Cheusi v Tanzania (judgment) (2020) 4 AfCLR 219

Application 004/2015, *Andrew Ambrose Cheusi v United Republic of Tanzania*

Judgment, 26 June 2020. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant, who had been convicted and sentenced for multiple offences, brought this action alleging a violation of his Charter guaranteed rights on grounds that the national courts mishandled his trial. While dismissing the Applicant's other claims the Court held that the Respondent State had violated the Applicant's right to free legal assistance and the right to be tried within a reasonable time.

Jurisdiction (material jurisdiction, 28-32; personal jurisdiction, 37, 38)

Admissibility (exhaustion of local remedies, 52; extraordinary remedies, 53, 55; unduly prolonged remedies, 56; reasonable time, 65, 66, 69, 71)

Procedure (margin of appreciation of domestic court, 83, 98; Onus to prove, 128)

Fair trial (identification parade, 84, 86; right to defence, 92; alibi defence, 97; free legal assistance, 105, 108, 110; trial within a reasonable time, 116, 117; right to appeal, 116)

Reparations (purpose of reparations, 139; measures of reparations, 139; material prejudice, 140; proof, 145, 146; moral prejudice 150; quantum of damages, 156; indirect victims, 157; guarantees of non-repetition, 169)

Separate opinion: Bensaoula

Admissibility (determination of reasonable time, 1)

I. The Parties

1. Mr Andrew Ambrose Cheusi (hereinafter referred to as "the Applicant"), a national of Tanzania, is currently serving a thirty (30) year prison sentence at Ukonga prison following his conviction for the offence of armed robbery. In addition, the Applicant was convicted on charges of conspiracy to commit a felony and of robbery and sentenced to seven (7) years and fifteen (15) years imprisonment, respectively.

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. It also filed, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that, on 6 June 2003, the Applicant was arrested for having committed armed robbery of a pick-up vehicle at a place known as Sinza Madukani, in Dar es Salaam. He was prosecuted for the offence in Criminal Case No. 95/2003 before the Kibaha District Magistrate Court.

4. Following his appearance in Criminal Case No. 95/2003, the Applicant was released on bail on 7 November 2003. While he was out on bail in this case, on 3 September 2004, he was again arrested and charged in a second case, that is, Case No. 194/2004, before the same Court, for conspiracy to commit a felony and for the offence of robbery. It was alleged that he had stolen a saloon car at Korogwe area in Kibaha District.

5. In the first case, Criminal Case No. 95/2003, he was convicted of armed robbery and sentenced to thirty (30) years imprisonment on 22 September 2005. The Applicant appealed against his conviction and sentence before the High Court of Tanzania at Dar es Salam on 28 April 2006 by Criminal Appeal No. 45/2006. The appeal was dismissed on 21 November 2006.

6. On 27 November 2006, he filed Criminal Appeal No. 141/2007 before the Court of Appeal of Tanzania at Dar es Salaam, against the decision of the High Court in Criminal Appeal No. 45/2006. The Court of Appeal dismissed this appeal on 29 May 2009.

7. In the second case, Criminal Case No. 194/2004, the Applicant was, on 3 October 2005, convicted of the count of conspiracy to commit a felony and for the offence of robbery, and sentenced to seven (7) and fifteen (15) years imprisonment, respectively.[1]

1 The judgment in this case does not appear on the record. However, in its judgment of 20 March 2017, the High Court indicated that the sentence handed down in this matter was twenty-two (22) years in prison: seven (7) years for conspiracy to commit a felony and fifteen (15) years for robbery; p. 2, lines 5 and 6.

8. On 27 October 2006, the Applicant filed Criminal Appeal No. 58/2006 against the sentence before the High Court of Tanzania at Dar es Salaam.

9. On 20 March 2017, the Court quashed the Applicant's conviction and set aside part of the unserved sentence on the grounds that the records of his case file were lost and that the Applicant had served a substantial part of his sentence. The High Court also ordered the Applicant to be set free forthwith unless lawfully held for another matter. However, the Applicant remained in prison serving his thirty (30) years sentence for the conviction of armed robbery in the first case.

B. Alleged violations

10. The Applicant alleges as follows:

i. Although the prosecution called eight (8) prosecution witnesses in Criminal Case No. 95/2003, the District Magistrate Court and the Court of Appeal relied on the visual identification of PW2 and PW3 to convict him without following due process, thus violating his rights under Article 13(1) of the 1977 Constitution of the United Republic of Tanzania.

ii. The District Magistrate Court grossly violated his rights when it admitted prosecution exhibits (1-5) without considering his submissions regarding their admissibility, thus contravening his basic rights under Article 26(1) and (2) of the Respondent State's Constitution. The Applicant states that the Court of Appeal also failed to consider these violations when it upheld his conviction and sentence.

iii. He did not have legal representation throughout the trial and appeal proceedings and this violated his right under Article 7(1)(c) of the Charter.

iv. In the first case, Criminal Case No. 95/2003, he was charged with the offence of armed robbery under Section 285 of the Penal Code which provides for a sentence of fifteen (15) years upon conviction, yet he was sentenced to thirty (30) years imprisonment. This violated his rights under Article 13(6)(c) of the Respondent State's Constitution which proscribes the imposition of a sentence that was not in force at the time of commission of the crime.

v. He immediately filed an appeal in 2006, against his conviction and sentence in Criminal Case No. 194/2004. This appeal was heard in June 2007 but the judgment remained pending for almost a decade despite his sustained follow-up efforts. The Respondent State's failure to finalise his appeal for such a long time therefore violated his rights under Article 7(1)(d) of the Charter.

vi. He was kept in isolation during the trial and appeal proceedings, and this violated his right to equality before the law and equal protection of the law under Article 3 of the Charter.

vii. The Respondent State subjected him to cruel, inhuman and degrading treatment, in contravention of Article 5 of the Charter since he was beaten up by its agents when he was first arrested and he was also denied medical care while in custody.

