Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48

Application 025/2016, *Kenedy Ivan v United Republic of Tanzania*

Judgment, 28 March 2019. 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 was convicted and sentenced for armed robbery. He claimed that the Magistrate Court failed to summon his witnesses and that that he had no legal assistance, depriving him of his right to fair trial. The Court, based on the record of proceedings at the national court, dismissed the Applicant's claim that the Magistrate Court failed to summon his witnesses. In respect to his claim that he had no legal representation, the Court stated that considering the gravity of the crime he was accused of, he should have been provided with free legal assistance. Consequently, it found violation of the right to free legal assistance and ordered the Respondent to pay compensation to the Applicant.

Admissibility (exhaustion of local remedies, constitutional petition, 42; submission within reasonable time, 53)

Fair trial (free legal assistance, 83)

Reparations (compensation, 90)

Separate opinion: TCHIKAYA

Jurisdiction (substantive, 13)

I. The Parties

1. Mr Kenedy Ivan (hereinafter referred to as "the Applicant") is a national of Tanzania, currently serving a 30 years prison sentence at the Butimba Central Prison for the offence of armed robbery.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, through which it accepts the jurisdiction of the Court to receive applications from

individuals and NGOs.

II. Subject of the Application

A. Facts of the matter

3. The Application originates from the judgment of 8 February 2006 in Criminal Case 157 of 2005 in the District Court of Ngara; judgment of 23 May 2007 in Criminal Appeal 31 of 2006 of the High Court of Tanzania and judgment of 17 February 2012 in Criminal Appeal 178 of 2007 of the Court of Appeal of Tanzania sitting at Mwanza. The Applicant alleges violation of his human rights and fundamental freedoms arising from these proceedings.

4. The record before this Court indicates that "…on 03/07/2004 on or about 8:15 pm in Murugwanza village", the Applicant together with others stole "cash Tshs. 35,000/=, a radio make Panasonic valued at Tshs. 20,000/=, the property of one Jesca d/o Nyamwilahila". It is alleged that the Applicant "used a fire arm and a machete in order to steal or overcome resistance" from Jesca Nyamwilahia.

5. Three (3) of the Prosecution Witnesses, that is, PW1, PW2 and PW3 testified in the District Court that they were in the house that was the subject of the robbery mentioned above. Furthermore, they identified the Applicant and one Baraka as being among the assailants on the day of the robbery.

B. Alleged violations

6. The Applicant alleges that he was deprived of a fair hearing when the Magistrate failed to summon his witnesses in spite of his request and that this violates his rights under Article 6(a) of the Constitution of the United Republic of Tanzania 1977 and Section 231 (4) of the Criminal Procedure Act (2002).

7. He also alleges that he had no legal representation at both the initial trial and appeal stages of his case, noting that this violates his fundamental rights under Article 7(1)(c) of the Charter.

III. Summary of the procedure before the Court

8. The Application was filed at the Court on 22 April 2016 and transmitted to the Respondent State on 7 June 2016. On 14 June 2016, a notification of the Application was sent to the State Parties to the Protocol, the Executive Council and the Assembly of the African Union through the Chairperson of the

African Union Commission.

9. The Respondent State filed its Response on 31 January 2017 within time after extensions in this regard by the Court and this was transmitted to the Applicant on 3 February 2017. Subsequently, the Applicant, on 21 February 2017 filed a Reply within time and this was transmitted to the Respondent State on 28 June 2017.

10. On 11 July 2018, the Applicant was requested to file submissions to substantiate his claim for reparations in accordance with the Court's decision at its 49th Ordinary Session (16 April to 11 May 2018) to combine judgment on merits with reparations**.** The Court notes that the Applicant did not submit this detailed claim.

11. On 8 November 2018, written pleadings were closed with effect from that date and the Parties were notified.

IV. Prayers of the Parties

12. The Applicant prays the Court to:

"i. Find violations of his rights done by the judiciary of the Respondent State and order his release;

ii. Be provided with free legal representation under Rule 31 of the Rules and Article 10(2) of the Protocol;

iii. Grant any other orders or relief the Court may deem fit in the circumstances."

13. In his Reply, the Applicant prays the Court to dismiss the objections to its jurisdiction and admissibility and to determine the case on its merits.

14. The Respondent State prays the Court to:

"i. Declare that it is not vested with jurisdiction to adjudicate the Application.

ii. Declare the Application inadmissible and dismiss the same.

iii. Hold that the Government of Tanzania has not violated any of the rights alleged by the Applicant.

iv. Declare that the cost of this Application be borne by the Applicant."

V Jurisdiction

15. Pursuant to Article 3(1) of the Protocol, "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 instruments ratified by the States concerned".

