Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498

Application 025/2015, *Majid Goa alias Vedastus v United Republic of Tanzania*

Judgment, 26 September 2019. Done in English and French, the English text being authoritative.

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

Recused under Article 22 of the Protocol, ABOUD

The Applicant was convicted and sentenced to thirty (30) years imprisonment for rape. He alleged that the Respondent State violated his rights by disregarding his defence of *alibi* and by neglecting contradictions and discrepancies in witness statements. He also alleged that he was not provided with free legal assistance. The Court dismissed his allegation in relation to the evalution of the evidence. However, it found a violation in relation to the Applicant's right to legal aid.

Admissibility (exhaustion of local remedies, constitutional petition 32; submission within reasonable time, 41, 42)

Fair trial (evaluation of evidence, 56; 65; legal aid, 71, 72)

Reparations (moral damages, 89)

I. The Parties

1. Majid Goa alias Vedastus (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who is currently serving a sentence of 30 years following his conviction for rape of a twelve (12) year old minor.

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, by which it accepted the jurisdiction of the Court to receive applications from individuals and NGOs.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the file that on 20 December 2005, the District Court of Tarime, in Criminal case 418 of 2005 convicted the Applicant of rape of a twelve (12) year old minor and sentenced him to thirty (30) year imprisonment.

4. The Applicant appealed in Criminal Appeal No 35 of 2006 against both the conviction and sentence to the High Court of Mwanza, which confirmed the decision of the District Court on 11 October 2006.

5. The Applicant further appealed to the Court of Appeal of Tanzania sitting at Mwanza, in Criminal Appeal No. 303 of 2013 which was dismissed on 13 August 2014. Dissatisfied with the Court of Appeal's decision, he lodged an application for Review of the Court of Appeal's decision being, Misc. Criminal Application 11 of 2014 in the Court of Appeal of Tanzania at Mwanza which was rejected.

6. On 2 October 2015, the Applicant seized this Court.

B. Alleged violations

7. The Applicant alleges that the Respondent State has violated his rights under Articles 2, 3(1) and (2) and 7(1)(c) and (d) of the Charter by failing to consider his defence of *alibi* and various contradictions and discrepancies in the witness statements. He also alleges that he was denied the right to be heard, as he did not benefit from free legal assistance during the trial and before the appellate courts.

III. Summary of the procedure before the Court

8. The Application was received on 2 October 2015 and served on the Respondent State and the entities listed under Rule 35(3) of the Rules on 4 December 2015.

9. The parties were notified of the pleadings and filed their submissions within the time stipulated by the Court.

10. On 7 December 2018, the Court informed the parties that written pleadings were closed.

IV. Prayers of the Parties

11. The Applicant prays the Court to:

"a. …restore justice where it was overlooked and quash both conviction and sentence imposed upon him and set him at liberty;

b. grant him reparations pursuant to Article 27(1) of the Protocol of the Court;

c. that the conviction and sentence meted upon him be quashed and he be set free;

d. …be facilitated with free legal representation or legal assistance under Rule 31 of the Court and Article 10(2) of the Protocol, and

e. grant any other order the Court may deem fit in the circumstances of the complaint."

12. The Respondent State prays the Court to declare:

"a. That the Court is not vested with jurisdiction to adjudicate over this Application;

b. That the Application has not met the admissibility requirements stipulated under Rule 40(1-7) of the Rules of the Court or Article 56 and Article 6(2) of the Protocol;

c. That the Application be dismissed in accordance with Rule 38 of the Rules of court;

d. That the costs of the Application be borne by the Applicant; and

e. That no reparation be awarded in favour of the Applicant."

13. The Respondent State thus prays the Court to find that it has not violated Articles 2, 3(1), 3(2), 7(1) (c) and 7(1)(d) of the Charter.

14. In his Reply, the Applicant prays the Court to dismiss the Respondent State's objections averring that the Application has merit and should be determined.

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

16. The Respondent State raises an objection to the material jurisdiction of the Court.

A. Objection to material jurisdiction

17. The Respondent State avers that the jurisdiction of the Court has not been properly invoked by the Applicants. In this regard, it

asserts that Article 3(1) of the Protocol and Rule 26 of the Rules only affords the Court jurisdiction to deal with cases or disputes concerning the application and interpretation of the Charter, the Protocol and any other human rights instruments ratified by the concerned State. Accordingly, the Respondent State submits that the Court is not afforded jurisdiction to sit in the instant Application as a court of first instance or an appellate court.