III. Summary of the Procedure before the Court

11. The Application was filed on 19 January 2015 and served on the Respondent State on 20 March 2015.

12. The parties filed their pleadings on the merits within the timeframe stipulated by the Court. The pleadings of the parties were duly served on the other party.

13. On 6 July 2018, the Registry invited the parties to file their submissions on reparations.

14. The parties filed their submissions on reparations within the timeframe stipulated by the Court. The submissions of the parties were duly served on the other party.

15. Pleadings on reparations were closed on 23 September 2019, and the parties were duly notified.

IV. Prayers of the Parties

16. The Applicant prays the Court to:

i. intervene to remedy the violation of his fundamental rights;

ii. grant him free legal assistance under Rule 31 of the Rules and Article 10(2) of the Protocol;

iii. issue an order on the undue delay in disposing of his appeal No. 58/2006 at the High Court of Tanzania;

iv. re-establish justice, quash his conviction and sentence, and order his release;

v. grant him reparation pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules, in order to remedy the said violations;

vi. grant such other order(s) or relief(s) as it may deem fit.

17. In his Reply, the Applicant also prays the Court to:

i. declare that his rights to equality before the law and equal protection of the law, protected under Article 3 of the Charter have been violated by the Respondent State;

ii. declare that his right not to be subjected to cruel, inhuman and degrading treatment or punishment, protected by Article 5 of the Charter, has been violated by the Respondent State;

iii. declare that his right to a fair trial, protected by Article 7 of the Charter has been violated by the Respondent State;

iv. quash his conviction and sentence, and order his release from custody, given his excessive period of imprisonment by the Respondent State;

v. award him the amount of United States Dollars Twenty Thousand (US$ 20,000) as a direct victim of the moral prejudice suffered;

vi. award him the amount of United States Dollars Five Thousand (US$ 5,000) being compensation for the moral prejudice suffered by each of the indirect victims;

vii. award him the amount of United States Dollars Two Thousand (US$ 2,000) being the legal fees incurred during the domestic proceedings;

viii. award him the amount of United States Dollars Twenty Thousand (US$ 20,000) being the legal fees in the present Application;

ix. award him the amount of United States Dollars Fifteen Thousand (US$ 15,000) being reparation of the pecuniary prejudices suffered by the indirect victims;

x. award him the amount of United States Dollars One Thousand Six Hundred (US$ 1,600) for other miscellaneous expenses incurred;

xi. apply the principle of proportionality in assessing the compensation to be granted to him;

xii. order the Respondent State to guarantee the non-repetition of the aforesaid violations and accordingly report to the Court every six months until the full implementation of the Orders;

xiii. order the Respondent State to publish the Court's judgment in the Government Gazette within one month of delivery thereof as a measure of satisfaction.

18. The Respondent State, for its part, prays the Court to

i. declare that the Application has not invoked the Court's jurisdiction and should therefore be dismissed;

ii. declare that the Application has not met the admissibility conditions stipulated under Rules 40(5) and (6) of the Rules and should consequently be declared inadmissible, and duly dismissed;

iii. find that it has not violated Articles 3, 7(1)(c) and (d) and 7(2) of the Charter and the Application should therefore be dismissed;

iv. rule that the Applicant's prayer for release should be denied on the ground that it is s contemptuous of the judgment of the Court of Appeal;

v. dismiss with costs the Applicant's claim for reparations in its entirety;

vi. issue such other order as it may deem appropriate and fair.

V. Jurisdiction

19. The Court notes that Article 3 of the Protocol provides as follows:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

20. The Court further notes that, in terms of Rule 39(1) of the Rules: "The Court shall conduct preliminary examination of its jurisdiction ..."

21. On the basis of the above-cited provisions, the Court must, in every application, conduct preliminary assessment of its jurisdiction and dispose of objections thereto, if any.

A. Objections to material jurisdiction

22. The Respondent State submits that this Court is being asked to adjudicate as a court of first instance on certain issues, and as an appellate court on other issues already decided by the Court of Appeal of Tanzania.

23. The Respondent State further argues that Article 3(1) of the Protocol does not confer jurisdiction on this Court to adjudicate issues of law and evidence raised before it for the first time. It is the Respondent State's contention that the Court is being asked to pronounce on matters that would oblige it to sit as a trial court, whereas remedies are available at national level that the Applicant could still exercise. In this regard, the Respondent State mentions that the following three allegations have been raised before this Court for the first time:

i. That it took nearly ten (10) years from June 2007, to deliver the judgment in Criminal Appeal No. 58 of 2006 and this constitutes a violation of Article 7(d) (*sic*) of the African Charter on Human and Peoples' Rights;

ii. That he was denied his right to legal representation in the first and second appellate Courts, in breach of Article 7(1)(c) of the African Charter on Human and Peoples' Rights;

iii. That he was illegally sentenced to serve a thirty years sentence in Criminal Case No. 95/2003 instead of fifteen (15) years, which he was supposed to serve as he was charged under Section 285 of the

Penal Code (Cap. 16 RE 2002) and this, in violation of Article 13(6)(c) of Constitution of the United Republic of Tanzania, 1977.[2]

24. The Respondent State also submits that this Court does not have the jurisdiction of an appellate court to hear issues of evidence and procedure that its Court of Appeal has finalised. In this regard, the Respondent State particularly points out to the following allegations:

i. That in Criminal Case No. 95 of 2003, the Courts erred by relying on the evidence of identification in the testimonies of PW2 and PW3 even though they failed to describe the Applicant, in contravention of Article 13(1) of the Constitution of the United Republic of Tanzania, 1977.

ii. That the testimonies of PW2 and PW3 on identification were uncertain given that the said testimonies were not corroborated by an independent witness, which is in violation of equality before the law.[3]

25. Refuting the Respondent State's contention, the Applicant asserts that, although this Court is not an appellate court, it has jurisdiction to hear any dispute pertaining to violation of the provisions of the Charter or any other relevant human rights instrument, to evaluate decisions of national courts, re-examine evidence, set aside a sentence and order acquittal of a victim of human rights violation.

