the judicial authorities did not inform him that they could assist him to obtain their appearance.

65. The Court is of the opinion that even if the Applicant has given up on calling his witnesses, the fact remains that witnesses did not cease to be necessary in the course of the trial proceedings to ensure equality of arms. However, this being the case, the reasons as to why the trial court decided not to take the appropriate measures to hear the Applicant's witnesses are not provided anywhere in the record of the proceedings.

66. The Court is of the view that it was necessary for the Respondent State's judicial authorities to be more proactive, in particular, in ascertaining whether the Applicant no longer intended to call his witnesses either because he did not actually want them to appear on his behalf or because he did not have the means to obtain their attendance. It was also desirable on the part of the Respondent State's judicial authorities to provide, *suo motu*, sufficient information in this regard to the accused, where he is indigent, in detention and without legal aid.

67. The Court therefore holds from the foregoing that the Respondent State has violated the Applicant's right to defence under Article 7(1)(c) of the Charter by failing to ensure the appearance of his witnesses.

ii. Allegations of insufficient evidence and inconsistencies in witness statements

68. The Applicant submits that the evidence presented at the trial court and relied upon to convict him was based only on the victim's (PW4) testimony, who claimed she was at home playing with a friend (PW5) and that the Applicant went to PW2's house (the victim's mother) and told her to follow him to his house where he promised to give her one hundred Tanzania Shillings (TZS 100); that halfway to his house, the Applicant took her to a thicket where he raped her and threatened to stab and beat her with a stick if she told anyone what happened.

69. The Applicant denies having committed such a crime, affirming that on the day in question, he was at the house of the victim's mother (PW2), together with three friends to consume alcohol ("pombe" also known as "Gongo") at around 6:00 pm to 7:00 pm. He then amended

10 At the hearing of 24 November 2010 before Resident Magistrate Court of Bukoba, the Applicant declared: "I have failed to get my witness. I am no longer intending to call them. I am closing my defence case". See page 23 of the document attached to Criminal appeal No. 225/2014 before the Court of Appeal.

his initial statement and said that they had arrived at PW2's house at around 3:45 pm, 45 minutes after they had left their own houses.

70. He disputes the Respondent State's claims regarding examination of evidence, and prays the Court to re-examine the evidence, taking into account the doubts he has raised over the statements of the Respondent State's Attorney.

71. The Respondent State refutes the Applicant's claims and describes the steps that were followed during proceedings at its various courts until the final determination, wherein the Resident Magistrate's Court of Bukoba,[11] the High Court of Tanzania,[12] and the Court of Appeal,[13] all concluded that the Applicant had committed the offence in question.

72. The Court notes that in criminal proceedings the conviction of individuals for a crime should be established with certitude. In this regard, the Court has in the past held "....that a fair trial requires that the imposition of a sentence in a criminal offence, and in particular a heavy prison sentence, should be based on strong and credible evidence. That is the purport of the right to the presumption of innocence also enshrined in Article 7 of the Charter."[14]

73. In the instant case, the Court notes that, as stated in the record of the proceedings, the Applicant was charged and convicted essentially on the basis of information provided by the victim (PW4), corroborated by the testimonies of her family members, especially her mother (PW2), the victim's friend (PW5), the mother of her friend and the victim's aunt (PW1), who recounted what the victim herself had told them. The victim's friend (PW5) is the only eyewitness who allegedly saw the events first hand, and partially witnessed some of the facts affirming that the victim was taken away by the Applicant while she was playing with her.

74. The Court also notes the fact that the items of clothing worn

11 Criminal case No. 42 of 2010, Judgment of 8/12/2010: "27. The Court of Appeal also considered the Applicants defense in its Judgment at para 5, lines 11 – 15 and from pages 10-11 of its Judgment and concluded as follows: "We find no reason for interfering with the finding of the first appellant Court that it was the appellant who committed the offence of rape."

12 Criminal Appeal No. 23 of 2011, Judgment of 29/5/2014: "26. The High Court Judgement also considered the Applicant's defense from pages 4 - line 6 and concluded at page 9, line 13 by stating: "His defense did not raise any doubt against the prosecution case."

13 Criminal Appeal No. 225 of 2014, Judgment of 24/2/2014: "24. The Court of Appeal then considered whether it was the Applicant who committed the offence and stated at page 10 of its Judgement: "The other issue is whether it was the penis of the appellant which penetrated the vagina of the complainant' and held as follows at page 11 "We find no reason for interfering with the findings of the first appellant court that it was the appellant who committed the offence of rape.".