16. In accordance with Rule 39(1) of the Rules of Court (hereinafter referred to as Rules), "the Court shall conduct preliminary

examination of its jurisdiction …"

A. Objections to material jurisdiction

17. The Respondent State raises two objections relating to the material jurisdiction of the Court: first, that the Court is being asked to act as a Court of first instance, and second, that the Court is being requested to sit as an appellate Court.

i. Objection on the ground that the Court is being requested to sit as a Court of first instance

18. In its objection, the Respondent State avers that the Applicant has raised three allegations before this Court for the first time and is asking the Court to adjudicate on them. According to the Respondent State, the allegations raised for the first time are:

"i. Allegation that the Respondent State violated the Applicant's right to be represented by a legal counsel;

ii. Allegation that the Applicant's conviction and sentence was determined on the strength of evidence which was not thoroughly evaluated;

iii. Allegation that the Applicant's right to a fair hearing was violated as a result of the magistrate failing to "summon his defence witnesses."

19. The Applicant's reply to these objections is that the Court's jurisdiction is invoked "in so far as the applicant's complaints hinge on the adherence to the principles of human and peoples' rights and freedoms contained in the declaration".

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20. The Court recalls its established jurisprudence on the issue and reaffirms that its material jurisdiction is established if the Application brought before it raises allegations of violation of human rights; and it suffices that the subject of the Application relates to the rights guaranteed by the Charter or any other

relevant human rights instrument ratified by the State concerned.[1]

21. The Court notes that this Application invokes violation of the human rights protected by the Charter and other human rights instruments ratified by the Respondent State.

22. Consequently, the Court dismisses the Respondent State's first objection herein.

ii. Objection on the ground that the Court is being requested to sit as an appellate Court

23. The Respondent State alleges that this Court is being requested to consider matters already settled in the national courts and therefore exercise an appellate jurisdiction. It especially contends that the Court of Appeal already settled the examination of the visual and voice identification evidence and the evidence regarding the source and intensity of the light relied upon to convict the Applicant.

24. According to the Respondent State, this Court lacks jurisdiction to hear the Application and it should thus be dismissed.

25. The Applicant's reply is that the Court's jurisdiction is invoked "in so far as the applicant's complaints hinges on the adherence to the principles of human and peoples' rights and freedoms contained in the declaration".

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26. This Court reiterates its position in the matter of *Ernest Francis*

1 See: Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania* (Merits) *(hereinafter referred to as "Alex Thomas v Tanzania* (Merits)*"*), para 45; Application 001/2012. Ruling of 28 March 2014 (Admissibility), *Frank David Omary and others v United Republic of Tanzania (hereinafter referred to as "Frank Omary v Tanzania* (Admissibility)"), para 115; Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania (hereinafter referred to as "Peter Chacha v Tanzania* (Admissibility)"), para 114; Application 20/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v United Republic of Tanzania (hereinafter referred to as "Anaclet Paulo v Tanzania* (Merits and Reparations)"), para 25; Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania (hereinafter referred to as "Armand Guehi v Tanzania* (Merits and Reparations)*"*), para 31; Application 024/15. Judgment of 7 December 2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania (hereinafter referred to as "Werema Wangoko v Tanzania* (Merits and Reparations)"), para 29.

Mtingwi v Republic of Malawi, in which it noted that it is not an appellate body with respect to decisions of national courts.[1] However, the Court emphasised in the matter of *Alex Thomas v United Republic of Tanzania,* that, "... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[2]

27. This Court exercises jurisdiction as long as "the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the Respondent State".[3] In the instant Application, by exercising this mandate, the Court is not acting as an appellate Court.

28. The Court therefore dismisses the objections raised by the Respondent State in this regard, and finds that it has material jurisdiction over the Application.

B. Other aspects of jurisdiction

29. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on the record indicates that it lacks such jurisdiction. The Court therefore holds that:

i. it has personal jurisdiction given that the Respondent State is a party to the Protocol and has made the Declaration prescribed under Article 34(6) thereof, which enabled the Applicant to file this Application pursuant to Article 5(3) of the Protocol.

ii. it has temporal jurisdiction in view of the fact that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers as irregularities;[4] and

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

2 *Alex Thomas v Tanzania* (Merits), para 130. See also Application 010/2015, Judgment of 28 September 2017 (Merits), *Christopher Jonas v United Republic of Tanzania (hereinafter referred to as "Christopher Jonas v Tanzania* (Merits)"), para 28; Application 003/2014, Judgment of 24 November 2017 (Merits), *Ingabire Victoire Umuhoza* v *Republic of Rwanda (hereinafter referred to as (hereinafter referred to as "Ingabire Umuhoza v Rwanda* (Merits)"), para 52; Application 007/2013, Judgment of 3 June 2013 (Merits), *Mohamed Abubakari v United Republic of Tanzania*, (hereinafter referred to as "*Mohamed Abubakari v Tanzania* (Merits)"), para 29.

3 *Alex Thomas v Tanzania* (Merits), para 45.

4 See Application 013/2011. Ruling of 21 June 2013, (Preliminary Objections), *Norbert Zongo and others v Burkina Faso*, paras 71 to 77.

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

30. In light of the foregoing, the Court holds that it has jurisdiction to hear the case.

VI. Admissibilty

31. 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".

32. Pursuant to Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of … the admissibility of the Application in accordance with Article…56 of the Charter and Rule 40 of the Rules".