26. The Applicant accordingly prays the Court to dismiss the Respondent State's arguments, submitting that this Court has jurisdiction to adjudicate the case by virtue of the provisions of the Charter and of the Protocol. In this regard, he contends that the Court's jurisprudence on this point is clear, in reference to its decisions in *Alex Thomas v United Republic of Tanzania*[4] and *Peter Joseph Chacha v United Republic of Tanzania*.[5]

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27. The Court notes that the Respondent State's objection suggests that this Court does not have jurisdiction to entertain the

2 Reproduced *in extenso* in the Respondent State's submissions

3 Reproduced *in extenso* in the Respondent State's submissions

4 *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465, § 130.

5 *Peter Joseph Chacha v United Republic of Tanzania* (jurisdiction) (2014) 1 AfCLR, 398, §114.

Application before it, since it is neither a court of first instance nor an appellate court with respect to decisions of national courts.

28. As regards the objection that the Court lacks jurisdiction since it is not a court of first instance, the Court recalls that it has jurisdiction as long as the rights alleged by Applicant as having been violated fall under a bundle of rights and guarantees that form part of cases that had been heard by national courts.[6] The Court notes in the instant case that the matters at issue relate to the identification of the Applicant by two witnesses, the absence of independent witnesses and the *alibi* defence.

29. The Court considers that these issues fall within the bundle of the rights and guarantees, and consequently dismisses the Respondent State's objection on this point.

30. As for the Respondent State's allegation that the Court is being asked to sit as an appellate court, the Court notes that, pursuant to its established jurisprudence, it has consistently held that, when examining cases brought before it, it cannot be considered as exercising appellate jurisdiction in respect of decisions of national courts.[7]

31. In this connection, the Court notes that under Articles 3(1) and 7 of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[8]

32. Thus, the Court is empowered to ascertain the conformity of any act of the Respondent State and its organs with the above-mentioned instruments. It follows that, with regard to national courts, "the Court shall have jurisdiction to examine their procedures in order to determine whether they are in conformity with the standards set out in the Charter or in any other human rights instrument

6 *Alex Thomas v United Republic of Tanzania* (merits) §§ 60-65.

7 *Ernest Francis Mtingwi v Republic of Malawi* (admissibility) (2013) 1 AfCLR 190, § 14. See also *Kenedy Ivan v United Republic of Tanzania*, AfCHPR, Application No.025/2016 - Judgment of 28 March 2019 (merits and reparations), § 26; *Armand Guéhi v United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 493,§ 33 ; *Werema Wangoko Werema & ors v United Republic of Tanzania* (merits) (2018) 2 AfCLR 539,§ 29 ; *Christopher Jonas v United Republic of Tanzania* (merits) (2017) 2 AfCLR 105, § 28; and *Mohamed Abubakari vUnited Republic of Tanzania* (merits) (2016) 1 AfCLR 599, § 25.

8 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility), § 114; *Alex Thomas v United Republic of Tanzania* (merits), § 45 and *Oscar Josiah v United Republic of Tanzania*, AfCHPR, Application 053/2016 - Judgment of 28 March 2019 (merits), § 24.

ratified by the State concerned ..."[9]

33. The Court notes that the present Application raises allegations of violations of the human rights enshrined in Articles 3, 5 and 7 of the Charter, the examination of which falls within the Court's jurisdiction. The Court therefore considers that Respondent State's objections in this respect are unfounded and are therefore dismissed.

34. The Court therefore holds in conclusion that it has material jurisdiction in this case.

B. Personal Jurisdiction

35. The Court notes with respect to its personal jurisdiction, that as earlier stated in this Judgment,[10] the Respondent State is a party to the Protocol and on 29 March 2010, filed the Declaration prescribed under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-governmental Organisations with Observer Status before the African Commission on Human and Peoples' Rights.

36. The Court also notes that on 21 November 2019 the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration.

37. With respect to the effects of the withdrawal, the Court recalls that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect.[11] Furthermore, the withdrawal has no bearing on matters pending prior to the filing of the withdrawal, as is the case with the present Application.

38. In regard to the date of entry into force of the withdrawal, the Court reaffirms its ruling in the above cited *Ingabire case* that such a withdrawal takes effect twelve (12) months after the filing of the instrument of withdrawal.

39. Similarly, based on its decision in the *Ingabire Case* cited above, the Court holds that the withdrawal of the declaration by the United

9 *Alex Thomas v United Republic of Tanzania* (merits), §130. See also *Mohamed Abubakari vUnited Republic of Tanzania* (merits), § 29; *Christopher Jonas v United Republic of Tanzania* (merits), § 28; *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits)(2017) 2 AfCLR 171, § 54.

10 See paragraph 2 above.

11 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdcition)(2014) 1 AfCLR 540 § 67.

Republic of Tanzania will take effect on 22 November 2020.

40. In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

C. Other aspects of jurisdiction

41. The Court notes that its personal, temporal and territorial jurisdiction are not disputed by the Respondent State and that nothing on record indicates that the Court lacks such jurisdiction. The Court accordingly holds that:

i. It has temporal jurisdiction given that the alleged violations are continuous in nature, in that the Applicant remains convicted and is serving a sentence of thirty (30) years' imprisonment on grounds which he considers wrong and indefensible;[12]

ii. It has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

42. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Admissibility

43. 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". Rule 39 (1) of the Rules also provides that "the Court shall conduct preliminary examination of its jurisdiction and the admissibility of the application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules".