18. The Applicant submits that his Application concerns the violations of fundamental human rights which is within the jurisdiction of this Court.

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19. The Court has held that Article 3 of the Protocol gives it the power to examine an Application submitted before it as long as the subject matter of the Application involves alleged violations of rights protected by the Charter, the Protocol or any other international human rights instruments ratified by a Respondent State.[1]

20. The Court reiterates its well established jurisprudence that it is not an appellate body with respect to decisions of national courts.[2] However, the Court has also emphasised, 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

1 Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania*, para 114, Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania, (*hereinafter referred to as *"Alex Thomas v Tanzania* (Merits)*"*), para 45, Application 053/2016**.** Judgment of 28 March 2019 (Merits), *Oscar Josiah v United Republic Tanzania* (hereinafter "*Oscar Josiah v Tanzania* (Merits)"), para 24.

2 Application 001/2013. Decision of 15 March 2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*, para 14, Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations), *Kenedy Ivan v United Republic of Tanzania* (hereinafter referred to as "*Kenedy Ivan v Tanzania*") para 26; Application 024/2015. Judgment of 7 November 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* para 33; Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania,* para 35.

instruments ratified by the State concerned."[3]

21. The Court notes that the instant Application raises allegations of human rights violations protected under Articles 2, 3 and 7 of the Charter and by considering them in light of international instruments, it does not arrogate to itself the status of an appellate court or court of first instance. Accordingly, the Respondent State's objection in this regard is dismissed.

22. In light of the foregoing, the Court holds that it has material jurisdiction.

B. Other aspects of jurisdiction

23. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on record indicates that it does not have jurisdiction. The Court therefore 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 enables individuals to institute cases directly before it, in terms of 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

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.

24. From the foregoing, the Court holds that it has jurisdiction.

VI. Admissibility

25. 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". Pursuant to Rule 39(1) of the Rules, "the Court

3 *Alex Thomas v Tanzania* (Merits), para 130. See also Application 010/2015. Judgment of 28 November 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 *"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, *Kenedy Ivan, op cit*, para 26.

4 See Application 013/2011. Ruling of 21 June 2013 (Preliminary Objections), *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights movement v The Republic of Burkina Faso* (hereinafter referred to as "*Zongo and others v Burkina Faso* (Preliminary Objections)"), paras 71-77.

shall conduct preliminary examination of … the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of the Rules."

26. Rule 40 of the Rules, which in essence 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

27. The Respondent State submits that the Application does not comply with two admissibility requirements, namely, exhaustion of local remedies provided for under Rule 40(5), and the need for applications to be filed within a reasonable time after exhaustion of local remedies provided for under Rule 40(6) of the Rules.

i. Objection based on non-exhaustion of local remedies

28. The Respondent State contends that the Applicant raises allegations of violations of his rights to equality before the law, equal protection of the law and the right to a fair hearing, both of which are guaranteed and protected in Articles 12-29 of the Constitution of the United Republic of Tanzania.

29. The Respondent State submits also that it has enacted the Basic Rights and Duties Enforcement Act, which provides for the enforcement of constitutional and basic rights as set out in Section

4 thereof.[5] Furthermore, it argues that this Act is enforceable at the High Court and the failure of the Applicant to use this procedure denied it the chance to redress the alleged violations.

30. The Applicant avers that the Application satisfies the admissibility requirement because it was filed after the Applicant had already exhausted local remedies that is, he had seized the Court of Appeal in a case that was determined on 13 August 2014. He also contends that following the dismissal of his appeal, he filed for review of that judgment. The Applicant concludes that he "did pursue all available legal remedies".

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31. The Court notes from the records that the Applicant filed an appeal against his conviction before the High Court which was decided against him on 11 October 2006 following which he seized the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and the Court of Appeal upheld the judgment of the High Court on 13 August 2014.

32. Moreover, 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.[6] It is thus clear that the Applicant has exhausted all the available domestic remedies.

33. For this reason, the Court dismisses the objection that the Applicant has not exhausted local remedies.

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

34. The Respondent State argues that the Application was not filed within a reasonable time pursuant to Rule 40(6) of the Rules. It submits that the Applicant's case at the domestic courts was concluded on 13 August 2014, and it took one (1) year and one (1) month for the Applicant to file his case before this Court.

35. 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 the Court's attention to the fact that the African Commission has held a period of six (6) months to be reasonable time.[7]

36. The Respondent State avers further that the Applicant has not explained the reason why he could not lodge the Application within six (6) months, and submits that for these reasons, the Application should be declared inadmissible.