33. Rule 40 of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:
"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. Comply with the Constitutive Act of the Union and the Charter;
3. Not contain any disparaging or insulting language;
4. Not based exclusively on news disseminated through the mass media;
5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter;
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

34. The Respondent State submits that the Application does not comply with two admissibility requirements, that is, Rule 40(5) of the Rules regarding exhaustion of local remedies and Rule 40(6) of the Rules on the requirement to file applications within a

reasonable time after exhaustion of local remedies.

i. Objection on non-exhaustion of local remedies

35. The Respondent State avers that the Application does not comply with the admissibility condition prescribed under Article 56(5) of the Charter and Rule 40(5) of the Rules.

36. It submits that it has enacted the Basic Rights and Duties Enforcement Act, to provide the procedure for the enforcement of constitutional and basic rights as set out in Section 4 thereof.[5]

37. According to the Respondent State, the right to a fair hearing is provided for under Article 13(6)(a) of the Constitution of Tanzania of 1977, noting that though the Applicant is contesting that his right under the Constitution has been violated; he did not refer the violation to the High Court during the trial as required under Section 9(1) of the Basic Rights and Duties Enforcement Act.[6]

38. The Respondent State avers that the Applicant's failure to refer the violations of his rights to the High Court or to raise them during appeal, denied it the chance to redress the alleged violation at the domestic level.

39. Citing the African Commission on Human and Peoples' Rights in Communication 263/2002 – *Kenyan Section of the International Commission of Jurist, Law Society, Kituo Cha Sheria v Kenya (2004)*, the Respondent State concludes in this regard that, the Applicant seized the Court prematurely as he ought to have exhausted all the local remedies.[7]

40. The Applicant argues that the Application is admissible as it was filed after exhausting local remedies; that is, after the dismissal of Criminal Appeal No. 178 of 2007 on 17 February 2012 by the Court of Appeal of Tanzania, the highest and final appellate Court

5 "If anybody alleges that any of the provisions of Section 12 to 29 of the Constitution has been, is being, or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."

6 "Where in any proceedings in a subordinate court, any question arises as to the contravention of any of the provisions of Sections 12 to 29 of the Constitution, the presiding Magistrate shall, unless the parties to the proceedings agree to the contrary or the Magistrate is of the opinion that the raising of the question is merely frivolous or vexatious, refer the question to the High Court for decision; save that if the question arises before a Primary Court, the Magistrate shall refer the question to the court of a resident magistrate which shall determine whether or not there exists a matter for reference to the High Court."

7 *Kenyan Section of the International Commission of Jurists, Law Society, Kituo Cha Sheria v Kenya* (2004) AHRLR 71 (ACHPR 2004).

in the Respondent State.

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41. The Court notes from the record that the Applicant filed an appeal against his conviction before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State and that the Court of Appeal upheld the judgments of the High Court and the District Court.

42. This Court has stated in a number of cases involving the Respondent State that the remedies of constitutional petition and review in the Tanzanian judicial system are extraordinary remedies that the Applicant is not required to exhaust prior to seizing this Court.[8] It is thus clear that the Applicant has exhausted all the available domestic remedies.

43. For the above reasons, the Court dismisses the Respondent State's objection based on the non-exhaustion of local remedies.

ii. Objection on failure to file the Application within a reasonable time

44. The Respondent State contends that the Applicant has not complied with the requirement under Rule 40(6) of the Rules that an application must be filed before the Court within a reasonable time after the exhaustion of local remedies. It submits that the Applicant's case at the national courts was concluded on 17 February 2012, and it took three (3) years for the Applicant to file his case before this Court.

45. Noting that Rule 40(6) of the Rules does not prescribe the time limit within which individuals are required to file an application, the Respondent State draws this Court's attention to the fact that the African Commission has held a period of six (6) months to be the reasonable time.[9]

8 See ***Alex Thomas v Tanzania*** (Merits), ***op cit*** para 65; ***Mohamed Abubakari v Tanzania*** (Merits) op cit, paras 66-70; ***Christopher Jonas v Tanzania*** (Merits), para 44.

9 *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

46. The Respondent State avers further that the Applicant has not stated any impediments which caused him not to lodge the Application within six (6) months, and submits that for these reasons, the Application should be declared inadmissible.

47. In his Reply, the Applicant avers that he filed the Application within a reasonable time as his perceived delay was caused by his application for review of the Court of Appeal's judgment.

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48. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 40 (6) of the Rules, which in substance restates Article 56(6) of the Charter, simply states: "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".

49. The records before this Court show that local remedies were exhausted on 17 February 2012, when the Court of Appeal delivered its judgment. Therefore, this should be the date from which time should be reckoned regarding the assessment of reasonableness as envisaged in Rule 40(6) of the Rules and Article 56(6) of the Charter.

50. The Application was filed on 22 April 2016, that is, four (4) years and thirty-six (36) days after exhaustion of local remedies. Therefore, the Court shall determine whether this time is reasonable.