44. Rule 40 of the Rules, which in essence restates the provisions of Article 56 of the Charter, provides that:

Pursuant to the provisions of article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that the procedure in unduly prolonged;

12 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) 1 AfCLR 197, §§ 71 - 77.

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

A. Conditions of admissibility in contention between the Parties

45. The Respondent State raises two (2) objections to the admissibility of the Application; the first, relating to the requirement of exhaustion of local remedies and the second, to the filing of the Application within a reasonable time under Rules 40 (5) and (6) of the Rules.

i. Objection based on non-exhaustion of local remedies

46. The Respondent State submits that the Application does not meet the conditions of admissibility set out in Rule 40(5) of the Rules as regards exhaustion of local remedies, adding that it was premature for the Applicant to file the present case before the Court, given that domestic remedies were available to him.

47. According to the Respondent State, after the judgments of the Kibaha District Magistrate Court and of the appeals at the High Court and the Court of Appeal on his conviction and sentence on the charge of armed robbery, the Applicant should have sought redress for any alleged human rights violations by filing a constitutional petition in accordance with the Respondent State's Constitution and its Basic Rights and Duties Enforcement Act.

48. The Respondent State also avers that the Applicant could have sought a review of the Court of Appeal's decision in Criminal Appeal No. 141/2007 in accordance with the provisions of Court of Appeal of Tanzania's Rules, 2009.

49. In his Reply, the Applicant did not deny the existence of local remedies as stated by the Respondent State. He argues, however, that domestic remedies were exhausted when the Court of Appeal delivered its judgment on 29 May 2009 in Criminal Appeal No. 141/2007 on the charge of armed robbery. The Applicant argues that the other remedies that the Respondent State claims he ought to have exercised are "extraordinary remedies" which he was not under obligation to exhaust. He maintains that since

the Court of Appeal is the Respondent State's highest court, and has pronounced on his appeal, he was not obliged to file a constitutional petition before the High Court, which is a lower court in relation to the Court of Appeal.

50. The Applicant further submits that he seized this Court in the hope that doing so would speed up the finalisation of his appeal in the second case, that is, Criminal Appeal No. 58/2006 on his conviction and sentence on the count of conspiracy to commit a felony and robbery, which had been pending before the High Court since 2007, that is for over nine (9) years.

51. The Applicant accordingly prays the Court to take into account his appeals before the High Court and the Court of Appeal in respect of the first case and the undue delay in the finalisation of the appeal in his second case, to consider that he has exhausted domestic remedies, and therefore declare his Application admissible.

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52. The Court notes that pursuant to Article 56(5) of the Charter and Rule 40(5) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are not available, are ineffective and insufficient or the procedure is unduly prolonged.[13]

53. In its jurisprudence, the Court emphasised that an Applicant is only required to exhaust ordinary judicial remedies.[14] In relation to several applications filed against the Respondent State, the Court has determined that the constitutional petition procedure in the High Court and the review procedure at the Court of Appeal are extraordinary remedies in the Tanzanian judicial system, which an applicant is not required to exhaust prior to filing an application before this Court.[15]

54. In the instant case, the Court notes that the Applicant appealed his conviction and sentence on the count of armed robbery by filing

13 *Ibid* § 84.

14 *Alex Thomas v United Republic of Tanzania* (merits), § 64. See also *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania*, (merits)(2016) 1 AfCLR 507, § 95, *Oscar Josiah v United Republic of Tanzania* (merits), § 38, *Diocles William v United Republic of Tanzania* (merits) (2018) 2 AfCLR 426 § 42.

15 *Alex Thomas v United Republic of Tanzania* (merits), §§ 63-65.

Criminal Appeal No. 45/2006 at the High Court and thereafter Criminal Appeal No. 141/2007 at the Court of Appeal, the highest court in the Respondent State. Both the High Court and the Court of Appeal upheld the decisions of the District Magistrate Court.

55. The Court considers that the 29 May 2009 judgment of the Court of Appeal, the highest court in the Respondent State, demonstrates that the Applicant has exhausted local remedies as regards the first case on the conviction and sentence on the charge of armed robbery. Following this judgment, he was neither required to pursue an application for review of that decision at the Court of Appeal nor to file a constitutional petition at the High Court as these are extraordinary remedies.

56. Concerning the Applicant's second case, the Court notes that, on 27 October 2006, the Applicant appealed to the High Court against his conviction and sentence on the count of conspiracy to commit a felony and robbery. However, despite several correspondences to the concerned authorities to follow up on his appeal, it was still pending as at the time he filed the Application before this Court on 19 March 2015, that is, nine (9) years since he filed the appeal.[16] The Court notes that even though the remedy was available in theory, the procedure to exercise it was unduly prolonged. Therefore, pursuant to Rule 40(5) of the Rules, he is deemed to have exhausted the local remedies.

57. Accordingly, the Court dismisses the objection raised by the Respondent State to the admissibility of the Application on the ground of failure to exhaust the local remedies.

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

58. The Respondent State submits that the Applicant did not file his Application within a reasonable time as required by Rule 40(6) of the Rules. In this regard and citing the decision of the African Commission on Human and Peoples' Rights (herein-after referred as "the Commission") in the matter of *Michael Majuru v Zimbabwe,* the Respondent State argues that international courts consider a six-month timeframe as reasonable and the Court should adopt the same position.

16 See the Letters sent to the Chief Justice, dated 8 November 2013; to the Chairperson of the Judicial Service Commission, dated on 2 May 2013; to the Presiding Judge of the High Court, dated 6 August 2013 and 4 February2013; to the Judge presiding over the Appeal before the High Court, dated 25 May 2012, 2 February 2012 and 11 March 2011, respectively.