14 *Mohamed Aboubakari v Tanzania* Judgment, *op cit*, para 174.

by the victim at the time of the rape were not presented as evidence before the domestic judicial authorities and the prosecuting authorities merely stated that their production was deemed to be irrelevant.

75. Furthermore, the Court notes that the absence of information in the record of proceedings concerning the steps taken to obtain clarifications on whether the victim's mother sells alcoholic beverages and, if so, determine the trading hours of the business; and whether the Applicant was drinking in her presence on the material day, as she claims, and up to what time; and cross-check this information with the version given by the victim who claims that no adults were at home at the time; the reasons as to why no blood was drawn from the Applicant for testing to confirm whether or not the bodily fluids of the rapist found in the victim's private parts or on her clothing matched the Applicant's DNA (deoxyribonucleic acid) disclose patent anomalies in the domestic proceedings.

76. The Court is of the view that the medical report should not be limited to only confirming the occurrence of rape, but should also ascertain whether the offence had been committed by the Applicant, since the victim was taken for medical examination when she was still wearing the same clothes about one hour after the offence was committed (between 4:00 pm and 5:00 pm). In the instant case, there is no mention that the Respondent State has any technical constraints in that respect, and as such due diligence would have required the DNA testing to clear any doubt as to who committed the offence.

77. The Court recalls its position in the matter of *Mohamed Abubakari v United Republic of Tanzania*,[15] where it emphasised the need to obtain clarification on issues or situations likely to impact the decision of the judges. In the instant case, the Court's understanding is that even if it is accepted that, in offences of sexual nature, the main testimony is given by the victim, as the Respondent State's prosecuting authorities claim, in the specific circumstances of the case, wherein there are signs of contradiction between the statements given by the witnesses, all of whom are relatives of the victim, especially the fact that the accused was not assisted by counsel, it would have been desirable for the prosecuting authorities to exercise greater effort in terms of due diligence to corroborate the victim's statements and clarify the circumstances of the crime.

78. In view of the aforesaid, the Court accordingly considers that the Applicant's right to a fair trial provided for in Article 7 of the Charter has been violated, as the victim's and Prosecution witnesses' statements

15 *Mohamed Abubakari v Tanzania* Judgment, paras 110 and 111. See also Application No. 006/2015, Judgment of 23/3/2018, *Nguza Viking (Babua Seya) and Johnson Nguza (Papi Kocha)*, paras 105 – 107.

were not corroborated, and the circumstances of the crime were not clarified.

iii. Alleged violation of the right to legal aid

79. The question of legal aid was not raised expressly in the Application. However, in his Reply, the Applicant refutes the Respondent State's arguments regarding legal aid, claiming that the only established procedure in Section 3 of the Legal Aid Act is that the judicial authorities order the provision of legal aid where such aid is deemed justified if the interests of justice so demand.

80. The Respondent State contends that at all stages of the proceedings before its judicial authorities, the Applicant never requested for legal aid, nor did he make any such request to the various Non-Governmental Organizations (NGOs) that provide such assistance; and never declared his indigent status in order to qualify for the same.

81. The Respondent State submits that legal aid is mandatory for those accused of manslaughter and murder, and does not require an express request by the accused. It, however, further submits that legal aid is not an absolute right and that States exercise the margin of appreciation in granting such aid within the limits of their capacity; and this is how the current legal aid regime operates in the country. It states also that, with respect to the Court itself, Rule 31 of the Rules makes provision for legal assistance only within the limits of available financial resources.

82. In conclusion, the Respondent State indicates that, in any event, the process of reviewing its legal aid system was ongoing, and the outcome would be communicated to the Court in due course.

83. The Court notes that Article 7(1)(c) of the Charter stipulates

> "Every individual shall have the right to have his cause heard. This comprises:
>
> … c. The right to defence, including the right to be defended by counsel of his choice."

84. The Court observes that even though Article 7(1)(c) of the Charter guarantees the right to defence, including the right to be assisted by counsel of one's choice, the Charter does not expressly provide for the right to free legal assistance.