37. The Applicant argues that the decision on his Appeal to the Court of Appeal was delivered on 13 August 2014 and he subsequently filed an Application for the review of the Court of Appeal's judgment. Therefore, the Applicant avers that he has filed his Application within a reasonable time.

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38. 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 mentions "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".

39. The Court recalls its jurisprudence in which it held: "…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".[8]

40. The record before this Court shows that local remedies were exhausted on 13 August 2014, when the Court of Appeal delivered its judgment while the Application was filed on 2 October 2015, that is, one (1) year, one (1) month and twenty (20) days after exhaustion of local remedies. Therefore, the Court is required to decide whether the time taken to file the Application is reasonable.

41. The Court notes that the Applicant is in prison, restricted in his movements and with limited access to information.[9] The Applicant also did not benefit from free legal assistance throughout his initial trial and appeals. He chose to use the review procedure of the Court of Appeal on 8 September 2014.[10] even though, it is not a remedy required to be exhausted so as to file an Application before this Court. These circumstances taken together contributed to the Applicant seizing the Court one (1) year, one (1) month and twenty (20) days after exhaustion of local remedies.

42. Consequently, the Court observes that the time taken by the Applicant to seize it, that is, one (1) year, one (1) month and twenty (20) days after the exhaustion of local remedies is reasonable and accordingly dismisses the objection raised.

B. Conditions of admissibility not in contention between the Parties

43. The conditions in respect of the identity of the Applicant, incompatibility with the Constitutive Act of the African Union and the Charter, the language used in the Application, the nature of the evidence adduced and the principle that an application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other

8 *See Zongo and others v Burkina Faso* (Merits) o*p cit*, para 121, *Kenedy Ivan v Tanzania* (Merits and Reparations), para 51, *Oscar Josiah v Tanzania* (Merits), para 24, Application 009/2015. Judgment of 28 March 2019 (Merits and Reparations), *Lucien Ikili Rashidi v United Republic Tanzania* (hereinafter "*Lucien Ikili Rashidi v Tanzania* (Merits and Reparations)"), para 54.

9 See *Alex Thomas v Tanzania* (Merits), para 74*, Kenedy Ivan v Tanzania* (Merits and Reparations), para 56.

10 See Application 024/2015. Judgment of 7 December 2018 (Merits and Reparations), Application 024/2015. Judgment of 7 December 2018 (Merits), *Werema Wangoko v United Republic of Tanzania* (hereinafter referred to as "*Werema Wangoko v Tanzania* (Merits)"), para 49, 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 56.

legal instruments of the African Union (Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules), are not in contention between the Parties. The Court notes that nothing on record indicates that any of these conditions have not been fulfilled in this case.

44. In light of the foregoing, the Court finds that this Application meets all the admissibility conditions set out in Article 56 of the Charter and Rule 40 of the Rules and declares the Application admissible.

VII. Merits

45. The Applicant alleges his rights guaranteed under Articles 2, 3 and 7 of the Charter were violated. In as much as the allegations of violations of Articles 2 and 3 stem from the allegation of the violation of Article 7, the Court will begin its assessment from the latter.

A. Alleged Violation of Article 7 of the Charter

46. The Applicant alleges the violation of his right to a fair trial as the domestic courts failed to take into consideration the inconsistencies in the identification evidence relied upon to convict him, and the failure to consider his defence of *alibi* and right to be provided with free legal assistance.

i. Allegation concerning the inconsistencies in the evidence

47. The Applicant avers that the testimony proffered by the four prosecution witnesses did not properly identify him as the perpetrator of the offence of rape. He also avers that there were clear inconsistencies in the testimonies of the prosecution witnesses as to the identity of the perpetrator of the offence of rape.

48. He also asserts that because the offence took place at night, it was not possible for the witnesses to properly identify the perpetrator and he avers that the trial court should not have relied on the testimony of the prosecution witnesses to convict him.

49. The Respondent State refutes all the allegations raised by the Applicant as baseless. It states that the Applicant was properly identified, especially, because the witnesses knew the Applicant before the commission of the crime and they had a good look at him at the scene of the crime.

50. The Respondent State contends that one of the prosecution witnesses was the Applicant's uncle as well as brother-in-law to

the victim; they both knew him well and thus easily identified him as the perpetrator. It further avers that the evidence proffered by the prosecution witnesses was sound and corroborative.