59. According to the Respondent State, however, since the Applicant filed his Application five (5) years after the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol, the Court must consider this timeframe unreasonable and declare the Application inadmissible.

60. It also contends that the Application was filed after an excessive time lapse, in relation to the date considered by the Applicant as that on which the local remedies were exhausted, namely 29 May 2009, the date of the judgment rendered by the Court of Appeal in the first case.

61. The Applicant, for his part, submits that he is a layman, indigent, incarcerated and without the assistance of counsel which made it impossible for him to obtain information on the existence of this Court and of its procedural and timeframe requirements. He consequently prayed the Court to admit and examine his Application by virtue of the powers vested in it.

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62. 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."

63. In the instant Application, the Court notes that in regard to the first case, domestic remedies were exhausted on 29 May 2009 the date on which the Court of Appeal rendered its judgment. However, the Applicant was able to file the Application before this Court only after 29 March 2010, the date that the Respondent State deposited the Declaration prescribed under Article 36 (4) of the Protocol empowering individuals to directly access the Court. A period of four (4) years, nine (9) months and twenty three (23) days elapsed between 29 March 2010 and 19 January 2015 when the Applicant filed his Application before this Court.

64. The issue for determination is whether the four (4) years, nine (9) months and twenty three (23) days that the Applicant took to file his Application before the Court is reasonable in terms of Article 56(6) of the Charter and Rule 40(6) of the Rules and considering the circumstances of this case.

65. As regards the reasonableness of the time limit, the Court considers that the Respondent State erred by relying on the position adopted by the Commission in the *Majuru* Case to allege that the applicable time limit for filing an application after the exhaustion of the local remedies is six months.[17]

66. The Court recalls in this regard that, as it held that "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."[18] Some of the circumstances that the Court has taken into consideration with respect to Applicants include: imprisonment and being lay without the benefit of legal assistance.[19]

67. In correlating the elapsed time with the situation of the Applicants, this Court also notes that in its judgments in *Amiri Ramadhani v Tanzania*[20] and *Christopher Jonas v Tanzania*,[21] it held that the period of five (5) years and one (1) month was reasonable owing to the fact that both Applicants were in prison, were lay and were without legal assistance during their trials before the domestic courts.

68. Furthermore, the Court held that the Applicants having had recourse to the review procedure, were entitled to wait for the decision on their application for review and that this justified the filing of their Application five (5) years and five (5) months after exhaustion of local remedies.[22]

69. In the instant case, the Court notes that the Applicant was incarcerated and as an incarcerated person, he might have been unaware of the existence of the Court prior to the filing of the

17 See *Lucien Ikili Rashidi v United Republic of Tanzania* AfCHPR Application 009/2015. Judgment of 28 March 2019, (merits and reparations), § 52-53.

18 *Norbert Zongo & ors v Burkina Faso* (preliminary objections), § 121.

19 *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 56; *Werema Wangoko & anor v United Republic of Tanzania* (merits) § 49; *Alfred Agbesi Woyome v Republic of Ghana* AfCHPR; Application 001/2017. Judgment of 28 June 2019 (merits and reparations), §§ 83-86.

20 *Amiri Ramadhani v United Republic of Tanzania* (merits) (2018) 2 AfCLR 344, § 50.

21 *Christopher Jonas v United Republic of Tanzania* (merits), § 54.

22 *Werema Wangoko Werema & anor v United Republic of Tanzania* (merits), § 49.

Application. The Court further notes that he did not have the benefit of legal aid during the appeal proceedings before the domestic courts.

70. Furthermore, it is apparent from the record that the Applicant was awaiting the outcome of his second appeal, which remained pending before the High Court of Tanzania from 27 October 2006 until 19 March 2017. In this respect, between 2011 and 2013, he did not simply sit back and wait for his matter to be considered, but rather sent several reminders to various judicial authorities requesting the finalisation of his appeal.[23] Thus, the Applicant had a legitimate expectation that his requests would be addressed and his delay in filing his Application before this Court was justified.

71. The Court therefore holds that the period of four (4) years, nine (9) months and twenty-three (23) days that the Applicant took to file the Application after the Respondent State filed the Declaration under Article 34(6) of the Protocol, is reasonable within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules.

72. Accordingly, the Court dismisses the Respondent State's objection to the admissibility of the Application on the ground that it failed to comply with the requirement of filing an Application within a reasonable time after exhaustion of domestic remedies.

B. Other conditions of admissibility

73. The Court notes that the parties do not dispute the fact that the Application fulfils the conditions set out in Article 56(1), (2), (3), (4) and (7) of the Charter regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the terms used in the Application, the nature of the evidence filed and the prior settlement of the case, respectively, and that nothing on record indicates that these requirements have not been complied with.

74. In view of the foregoing, the Court finds that the Application meets all the conditions of admissibility under Article 56 of the Charter and as set out in Rule 40 of the Rules, and therefore declares the same admissible.

23 See footnote 17 above.

VII. Merits

75. The Applicant alleges that the Respondent State has violated his rights guaranteed under Articles 3, 5, 7(1)(c) and (d) and (2) of the Charter. Considering that the allegations concerning Articles 3 and 5 of the Charter essentially arise from and are related to the Applicant's allegation of violation of his right to a fair trial, the Court will first consider the allegations regarding Article 7 of the Charter.

76. Article 7 of the Charter provides that:

1. 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 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.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

A. Alleged violations of the right to a fair trial

77. The Applicant alleges violations of Article 7 of the Charter for the following reasons:

i. irregularities in the visual identification and hence the reliance on erroneous testimony to convict him;

ii. denial of the opportunity to challenge the prosecution's evidence;

iii. failure to allow the Applicant to present the *alibi* defence;

iv. failure to provide him with free legal assistance;

v. failure to render judgment on his appeal in Criminal Appeal No. 194/2004 within a reasonable time; and

vi. the fact of imposing a sentence for which there is no provision under the law.[24]

24 Quoted *in extenso* from the Applicant's submissions.

ii. Alleged violation as regards identification and testimonies

78. The Applicant submits that in Case No. 95/2003, the District Magistrate Court did not organise an identification parade, contrary to the requirements of the law, in order to ensure respect for the principles of fair trial.