85. However, in its Judgment in the Matter of *Alex Thomas v The United Republic of Tanzania*, this Court stated that free legal aid is a right intrinsic to the right to a fair trial, particularly, the right to

defence guaranteed by Article 7(1)(c) of the Charter.[16] In its previous jurisprudence, the Court also held that an individual charged with a criminal offence is automatically entitled to the right of free legal aid, even without the individual having to request for the same, where the interests of justice so require, and in particular, if he is indigent, if the offence is serious and if the penalty provided by the law is severe.[17]

86. In the instant case, it is not in dispute that the Applicant was not afforded free legal aid throughout his trial. Given that the Applicant was convicted of a serious crime, that is, rape, which carries a severe punishment of thirty (30) years, there is no doubt that the interests of justice would warrant free legal aid where the Applicant did not have the means to engage his own legal counsel. In this regard, the Respondent State does not contest the indigence of the Applicant nor does it argue that he was financially capable of getting a legal counsel. In these circumstances, it is evident that the Applicant should have been afforded free legal aid. The fact that he did not request for it does not exonerate the Respondent State from its responsibility to offer free legal aid.

87. As regards the allegations of the Respondent State relating to the margin of discretion that should be available to States in the implementation of the right to legal aid, its non-absolute nature and the lack of financial capacity, the Court is of the opinion that the allegations are no longer relevant in this case, given that the conditions for the mandatory provision of legal aid have all been met. Accordingly, the Court holds that the Respondent State has violated Article 7(1)(c) of the Charter.

B. Alleged violation of Article 13(2) and (5) of the Constitution of Tanzania

88. The Applicant contends that Sections 130(2)(e) and 131(2)(a) of the Tanzanian Penal Code dealing with Offences against Morality that formed the basis for his conviction clearly violate Article 13(2) and (5) of the Tanzanian Constitution.

89. The Respondent State contests this allegation by arguing that the acts committed by the Applicant fall under the definition of the crime of rape, as *per* the sentence of the trial court, which was upheld by the two appellate courts.

90. The Court observes that it is not mandated to assess the

16 *Alex Thomas v Tanzania* Judgment*, op cit,* para 114.

17 *Ibid*, para 123. See also *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 138 and 139.

constitutionality of a specific national legislation. However, this does not prevent the Court from examining the compatibility of a particular domestic legislation with international human rights standards established by the Charter and any other international human rights instruments ratified by the Respondent State.[18]

91. In the instant case, the Applicant alleges that Sections 130(2)(e) and 131(2)(a) of the Tanzanian Penal Code[19] breach Articles 13(2) and (5) of the Tanzanian Constitution, which enshrines the right to equality and equal protection of the law essentially in the same terms as Article 3 of the Charter.[20] It is thus incumbent upon this Court to ascertain whether such sections of the Penal Code contravene Article 3 of the Charter, which states that "Every individual shall be equal before the law [and] …the right to equal protection of the law".

92. The Court notes that Sections 130 (2)(e) and 131(2)(a) of the Penal Code define the material scope of the offence of rape in the Respondent State with the penalty its commission entails. The Court also observes from the file that the national Courts convicted and sentenced the Applicant on the basis of these provisions in accordance with established domestic procedures and there is nothing manifestly erroneous in the process.

93. For the Court, the Applicant's contention that the said sections of the Penal Code contravene the constitution is a mere general allegation which remains unproven. In this vein, the Court recalls its established jurisprudence that "general statements to the effect that a right has been violated are not enough. More substantiation is required".[21]

94. In view of the foregoing, the Court holds that the Respondent has not violated the Applicant's right to equality and equal protection of the law under Article 3 of Charter.

18 See para 29 of this judgment.

19 Section 130(2)(e) of the Penal Code provides that "A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions: … (e) being a religious leader takes advantage of his position and commits rape on a girl or woman. Section 131(2)(a) of the same stipulates that "Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall: if a first offender, be sentenced to corporal punishment only."

20 Article 13(3)(5) of the Tanzanian Constitution provides that "All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law. For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualification."

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

VIII. Remedies sought

95. The Applicant prays the Court to restore justice; quash his conviction and the sentence meted out to him; order that he be released and take such other measures as it may deem appropriate.