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51. Article 7 of the Charter provides that:
"Every individual shall have the right to have his cause heard. This comprises:

a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
c. The right to defence, including the right to be defended by counsel of his choice;
d. The right to be tried within a reasonable time by an impartial court or tribunal."

52. The Court reiterates its established position that:
"… domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence, and as an international court, this court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings."[11]

53. Moreover, the Court restates its position with regards to evidence relied upon to convict an Applicant, 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."[12]

11 Application 032/2015. Judgment of 21/03/2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania* (hereinafter referred to as "*Kijiji Isiaga v Tanzania* (Merits)"), para 65. *Oscar Josiah v Tanzania* (Merits) para 52.

12 *Mohamed Abubakari v Tanzania* (Merits), *op cit*, paras 26 and 173. See also *Kijiji Isiaga v Tanzania* (Merits) *op cit*, para 66. *Oscar Josiah v Tanzania* (Merits) para 53.

54. The Court notes 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.[13] 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.

55. In the instant case, the record before this Court shows that the domestic courts convicted the Applicant on the basis of evidence of visual identification tendered by four prosecution witnesses. On the fateful day, these witnesses rushed to the scene of the crime in response to the cries of the victim. Furthermore, the witnesses knew the Applicant before the commission of the crime, since they were neighbours and even some were his relatives. The domestic courts assessed the circumstances in which the crime was committed to eliminate possible mistaken identity and found that the Applicant was properly identified as having committed the alleged crime.[14]

56. In view of the above, the Court is of the opinion that the manner in which the domestic courts evaluated the facts and the weight they attached to the evidence does not disclose any manifest error or miscarriage of justice to the Applicant which requires the Court's interference. The Court therefore dismisses the allegation of the Applicant that the domestic courts failed to consider the inconsistencies in the identification evidence relied upon to convict him.

ii. Allegation of failure to consider the defence of *alibi*

57. The Applicant alleges that he was deprived of his right to a fair trial at the trial court and subsequently at the appellate courts as the domestic courts failed to take into account his defence of *alibi*.

58. The Respondent State disputes the allegations of the Applicant. According the Respondent State, the trial court reached its verdict after satisfying itself that the Applicant had failed to raise doubt to the prosecution's watertight proof of evidence.

59. Likewise, the Respondent State contends that the Applicant's defence of *alibi* was fully considered in the appellate courts but

13 *Kijiji Isiaga v Tanzania* (Merits) *op cit*, para 68, *Mohamed Abubakari v Tanzania* (Merits), para 175; *Kenedy Ivan v Tanzania* (Merits and Reparations), para 64.

14 *Kenedy Ivan v Tanzania* (Merits and Reparations), para 60.

found wanting.

60. The Respondent State concludes in this regard that the Applicant's alleged defence of *alibi* was "found to be of no evidential value" and was therefore an afterthought which should be disregarded, and for the given reasons, the Application lacks merits and should be duly dismissed.

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61. The Court notes that Article 7(1) of the Charter provides that: "Every individual shall have the right to have his cause heard".

62. This Court has in the past noted "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".[15]

63. The Court further recalls its previous decision that "where an *alibi* is established with certitude, it can be decisive on the determination of guilt of the accused".[16]

64. The Court notes that the Applicant's defence of alibi is premised on the fact that he was at Busulwa market selling sugarcane at the material time that the crime was committed. This however, was rebutted by PW1, a neighbour who on cross-examination stated that the Applicant could not have been at Busulwa market on 19 August 2005 because it was a Friday and thus not a market day. Further, the Applicant did not provide any corroboration for his defence of *alibi*. Also, the Court notes that there's nothing on record to show that the domestic courts made manifest errors in their judgment which would require its intervention.

65. In view of the above, the Court dismisses the allegation of the Applicant that the domestic courts failed to consider his defence of *alibi* and declares that the Applicant's right to a fair trial was not

15 *Mohamed Abubakari v Tanzania* (Merits) para 174; Application 016/2016. Judgment of 21 September 2018 (Merits and Reparations), *Diocles Williams v United Republic of Tanzania*, para 72.

16 *Mohamed Abubakari v Tanzania* (Merits), para 191, Application 016/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking and Johson Nguza v United Republic of Tanzania*, para 104.

violated.

iii. Allegation of failure to provide the Applicant with free legal assistance

66. The Applicant contends that the Respondent State has violated Article 7(1)(c) of the Charter, claiming that he did not benefit from free legal assistance at both the trial and appeal stages of his case.

67. The Respondent State submits that the Applicant's lack of legal representation did not occasion miscarriage of justice. 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;[17] 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.