79. The Respondent State submits that in Case No. 95/2003, PW2 was the driver of the rented pick-up vehicle stolen by the Applicant, and that PW3 was the turn boy, that is, the driver's assistant. The Respondent State submits that on 15 April 2003, the Applicant rented the pick-up vehicle from PW2 and PW3 and that, thereafter, these two (2) witnesses were driving in the vehicle with the Applicant from 8.30 a.m. to 10 a.m. It was around 10 a.m. that the Applicant and other persons armed with rifles and knives attacked both witnesses, tied them up, abandoned them on the road side and made away with the vehicle. The witnesses thus had ample time to see, recognise and identify the Applicant.

80. The Respondent State avers that the District Magistrate Court, the High Court and the Court of Appeal confirmed that the Applicant's identification and the criteria applied thereon, are in line with the principles of justice and that there could be no error of identification in this case.

81. The Respondent State prays the Court to dismiss the allegation in its entirety, as baseless.

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82. Having taken note of the above submissions of the parties, the Court considers that the key issues for determination are whether the Respondent State's failure to conduct an identification parade and the domestic courts' use of PW2's and PW3's testimonies of visual identification to convict the Applicant are contrary to Article 7(1)(b) of the Charter, which guarantees the right to be presumed innocent until proven guilty.

83. The Court recalls its position, that domestic courts enjoy a wide margin of discretion in evaluating the probative value of evidence. As an international human rights court, the Court cannot substitute itself for the domestic courts and investigate the details and

particularities of evidence used in domestic proceedings.[25]

84. As regards the issue of identification parade, the Court also notes that "it is a matter of common sense that in criminal proceedings, identification parade is not necessary and cannot be carried out if witnesses previously knew or saw a suspect before the identification parade (was conducted). The Court notes that this is also the practice in the jurisdiction of the Respondent State."[26]

85. The Court has also consistently held in its jurisprudence 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…".[27]

86. In the instant case, the record shows that the domestic courts convicted the Applicant on the basis of evidence from the visual identification of two prosecution witnesses, that is, PW2 and PW3, themselves victims of the crime. These witnesses were with the Applicant in the pick-up vehicle for nearly two (2) hours on the road. According to the national courts, the witnesses recognised the Applicant during this time and were able to subsequently identify him. In the circumstances, the Court holds that the omission of the identification parade does not constitute a miscarriage of justice, and therefore is not a violation to the Applicant's right to a fair trial.

87. As regards the credibility of the witnesses, the Court notes that the national courts carefully examined the circumstances of the crime, ruled out any risk of error and concluded that the Applicant was indeed identified as the perpetrator of the alleged crime. The Court considers that the assessment of the facts or evidence by the domestic courts reveals no manifest error nor did it result in any miscarriage of justice for the Applicant. It accordingly dismisses the Applicant's allegation that the testimony regarding the visual identification was marred by irregularities.

88. For this reason, the Court holds in conclusion that there has been no violation of Article 7(1)(b) of the Charter as regards the issue of visual identification and the related testimonies and consequently, dismisses the allegation.

25 *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 AfCLR 218, §65; *Armand Guehi v United Republic of Tanzania* (merits and reparations), §-§ 107-108.

26 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (2017) 2 AfCLR 65, § 86.

27 *Mohamed Abubakari v United Republic of Tanzania* (merits), §174; *Armand Guehi v Tanzania* (merits and reparations), §105.

ii. Alleged denial of opportunity to challenge the prosecution's evidence

89. The Applicant alleges that, in the first case, the Respondent State had not properly notified him of the exhibits it would tender for him to have the opportunity to contest their admission. The Applicant contends that, despite this, the District Magistrate Court admitted Exhibits 1 to 5 tendered by the Prosecution. The Applicant argues that, by these acts, the Respondent State violated his fundamental rights enshrined in Article 26(1) and (2) of the Constitution of the United Republic of Tanzania.

90. The Applicant further states that he made multiple requests for the witness statements to be disclosed to him so that he could effectively prepare his defence and that none of his requests was fulfilled until the end of the trial process. He avers that he raised this lack of disclosure of evidence in his Memorandum of Appeal in Criminal Appeal No. 45 of 2006. The Respondent State admitted that it did not disclose the witness statements, and that the Court of Appeal had held that this omission did not constitute a ground for appeal. The Applicant however submits that this omission infringed upon his right to a fair trial under Article 7 of the Charter.

91. Refuting these allegations, the Respondent State asserts that the Applicant had his counsel during part of the trial before the Kibaha District Magistrate Court, adding that the counsel was never prevented from tendering exhibits or evidence in support of the Applicant's case. The record of proceedings shows that the Applicant's counsel raised only one objection at the time of examination of the prosecution exhibits. The Respondent State, consequently, prays the Court to dismiss this allegation as unfounded.

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92. The Court notes that in criminal cases, the right to defence as enshrined in Article 7(1)(c) of the Charter, includes the right to be supplied with prosecution evidence and the right of the accused to challenge the said evidence. In the instant case, the main issue for determination is whether the Respondent State's alleged failure to provide the Applicant with witness statements is a violation of

the Applicant's right to defence.

93. The Court further notes from the record that, during the trial stage at the District Magistrate Court, the Applicant was represented by counsel and had the opportunity to challenge the tendering of exhibits by the prosecution. He was also provided with records of witness testimony. There is nothing on record showing that he was prevented in any manner from challenging the admissibility of the exhibits in question or disputing the witness testimony.