96. In its Response, the Respondent State prays the Court to dismiss the Application and the Applicant's prayers in their entirety, as being unfounded

97. Article 27(1) of the Protocol stipulates 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."

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

99. The Court notes its finding in paragraphs 67, 78 and 87 above that the Respondent State violated the Applicant's rights to a fair trial due to (i) the fact that he was not afforded legal aid; (ii) his witnesses were not heard; and that his conviction was based on insufficient evidence and contradictory statements of the Prosecution witnesses. In this regard, the Court recalls its position on State responsibility in *Reverend Christopher R Mtikila v United Republic of Tanzania*, that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation."[22]

100. As regards the Applicant's prayer to quash his conviction and sentence and directly order his release, the Court reiterates its decision that it is not an appellate Court for the reasons that it does not operate within the same judicial system as national courts; and that it does not apply "the same law as the Tanzanian national courts, that is, Tanzanian law". [23]

101. The Court also recalls its decision in *Alex Thomas v Tanzania* where it stated that "an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances"[24]. This would be the case, for example, if an Applicant sufficiently demonstrates or the Court itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a

22 Application No. 011/2011. Judgment of 13/6/2014; *Reverend Christopher R Mtikila v United Republic of Tanzania*, para 27.

23 *Mohamed Abubakari v Tanzania* Judgment, *op cit,* para 28.

24 *Alex Thomas v Tanzania* judgment, *op cit*, para157.

miscarriage of justice. In such circumstances, the Court has pursuant to Article 27(1) of the Protocol to order "all appropriate measures", including the release of the Applicant.

102. In this regard, the Court refers to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights. In their case law, both Courts, considering the nature of the violations established and in order to assist states to comply with their human rights obligations, have exceptionally requested Respondent States to ensure the release of individuals with respect to some specific violations where no other options are available to remedy or to put an end to the violations.[25]

103. In the instant case, the Court observes that the Respondent has violated the Applicant's right to a fair trial contrary to Article 7(1) of the Charter by failing to afford him legal aid, denying his witnesses to be heard and convicting him in the face of insufficient and contradictory statements of the prosecution witnesses.

104. The Court considers that in spite of the fact that it has found these violations of the Charter, according to the record before the Court and taking into account the nature and scope of the violations and the nature of the offence, it cannot in this instant case order the Respondent State to release the Applicant from prison.

105. In order to ensure fair and adequate reparations for the violations, the Court finds that the violations affected the right to a fair trial guaranteed in the Charter. Consequently, the trial of the Applicant should be reopened taking into consideration the guarantees of a fair trial pursuant to the Charter and international human rights standards, including the Applicant's right to defence.

106. The Court, lastly, notes that the Parties did not request or file submissions regarding other forms of reparation.

IX. Costs

107. The Respondent State prays the Court to rule that the costs be borne by the Applicant.

108. The Applicant has not made any specific request on this issue.

109. In terms of Rule 30 of the Rules: "Unless otherwise decided by the Court, each party shall bear its own costs."

110. In the instant case, the Court decides that each Party shall bear its own costs.

25 *Del Rio Prada v Spain*, European Court of Human Rights, Judgment of 10 July 2012, para 139, *Assanidze v Georgia* [GC] - 71503/01. Judgment 8 April 2004, para 204. Case of *Loayza-Tamayo v Peru*, Inter-American Court of Human Rights, Judgment of 17 September 1997, para 84

X. Operative part

111. For these reasons,
The Court,
unanimously,
On jurisdiction
i. *Dismisses* the objection to jurisdiction of the Court.
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objection to the admissibility of the Application;
iv. *Declares* that the Application is admissible.

On the merits
v. *Finds* that the alleged violation of Applicant's right to equal protection before the law provided for in Article 3 of the Charter, the content of which is similar to Article 13(2) and (5) of the Tanzanian Constitution has not been established;
vi. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter by failing to provide the Applicant with legal aid;
vii. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter by failing to hear the Applicant's defence witnesses;
viii. *Finds* that the Respondent State has violated Article 7 of the Charter by convicting the Applicant on the basis of insufficient evidence and contradictory statements of the prosecution witnesses;
ix. *Dismisses* the Applicant's prayer for the Court to quash his conviction and sentence;
x. Dismisses Applicant's prayer for the court to directly order his release from prison;
xi. Orders the Respondent State to reopen the case within six (6) months in conformity with the guarantees of a fair trial pursuant to the Charter and other relevant international human rights instruments and conclude the trial within a reasonable time and, in any case, not exceeding two (2) years from the date of notification of this judgment.
xii. Orders the Respondent State to report on the implementation of this judgment within a period of two (2) years from the date of notification of this judgment.

On costs
xiii. *Decides* that each Party shall bear its own costs.