51. The Court recalls its jurisprudence in *Norbert Zongo and others v Burkina Faso* in which it concluded that: "… the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis".[10]

52. The Applicant avers that he filed an application for review before the Court of Appeal but was unsuccessful; the Respondent State does not dispute this fact. In the Court's view, the Applicant pursued the review procedure even though it was an extraordinary remedy. The time spent by the Applicant in attempting to exhaust the said remedy should thus be taken into account when assessing the

10 Application 013/2011. Judgment of 28 March 2014 (Merits), *Norbert Zongo v Burkina Faso* (Merits) para 92. See also *Alex Thomas v Tanzania (*Merits) *op cit*, para 73.

reasonableness of time according to Rule 40(6) of the Rules and Article 56(6) of the Charter.[11]

53. From the record, the Applicant is in prison, restricted in his movements and with limited access to information; he is indigent and unable to pay for a lawyer. The Applicant also did not have free assistance of a lawyer throughout his initial trial and appeals; and was not aware of the existence of this Court before filing the Application. Ultimately, the above mentioned circumstances delayed the Applicant in filing his claim to this Court. Thus, the Court finds that the four (4) years and thirty six (36) days taken to file the Application before this Court is reasonable.

54. Accordingly, the Court dismisses the objection relating to the non-compliance with the requirement of filing the Application within a reasonable time after exhaustion of local remedies.

B. Conditions of admissibility not in contention between the Parties

55. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 40, Sub-rules1, 2, 3, 4 and 7 of the Rules on, the identity of Applicant, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case, respectively, and that nothing on the record indicates that these requirements have not been complied with.

56. The Court therefore finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

57. The Applicant claims the violations of his right to fair trial and sets out the following elements of this right:

a. The evidence relied upon to convict him was defective;

b. The failure to summon the defence witnesses; and

c. The failure to provide the Applicant with free legal aid.

11 See *Armand Guehi v Tanzania* (Merits and Reparations), para 56; Application 024/2015. *Werema Wangoko v United Republic of Tanzania* (Merits and Reparations), para 49.

A. Allegation that the evidence relied upon to convict him was defective

58. The Applicant alleges that the national courts solely relied upon defective voice and visual identification evidence to uphold his conviction. He avers that the evidence was not properly evaluated and that the quality of the light used by the witnesses to identify him during the commission of the alleged crime was questionable.

59. The Respondent State refutes all the allegations raised by the Applicant, noting that the Applicant's conviction was based on credible identification evidence. It also avers that over and above the identification evidence, the Court of Appeal found that the said witnesses had done their identification at the earliest possible opportunity which gave even more credence to their testimony.

60. The Respondent State submits that the evidence was analysed in all the domestic proceedings, adding that the Applicant was convicted not only as a result of voice evidence and visual evidence and the fact that witnesses were able to name the Applicant, whom they knew before the incident, to be the assailant. The Respondent State adds that other evidence, apart from voice and visual identification placed the Applicant at the scene of the crime at the material date and time when the crime was committed.

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61. The Court notes that it does not have the power to evaluate matters of evidence that were settled in national courts. Nevertheless, the Court has the power to determine whether the assessment of the evidence in the national courts complies with relevant provisions of international human rights instruments.

62. The Court further reiterates its position in the matter of *Kijiji Isiaga v Tanzania* that:

> "…domestic courts enjoy a wide margin of discretion in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings."[12]

12 Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania* (hereinafter referred to as "*Kijiji Isiaga v Tanzania* (Merits)"), para 65.

63. On the evidence used to convict the Applicant, the Court restates its position in the matter of *Mohamed Abubakari v Tanzania,* 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 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."[13]

64. Further, the Court has previously stated[14] that when visual or voice identification is used as evidence to convict a person, all circumstances of possible mistakes should be ruled out and the identity of the suspect should be established with certitude. This demands that the identification should be corroborated by other circumstantial evidence and must be part of a coherent and consistent account of the scene of the crime.

65. In the instant case, the record before this Court shows that the national courts convicted the Applicant on the basis of evidence of visual identification tendered by three (3) Prosecution Witnesses, who were at the scene of the crime. These witnesses knew the Applicant before the commission of the crime, since they were neighbours. The national courts assessed the circumstances in which the crime was committed, to eliminate possible mistaken identity and they found that the Applicant was positively identified as having committed the crime.

66. The Applicant's allegation that there was not enough light to properly identify him as the assailant so as to warrant his conviction are all details that concern particularities of evidence, the assessment of which must be left to the national courts.

67. In view of the above, the Court is of the opinion that the manner in which the national courts evaluated the facts and evidence and the weight they gave to them does not disclose any manifest error or miscarriage of justice to the Applicant which requires this Court's intervention. The Court therefore dismisses this allegation of the Applicant.

13 *Mohammed Abubakari v Tanzania* (Merits), *op cit*, paras 26 and 173. See also *Kijiji Isiaga v Tanzania* (Merits), *op cit*, para 66.

14 *Ibid*.