94. Accordingly, the Court finds that there has been no violation of Article 7(1)(c) of the Charter in relation to the Applicant's right to question the admissibility of prosecution's evidence and consequently dismisses the allegation.

iii. Alleged failure to allow the Applicant's to present an *alibi* defence

95. The Applicant alleges that he informed the District Magistrate Court of his intention to call a witness to corroborate his *alibi*, but the request was refused. He further asserts that he was deprived of his right to a fair trial in as much as the District Magistrate Court, the High Court and the Court of Appeal did not take his *alibi* defence into account.

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

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97. The Court notes that an *alibi* can be an important element of evidence for one's defence. The *alibi* defence is implicit in the right of a fair trial and should be thoroughly examined and possibly set aside, prior to a guilty verdict.[28] In its judgment in *Mohamed Abubakari v Tanzania*, this Court observed that:

> Where an alibi is established with certitude, it can be decisive in the determination of the guilt of the accused. This issue was all the more crucial especially as, in the instant case, the indictment of the Applicant relied on the statements of a single witness, and that no identification parade was conducted.[29]

28 *Mohamed Abubakari v United Republic of Tanzania* (merits), § 191, and *Kennedy Owino Onyachi & anor v United Republic of Tanzania* (merits), § 93.

29 *Ibid*, § 93.

98. In the instant case, the Court notes from the District Magistrate Court's judgment in the first case, that the Applicant had raised the *alibi* defence alleging that he was at work at the time when the pick-up vehicle was allegedly stolen. The Court further notes that the District Magistrate Court, the High Court and the Court of Appeal considered his *alibi* defence but found that it lacked merit in view of the irrefutable testimony of PW2 and PW3. Considering the wide margin of discretion that domestic courts enjoy in this regard, the Court does not see any reason for it to intervene or conclude otherwise.

99. In view of the foregoing, the Court dismisses the Applicant's allegation that he was not allowed to call witnesses to corroborate his *alibi* defence and, therefore, finds that the Respondent State has not violated Article 7(1)(c) of the Charter.

iv Alleged violation of the right to free legal assistance

100. The Applicant further alleges that he did not receive free legal assistance before the High Court and the Court of Appeal, which would have enabled him to better understand the legal and procedural issues arising during the appeals. He argues that by not granting him such assistance, the national courts failed to fulfil their obligation under Article 3 of the Criminal Procedure Act of the Respondent State and hence violated Article 7(1)(c) of the Charter.

101. The Applicant cites, in this regard, the judgment in *Wilfred Onyango Nganyi & 9 ors v Tanzania* wherein the Court noted that in view of the seriousness of the charges levelled against the Applicants, the Court held that the Respondent State was under the obligation to provide them with free legal assistance; and to inform the Applicants of their right to free legal assistance, as soon as it became clear that they were no longer being represented.

102. The Respondent State asserts that whereas the right to defence is absolute in domestic law, the right to legal aid is obligatory only in homicide, murder or manslaughter cases, and that for all other criminal cases, legal aid is granted only at the request of the accused if it is proved that he is indigent and unable to pay the counsel's fees. Refuting the Applicant's allegations, the Respondent State contends that at no point in the proceedings did he make such a request, but rather he opted to take charge of his own defence.

103. The Respondent State further asserts that the Applicant's counsel remained available to the Applicant between 3 November 2003 and 24 November 2004 and withdrew from the case after that

date due to lack of instructions from the Applicant. The counsel remained at the Applicant's disposal during the evidentiary period and did not challenge the evidence adduced before the Court throughout that stage of the trial.

104. The Respondent State also submits, with regard to the Applicant's allegation that he was deprived of the right to counsel, that the Applicant had the opportunity to apply for legal assistance as provided under Section 3 of the Legal Aid (Criminal Proceedings) Act. The Respondent State also avers that the Applicant had the opportunity of raising this issue during his appeals at the High Court and the Court of Appeal.

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105. The Court notes that Article 7(1)(c) of the Charter mentioned above[30] does not provide explicitly for the right to free legal aid. This Court has however, interpreted this provision as read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR")[31] and determined that the right to defence includes the right to be provided with free legal assistance.[32] The Court has also held that an individual charged with a criminal offence is entitled to the right to free legal assistance without requesting for it, provided that the interest of justice so requires.[33]

106. This Court further notes that:

In assessing these conditions (i.e., indigence and interest of justice), the Court considers several factors, including i). the seriousness of the crime; ii). the severity of the potential sentence; iii). the complexity of the case; iv). the social and personal situation of the defendant and, in cases of appeal, the substance of the appeal (whether it contains a contention that requires legal knowledge or skill); and the nature of the "entirety

30 See § 77 above.

31 The Respondent State became a party to ICCPR on 11 June 1976.

32 *Alex Thomas v United Republic of Tanzania* (merits), §123; *Kijiji Isiaga v United Republic of Tanzania*, § 72; *Kennedy Owino Onyachi and Charles Mwanini Njoka v United Republic of Tanzania* § 104, Application 025/2015. Judgment of 26 September 2019 (merits and reparations), *Majid Goa v United Republic of Tanzania*, AfCHPR, Application 025/2015. Judgment of 26 September 2019 (merits and reparations § 69.

33 *Alex Thomas v United Republic of Tanzania* (merits), § 123; *Mohamed Abubakari v United Republic of Tanzania* (merits), §§ 138-139.

of the proceedings", for example, whether there are considerable disagreements on points of law or fact in the judgments of lower courts.[34]

107. In the instant Application, the Court notes from the record that in the first case before the District Magistrate Court, the Applicant was represented by counsel whom he engaged. However, this was not the case with respect to proceedings before the High Court and the Court of Appeal. With regard to the second case, there is nothing on record to establish whether or not the Applicant was represented by counsel during his trial before the District Magistrate Court and at his appeal before the High Court. In view of this, the Court will limit its assessment only to the first case and determine whether the Applicant's right to free legal assistance has been violated.