68. Therefore, according to the Respondent State, it is not sufficiently clear from the provisions of Article 7(1)(c) that the State must provide free legal aid for every criminal trial, and that if an Applicant wants legal representation he is required to make such an application to the State or non-governmental organisations. It contends further, that the right to legal representation is not an absolute right but it is subject to a request of an accused person and the availability of financial resources.

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69. The Court notes that Article 7(1) (c) of the Charter does not provide explicitly for the right to free legal assistance. This Court has however, interpreted this provision in light of Article 14(3) (d) of the International Covenant on Civil and Political Rights (ICCPR),[18] and determined that the right to defence includes the right to be

17 *Melin v France*, 2914/87, 22 June 1993, ECtHR, Series A, 261.

18 The Respondent State became a State Party to ICCPR on on 11 June 1976.

provided with free legal assistance.[19] The Court has also held that an individual charged with a criminal offence is entitled to the right to free legal assistance without having requested for it, provided that the interests of justice so require. This will be the case where an accused is indigent and is charged with a serious offence which carries a severe penalty.[20]

70. The Court notes that the Applicant was not afforded free legal assistance throughout the proceedings in the national courts. The Court further notes that the Respondent State does not dispute 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.

71. Given that the Applicant was charged with a serious crime, that is, rape of a twelve (12) year old minor, carrying a severe mandatory punishment of 30 years' imprisonment.[21] Therefore**,** the interest of justice warranted that the Applicant be provided with free legal assistance and this should not have been contingent on the availability of financial resources. Also, whether he made such a request or not is immaterial.

72. The Court therefore finds that the Respondent State has violated Article 7(1)(c) of the Charter by failing to provide free legal assistance.

B. The alleged violation of the rights to non-discrimination, equality before the law and equal protection of the law

73. The Applicant contends that the violations of his right to a fair trial also demonstrate that he was not treated equally before the law and that the national courts discriminated against him.

74. The Respondent State refutes these allegations and prays the Court to put the Applicant to strict proof.

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19 *Alex Thomas v Tanzania* (Merits), para 114; *Kijiji Isiaga v Tanzania* (Merits), para 72, Application 003/2015. Judgment of 28 September 2018 (Merits), *Kennedy Owino Onyachi and Another v United Republic of Tanzania*, para 104.

20 *Alex Thomas Ibid*, para 123, see also *Mohammed Abubakari* v *Tanzania* (Merits), paras 138-139.

21 The Judge has no discretion in the imposition of the sentence

75. Article 2 of the Charter states that "every individual shall be entitled to the enjoyment of rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status".

76. Article 3 of the Charter guarantees that "every individual shall be equal before the law" and "…entitled to equal protection of the law".

77. The Court observes that the Applicant has not demonstrated or substantiated how he has been discriminated against, treated differently or unequally, resulting to discrimination or unequal treatment based on the criteria laid out under Article 2 and 3 of the Charter.

78. In view of the foregoing, the Court finds that the Applicant's rights to non-discrimination, his right to equality before the law and to equal protection of law as guaranteed under Articles 2 and 3 of the Charter were not violated by the Respondent State.

VIII. Reparations

79. 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".

80. The Court recalls its earlier judgments and restates its position that, "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim".[22]

81. The Court also restates that the purpose of reparation being *restitutio in integrum* it "…must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been

22 *Mohamed Abubakari v Tanzania* (Merits), para 242(ix), Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda* (hereinafter referred to as *Ingabire Umuhoza v Rwanda* (Reparations)"), para 19.

committed."[23]

82. Measures that a State must take to remedy a violation of human rights must include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations taking into account the circumstances of each case.[24]

83. The Court further reiterates that the general rule with regard to material prejudice is that there must be a causal link between the established violation and the prejudice suffered by the Applicant and the onus is on the Applicant to provide evidence to justify his prayers.[25] With regard to moral prejudice, the requirement of proof is not as rigid rather the Court can make assumptions in the Applicant's favour.

A. Pecuniary Reparations

84. The Applicant in his submissions on reparations avers that prior to his incarceration, he was a sugarcane farmer and his income from the sale of the sugarcane was one (1) million Tanzanian Shillings (TZS) per month.

85. According to the Applicant he had a family before his incarceration but now does not know where they are. He further alleges that he had a house which was destroyed by unknown people. Lastly, the Applicant alleges that he was framed and his conviction was for the sole purpose of destroying him and therefore prays the Court to grant him a total amount of one (1) billion Tanzanian shillings (TZS) as "compensation".