B. Allegation of failure to summon the defence witnesses

68. The Applicant alleges that he was deprived of his right to a fair trial because the trial magistrate did not exercise the power to summon his witnesses even after the Applicant notified the trial court of the said witnesses. He avers that he also raised this complaint on appeal at the High Court.

69. The Respondent State avers that the right to a fair hearing is provided for under Article 31(6)(a) of the Constitution of Tanzania and was granted to the Applicant at every stage of the case. It submits further that Section 231(4) of the Criminal Procedure Act (2002) mandates the trial magistrate to summon defence witnesses where the lack of attendance by the witnesses was not occasioned by the fault or neglect of the accused.

70. According to the Respondent State, the Applicant did not give notice of any witnesses in his defence but preferred to testify on his own.

71. The Respondent State concludes in this regard that the Applicant's allegation is an afterthought and should be disregarded, and that, the Application therefore, lacks merits and should be dismissed.

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72. The Court notes that Article 7(1)(c) of the Charter provides that:
"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".

73. In its judgment in the matter of *Ingabire Victoire v Rwanda*, this Court held that "an essential aspect of the right to defence includes the right to call witnesses in one's defence".[15]

74. In the instant case, the Applicant claims that at both the trial court and the High Court, he requested his witnesses to be summoned. The Respondent State refutes this assertion, arguing that the Applicant "did not give notice of any witness appearing to

15 *Ingabire Victoire Umuhoza v Rwanda* (Merits), para 94.

testify in his defence".

75. In view of the contradictory statements, the Court can only rely on the information on record. In this regard, the Court notes that the Applicant does not give any information on the names of witnesses that he allegedly notified the national courts to summon and when he made the request**.** Further, there is nothing on record to show that the Applicant made any request for the summoning of the defense witnesses and that the courts refused to grant it.

76. In view of the above, the Court dismisses the allegation of the Applicant that the trial magistrate failed to summon his witnesses.

C. Allegation on failure to provide the Applicant with free legal aid

77. The Applicant contends that the Respondent State has violated Article 7(1)(c) of the Charter, claiming that he was not provided with free legal representation at both the trial and appeal stages of his case.

78. The Respondent State submits that the fact that the Applicant had no legal representation does not mean that he was discriminated against or denied the right to be represented by a legal counsel of his choice. It further contends that it is not clear from Article 7(1)(c) of the Charter that it is required to provide legal aid for all criminal trials. Furthermore, the Respondent State contends that the right is not absolute and depends on availability of resources.

79. Citing Article 7(1)(c) of the Charter, the Respondent State avers that the Applicant made a deliberate decision to defend himself. The Respondent State refers to the Case of *Melin v France* in which the European Court of Human Rights held that an accused who decides to defend himself is required to show diligence;[16] and contends that the Applicant did not do so. The Respondent State therefore argues that it did not violate the Applicant's right to legal aid. The Respondent State also refers to Article 8(2)(d) and(e) of the American Convention on Human Rights in this regard.[17]

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16 *Melin v France*, Appl 12914/87, 22 June 1993, ECtHR, Series A, 261.

17 "it is clear that an accused may choose to defend himself or engage counsel of his own choice", adding that "in our case at hand, the Applicant defended himself and there was no evidence that he could not engage a legal counsel of his own choice."

80. Article 7(1)(c) of the Charter provides:
"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."

81. The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal aid. Nevertheless, in *Alex Thomas v Tanzania,*[18] the Court underlined that Article 7(1)(c) of the Charter**,** interpreted in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR)[19]**,** establishes the right to free legal aid where a person is charged with a serious criminal offence, who cannot afford to pay for legal representation and where the interests of justice so require.[20] The interest of justice is required in particular, if the Applicant is "indigent, the offence is serious and the penalty provided by the law is severe".[21]

82. The Court notes that the Applicant was not afforded free legal aid throughout the proceedings in the national courts. The Court further notes that the Respondent State does not dispute that the Applicant is indigent, that the offence is serious and the penalty provided by law is severe, it only contends that he did not make a request for legal aid.

83. Given that the Applicant was charged with a serious offence, that is, armed robbery, carrying a minimum punishment of thirty (30) years imprisonment; the interests of justice required that the Applicant should have been provided with free legal aid

18 *Alex Thomas v Tanzania* (Merits), para 114.

19 The Respondent State acceded to the International Covenant on Civil and Political Rights on 11 June 1976.

20 "in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality: …to defend himself in person or through legal assistance of his own choosing, to be informed if he does not have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case, if he does not have sufficient means to pay for it."

21 *Alex Thomas ibid*, para 123, see also *Mohammed Abubakari v Tanzania* (Merits), paras 138-139; Application 027/2015. Judgment of 21 September 2018 (Merits and Reparations), *Minani Evarist v United Republic of Tanzania* (hereafter referred to as "*Minani Evarist v Tanzania* (*Merits and Reparations*)"), para 68; Application 016/2016. Judgment of 21 September 2018 (Merits and Reparations), *Diocles Williams v United Republic of Tanzania* (hereafter referred to as "*Diocles William v Tanzania* (Merits and Reparations)"), para 85; Application 020/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v Tanzania* (Merits and Reparations), para 92.

irrespective of whether he requested for such assistance.

84. The Court therefore finds that the Respondent State has violated Article 7(1)(c) of the Charter.

VIII. Reparations

85. The Applicant prays the Court to find a violation of his rights and set him free and order such other measures or remedies as it may deem fit.

86. On the other hand, the Respondent State prays the Court to find that it has not violated any of the rights of the Applicant and that the Application should be dismissed.

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87. 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."

88. In this respect, Rule 63 of the Rules 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."

A. Pecuniary Reparations

89. The Court notes its finding in paragraph 84 above that the Respondent State violated the Applicant's right to a fair trial due to the fact that he was not afforded free legal aid in the course of the criminal proceedings against him. 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]

90. The Court notes that the violation it established caused moral prejudice to the Applicant. The Court therefore, in exercising

22 See Application 011/2011. Ruling of 13 June 2014 (Reparations), *Reverend Christopher Mtikila v Tanzania*, para 27 and Application 010/2015. Judgment of 11 May 2018, *Amiri Ramadhani v The United Republic of Tanzania* (Merits), para 83.

its discretion, awards an amount of Tanzania Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[23]

B. Non-Pecuniary Reparations

91. Regarding the order for release prayed by the Applicant, the Court has stated that it can be ordered only in specific and compelling circumstances.[24] Examples of such circumstances include "if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice".[25]

92. In the matter of *Armand Guehi v United Republic of Tanzania*, this Court observed that the determination of whether factors in a given case are special or compelling must be done with a goal of maintaining fairness and avoiding double jeopardy.[26]

93. It is the Court's view that the Applicant has not demonstrated specific or compelling circumstances to warrant an order for release.

94. Therefore, the Court rejects the Applicant's request to be released from prison.

IX. Costs

95. In their submissions, both parties prayed the Court to order the other to pay costs.

96. Pursuant to Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

97. The Court has no reason to depart from the provisions of Rule 30 of the Rules; consequently, it rules that each party shall bear its own costs.

23 See *Anaclet Paulo v Tanzania* (Merits and Reparations) para 107; *Minani Evarist v Tanzania* (Merits and Reparations), para 85.

24 *Alex Thomas v Tanzania* (Merits) *op cit*, para 157; *Diocles William v Tanzania* (Merits), para 101; *Minani Evarist v Tanzania* (Merits and Reparations), para 82*;* Application 006/2016. Judgment of 7 December 2018 (Merits), *Mgosi Mwita v United Republic of Tanzania*, para 84; *Kijiji Isiaga v Tanzania* (Merits), para 96*; Armand Guehi v Tanzania* (Merits and Reparations), para 164.

25 *Minani Evarist v Tanzania* (Merits and Reparations), para 82.

26 See *Armand Guehi v Tanzania* (Merits and Reparations), para 164.

X. Operative part

98. For these reasons:
The Court
Unanimously,
On jurisdiction
i. *Dismisses* the objections on material jurisdiction of the Court;
ii. *Declares* that it has jurisdiction.

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

On merits
v. *Finds* that the Respondent State has not violated Article 7(1) of the Charter as regards the trial Court's alleged reliance on defective evidence and the failure to summon the defence witnesses;
vi. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter by failing to provide the Applicant with free legal aid.

On reparations
Pecuniary reparations
vii. *Orders* the Respondent State to pay the Applicant the sum of Tanzania Shillings Three Hundred Thousand (TZS 300,000) free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.
viii. *Orders* the Respondent State to submit a report on the status of implementation of the decision set forth herein within six (6) months from the date of notification of this Judgment.

Non-pecuniary reparations
ix. *Dismisses* the Applicant's prayer for release from prison, without prejudice to the Respondent State applying such a measure *proprio motu*.
On costs
x. *Orders* each party to bear its own costs.

Separate opinion: TCHIKAYA

1. The African Court in Arusha has been asked to rule, once again, on a case of breach of Article 7 of the African Charter on Human and Peoples' Rights on the right to a fair trial. In this case of *Kenedy Ivan v Tanzania*,[1] I expressed my concurrence with the operational part adopted by the Court. My support stems from the fact that this operational part, in essence, recognizes that the Respondent State failed in its obligations in this regard and should award compensation to the Applicant, excluding his release.[2]

2. The fact remains that, without originality and almost incidentally, the *Ivan* case called on the Court to develop the real powers of the African human rights judge in relation to the powers exercised by the first judges, that is, the judges of the domestic courts. Two related aspects of the same question in the *Ivan* case will therefore be addressed in this opinion. On one hand, the capacity of the Court as an appellate court and on the other hand, it will consider the link between the jurisdictions exercised by the Court with the provisions of international instruments. These aspects stem from paragraphs 23 to 29 of the Judgment.