86. The Respondent State prays the Court to reject the Applicant's prayer for reparations.

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23 Application 007/2013. Judgment of 4 July 2019 (Reparations), *Mohamed Abubakari v United Republic of Tanzania*, para 21, Application 005/2013. Judgment of 4 July 2019 (Reparations), *Alex Thomas v United Republic of Tanzania*, para 12, Application 006/2013. Judgment of 4 July 2019 (Reparations), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 16.

24 *Ingabire Umuhoza v Rwanda* (Reparations), para 20.

25 Application 011/2011. Ruling of 13 June 2014 (Reparations), *Reverend Christopher R Mtikila v United Republic of Tanzania (hereinafter referred to as "Reverend Christopher R Mtikila v Tanzania* (Reparations)*"*), para 40, Application 004/2013. Judgment of 3 June 2016 (Reparations), *Lohé Issa Konaté v Burkina Faso (hereinafter referred to as "Lohé Issa Konaté v Burkina Faso* (Reparations)*"*), para 15.

87. The Court notes its finding that the Respondent State violated the Applicant's right to a fair trial due to the fact that he was not afforded free legal assistance in the course of his trials in the domestic courts. In this regard, the Court recalls its position on State responsibility that: "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation".[26]

88. The Court further notes that the Applicant did not adduce any evidence to support his claim for reparations. He merely enumerates them. The Court thus rejects the prayer for one (1) billion Tanzanian shillings as it was not substantiated.

89. The Court however, notes that the violation it established caused moral prejudice to the Applicant and therefore, in exercising its discretion, awards an amount of Tanzania Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[27]

B. Non-pecuniary Reparation

90. The Applicant prays the Court to order his release from prison.

91. The Respondent State prays the Court to hold that the Applicant was lawfully sentenced and should thus dismiss his prayer for release.

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92. Regarding the order for release prayed by the Applicant, the Court has stated that it can be ordered only in specific and compelling circumstances.[28] This would be the case "if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings

26 See *Reverend Christopher Mtikila v Tanzania* (Reparations), para 27 and Application 010/2015. Judgment of 11 May 2018 (Merits), *Amiri Ramadhani v United Republic of Tanzania*, para 83. *Kenedy Ivan* v *Tanzania* para 89. *Lucien Ikili Rashidi v Tanzania* (Merits and Reparations), para 116.

27 See Application 020/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v United Republic of Tanzania*, para 107, Application 027/2015. Judgment of 21 September 2018 (Merits and Reparations), *Minani Evarist v United Republic of Tanzania*, para 85.

28 *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 07 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.

that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice".[29]

93. In the instant case, the Applicant has not demonstrated specific or compelling circumstances nor has the Court found the same to warrant an order for release. The Court further notes that the Applicant's right to free legal assistance was violated but this did not affect the outcome of his trial.[30]

94. In view of the foregoing, the Court dismisses the Applicant's prayer for release.

IX. Costs

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

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

97. In the instant case, the Court rules that each party shall bear its own costs.

X. Operative part

98. For these reasons:

The Court

Unanimously,

On Jurisdiction:

i. *Dismisses* the objection on the material jurisdiction of the Court.

ii. *Declares* that it has jurisdiction.

On Admissibility:

iii. *Dismisses* the objections to the admissibility of the Application

iv. *Declares* it admissible.

On Merits:

v. *Holds* that the Respondent State has not violated Article 7(1) of the Charter in evaluating the identification evidence and the defence of alibi;

vi. *Holds* that the Respondent State has not violated the rights of the Applicant in Articles 2 and 3 of the Charter by convicting and sentencing him;

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

30 *Ibid,* para 84.

vii. *Holds* that the Respondent State has violated the Applicant's right to a fair trial by failing to provide him with free legal aid, contrary to Article 7(1)(c) of the Charter and Article14 (3)(d) of the ICCPR.

On Reparations:

On Pecuniary Reparations

viii. Grants the Applicant's prayer for reparation for moral prejudice suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300, 000);

ix. *Orders* the Respondent State to pay the sum awarded above 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 interests 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.

On Non-Pecuniary Reparations

x. *Dismisses* the Applicant's prayer for the Court to order his release from prison.

On Implementation and Reporting

xi. *Orders* the Respondent State to submit a report on the status of implementation of this decision set forth herein within six (6) months from the date of notification of this Judgment.

On Costs

xii. *Orders* that each party shall bear its own costs.