I. The Arusha African Court, an Appeal Court?

3. This question is not new. In fact, in the jurisprudence of 2018 in the matter of *Evarist Minani*,[3] Judge Ben Achour underscored the following position in his opinion: that "the Court reiterates its decision in paragraph 81 that it… is not an appellate Court", adding that "this is more than obvious in as much as we are in the presence of a continental court whose jurisdiction ... extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter ... the Protocol and any other relevant Human Rights instrument ratified by the States concerned''. The Court is not an appeal Court, and this is a legally obvious fact.

4. What can one make of this legally obvious fact, given that the Court repeatedly reverts to it with different reasons? The requisite explanations lie naturally in the founding act of the Court,

1 The Applicant was sentenced to 30 years in prison for the offence of armed robbery and alleges that he was deprived of his right to a fair trial.

2 AfCHPR, Judgment *Kenedy Ivan v Tanzania*, 28 March 2019, para 98 *et seq*.

3 AfCHPR, Judgment *Evariste Minani v Tanzania*, 27 September 2018, Separate Opinion, para 2.

the Protocol which, in its Article 3 sub-article 1 on Jurisdiction stipulates that: "The jurisdiction of the Court shall extend to all cases and disputes…". This provision, as it stands, does not pronounce itself on the entire regime attached to the Statute of the Court. If we combine this provision with the Preamble to the Protocol,[4] we can read the international and conventional character of the functions exercised by the Court. This basis is primarily internationalist.[5] It is in these terms that paragraph 27 of the judgment should be understood: "This Court exercises jurisdiction as long as the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the Respondent State".

5. This current position has its justification,[6] but it needs to be further explained and understood. From the standpoint of domestic law, the appellate judge determines an appeal seeking to have a judgment rendered by a lower court overturned or annulled. The appellate court is required, where appropriate, to review cases in fact and in law. Accordingly, it may overturn a decision, partially or completely, or uphold the same. It also has the possibility of changing the reasons, without necessarily changing the operative part of the judgment, which is the function of the Arusha Court. In terms of the Protocol, these are functions of judicial superiority, functions of re-establishment of the law for the sake of the right of individuals.

6. The question already came up in the mid-1950s, when, in light of a matter before the General Assembly at the International Court of Justice,[7] Louis Cavaré concluded that "it is of considerable

4 Moreover, in regard to the Protocol: "Member States note that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of Human and Peoples' Rights, freedoms and duties contained in the declarations, conventions, and other instruments adopted by the Organization of African Unity and other international organizations".

5 It may be noted in the case of *Vapeur Wimbledon* (PCIJ, *Vapeur Wimbledon, France and others* 23 August 1923) pertaining the application of the principle of the superiority of international law over domestic acts In this case, it related to the German Orders banning the use of the Kiel canal. The first question to which the judge at the Hague had to provide an answer is that which pertained the scope of the German decision of 21 March 1921 which denied access to and passage through the Kiel canal; a decision which the Court found to be in contradiction with the treaty.

6 Christina (C.), recent decisions of the Inter-American Human Rights Commission (1983-1987), AFDI, 1987. pp. 351-369; she notes therein the position of Judge Hector Gros Espiell: "the submission of a (contentious) matter to the Court does not constitute an appeal" v Wittenberg, *Admissibility of claims before international courts, RCADI,* 1932, t. III, p. 1 *et seq*.

7 ICJ, Advisory Opinion, *Effects of the Awards of Compensation made by United Nations Administrative Tribunal*, 13 July I954, Recueil 1954, p. 47: the Court infers

practical interest and easily discernible to do so. In the face of the decision of an organ, governments must know whether such decision offers the authority of a mandatory sentence or whether it boils down to a mere proposal, a recommendation or an advice. Their attitude in both cases must be fundamentally different.[8]"

7. The principle is established in international law, but it is also important for domestic law. This is emphasized hereunder as regards international jurisdictions in the following terms: "Today, especially in ..., the multiplicity of organizations has also posed this problem which is essentially practical since its solution depends on the nature of the jurisdictions they exercise and the possibility or impossibility of certain appeals against the decisions of these authorities"[9]. In any event and in the words of the International Court of Justice in its opinion on the Reparation for Injuries Suffered in the Service of the United Nations *(Advisory Opinion, ICJ Reports 1949, p 182):* "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties". It follows that this type of jurisdiction established on the basis of an international convention can render only decisions induced by the founding treaty, and has authority over domestic judgments

8. This analysis is present in the position expressed by the Inter-American Court of Human Rights, which states that: "Where a State is party to an international treaty such as the American Convention, all its organs, including its judges, are also subject to that treaty, and hence subject to an obligation to ensure that the effects of the provisions of the Convention shall not be diminished by the application of rules that are variance with its object and purpose". It goes on to say in this report that: "Judges and bodies related to the administration of justice at all levels are obliged to exercise *ex officio* a "control of conventionality" between the internal rules and the American Convention, obviously within the framework of their respective competences and the corresponding procedural rules".[10] These elements impact on the constitution of a jurisdictional power, be it the power of appeal or that of simple

from the judicial character of the United Nations Administrative Tribunal that the General Assembly is supposed to give effect to its judgment.

8 L Cavaré *The Notion of International Jurisdiction, AFDI*, 1956. pp 496 *et seq*.

9 *Idem*, pp 499 *et seq*.

10 IACHR, Report 2012, p 62 ***et seq***.

control.

9. Article 1 of the European Convention on Human Rights states that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." In this case, the jurisdiction of the Member State is interpreted in light of international law. This tends to enshrine the status of the appeal judge. In the important ECHR decision, *Bankovic et al v Belgium et al,* 12 December 2001,[11] it may be noted that: "The obligation of the Court in this respect is to take into account the particular nature of the Convention, a constitutional instrument of a European public order for the protection of human beings, and its role, as it emerges from the Article 19 of the Convention, is to ensure compliance by the Contracting Parties with the undertakings they have entered into."[12] This jurisdiction of the Court is certainly defined by the consent of the parties to the Convention, but it acquires *ipso jure,* a real authority, a power comparable to that of a court of appeal, a full appellate jurisdiction. It is therefore natural to consider that the Court of Arusha has such a jurisdictional power in an internationalist hierarchy of the jurisdictions involved here, national as well as international.

II. A jurisdiction resolutely tied to international instruments

10. It may happen that States refuse the intervention of an international judge to re-try a dispute, even if they have adopted the arbitration clause in an international convention. This hypothesis does not affect the Arusha Court, but it remains a possibility that international law leaves open to States or to parties. The global trend in this regard has been to challenge or restrict the devolution of international jurisdiction. In the 1960 Case of the arbitral award rendered by the King of Spain on 23 December 1906,[13] The Hague Court specified this occurrence: "The Court is not called upon to say whether the arbitrator has correctly or badly adjudicated. These considerations and those thereto attached are irrelevant to the functions which the Court is called upon to perform in the present proceedings and which are to determine whether it is proven that the award is null and void".[14] The fullness

11 ECHR, *Bankovic and others v Belgium and others*, 12 December 2001, 52207/99.

12 *Idem*, para 80.

13 *ICJ, Reports*, 1960, p 192.

14 *Idem*, p 26.

of the devolution of appeal was thereby excluded.

11. States may indeed choose, in sovereignty and exceptionally, that an international judge, seized by them in a case, does not consider himself as an appeal judge. This was the case in the dispute over the *Arbitral Award of 31 July 1989, Guinea-Bissau v Senegal*, in respect of the decision of the International Court of Justice.[15] The Court found that "the two parties were in agreement that the present proceedings constitute an action in non-existence and nullity of the award rendered by the Tribunal, and not an appeal against that award or an application for review thereof; as the Court has had occasion to point out in connection with the complaint of nullity presented in the case of the Arbitral Award rendered by the King of Spain on 23 December 1906".[16]

12. This same restriction is found in the present *Case of Ivan* at the Court in paragraph 26; The Court reiterates its position in the matter of *Ernest Francis Mtingwi v Republic of Malawi*,[17] in which it noted that it is not an appellate body with respect to decisions of national courts". On the other hand, the Court's response in the *Alex Thomas* case should be clarified.

13. The Court states "however, as it pointed out in the case of *Alex Thomas v United Republic of Tanzania*[18] that "while the African Court is not an appeal body for decisions rendered by national courts, this does not preclude it from examining the relevant procedures before the national authorities to determine whether they are in consonance with the standards prescribed in the Charter or with any other instrument ratified by the State concerned".[19] The Court may be reminded of two elements: a) to declare that "this does not preclude it from examining the relevant procedures before the national authorities", is not in consonance with the current exercise of the judicial function of the Court, the purpose of which is to examine domestic procedures used by national courts in matters of human rights; (b) to declare that "the African Court is not an appellate body for decisions rendered by the national courts" may lead to a voluntarist dimension of

15 ICJ, *Arbitral Award of 31 July 1989, Guinea-Bissau v Senegal*,12 November 1991.

16 *Idem*, para 25

17 AfCHPR, *Ernest Francis Mtingwi v Malawi*, 15 March 2013, para 14.

18 AfCHPR, *Alex Thomas v Tanzania*, 20 November 2015, paras 60 to 65.

19 *Op cit, Alex Thomas v Tanzania*, para 130; see also AfCHPR, *Christopher Jonas v Tanzania*, 28 September 2017, para 28; AFCHPR, *Ingabire Victoire Umuhoza v Rwanda*, 24 November 2017, para 52; and AfCHPR *Mohamed Abubakari v United Republic of Tanzania*.

the Court, whereas the Court exercises jurisdiction determined à priori by interstate conventions and protocols. The Court has a resolutely special jurisdiction, specifically recognized by the contracting parties to the Protocol establishing the Court. This jurisdiction, where established, is a legal and objective *datum.*

14. The Arusha Court does not seem to call to question the so-called notion of national assessment which is now recognized in international human rights law. This concept indeed combines the national powers with the judicial powers that the Court derives from the Protocol; a national determination of issues such as property, religious freedom, freedom of expression, the notion of public danger ... and many others for which States' laws have also provided common provisions.