108. The records show that the Applicant was charged with a serious offence carrying a heavy custodial sentence of a minimum of thirty (30) years. Besides, the case involved eight (8) prosecution witnesses, two (2) defence witnesses and five (5) prosecution exhibits, which shows the complexity of the matter. In the circumstances, it is evident that the interest of justice required the provision of free legal assistance so as to ensure that the Applicant's trial and appeals proceeded fairly.

109. In this connection, the Court takes note of the Respondent State's contention that the Applicant had counsel at the District Magistrate Court, that the lawyer withdrew his services for lack of cooperation from the Applicant, and that in any event, the Applicant was supposed to request for legal assistance if he felt he needed one. The Court also notes the Respondent State's argument that the Applicant was able to defend himself at all stages of his trial.

110. The Court notes from the file that, during part of his trial, the Applicant was indeed represented by counsel, whom he had personally engaged. However, this was not the case throughout the trial and appellate proceedings. In any case, the failure of the Respondent State to provide the Applicant with free legal assistance at appellate levels is inconsistent with international human rights standards.

111. Accordingly, the Court finds that the Respondent State has, by failing to provide the Applicant with free legal assistance during part of his trial and appeals in respect of the first case, Criminal Case No. 95/2003, violated the Applicant's right to free legal assistance as guaranteed by Article 7(1)(c) of the Charter as read

34 *Kennedy Owino & anor v United Republic of Tanzania* (merits) § 105.

together with Article 14(3)(d) of the ICCPR.

v Alleged violation of the right to be tried within a reasonable time in Criminal Case No. 194/2004

112. The Applicant alleges that immediately after his conviction in Criminal Case No. 194/2004, he filed an appeal before the High Court under Criminal Appeal No. 58/2006, challenging the decision of the District Magistrate Court. He indicates that the appeal was heard in June 2007 and scheduled for delivery of judgment but this had not happened by the time he filed his Application before this Court, on 19 January 2015. In his Reply, he further asserted that this appeal was pending until 20 March 2017. The Applicant contends that this delay is excessive for a criminal case and constitutes a violation of the right to be tried within a reasonable time contrary to Article 7(1)(d) of the Charter.

113. The Applicant asserts also that the multiple attempts he made to exercise his fundamental rights enshrined in the Constitution of the United Republic of Tanzania regarding finalisation of the appeal remained unsuccessful.

114. The Applicant reiterates that between 2011 and 2013, he repeatedly sent letters, complaints and requests to judicial authorities regarding the finalisation of his appeal, but all these attempts were fruitless.

115. The Respondent State, for its part, contends that the Applicant is making the aforesaid allegation for the first time, and that this issue has been resolved by the High Court's judgment of 20 March 2017, quashing the Applicant's conviction and part of the outstanding sentence in Criminal Case No. 194/2004.

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116. The Court reiterates that the right to appeal is a fundamental element of the right to a fair trial as enshrined under Article 7(1)(a) of the Charter stated above.[35] Appeal proceedings offer an opportunity for an accused to challenge the findings of the lower court on matters of law and fact and this lies in the very essence

35 See § 77.

of the right to a fair trial. The right to a fair trial also includes the principle that judicial proceedings should be finalised within a reasonable time.

117. In the determination of the right to be tried within a reasonable time, the Court has adopted a case-by-case approach, whereby it takes into consideration several factors, including the nature and complexity of the case, the length of the domestic proceedings and whether the national authorities exercised due diligence in the circumstances of the case, for the finalisation of the matter.[36]

118. Regarding the nature and complexity of the case, the Court notes that in its Judgment of 20 March 2017, the High Court considered that, since the original case file could not be traced, the Court had to rely on a copy of the said file. The Court thus holds in conclusion that the delay noted was not caused by the nature and complexity of the case, but by factors extraneous to the Applicant's will and stemming from the malfunctioning of the Respondent State's judicial system.

119. With regard to the duration of the proceedings and the obligation on the part of the Respondent State's judicial authorities to exercise due diligence, the Court notes that, in the second case, No. 194/2004, a period of ten (10) years, four (4) months and twenty three (23) days had elapsed between 27 October 2006, the date on which the Applicant filed his appeal No. 58/2006, and 20 March 2017, the date on which the High Court rendered its Judgment. The question that arises is whether or not such a timeframe is reasonable.

120. On this point, the Court notes that, according to the record, a period of more than nine (9) years had elapsed between the time the Applicant lodged his appeal and the time he filed the present Application on 19 January 2015; and this was despite the numerous requests to the national authorities for a determination on the criminal case No. 194/2004.[37] It was only on 20 March 2017 that the High Court finalised the appeal proceedings by rendering a Judgment; and this, after this Court had been seized of the present Application.

36 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (reparations) (2015) 1 AfCLR 258, § 152; *Wilfred Onyango Nganyi & ors v United Republic of Tanzania* (merits) (2016) 1 AfCLR 507, § 155. *Armand Guéhi v United Republic of Tanzania* (merits and reparations), §122; *Lucien Ikili Rashidi vUnited Republic of Tanzania* (merits and reparations) § 107.

37 See footnote 16 above.

121. By the said Judgment, the High Court quashed the conviction and part of the sentence and acquitted the Applicant. However, this occurred only more than ten (10) years after the filing of the appeal. The Respondent State did not provide justification for such considerable delay and nothing on record indicates that such a long period of time was necessary to adjudicate on an appeal.

122. In light of the foregoing, the Court holds that the period of ten (10) years four (4) months and twenty-three (23) days taken to determine the Applicant's appeal at the High Court in respect of Criminal Appeal No. 58/2006 is excessive and cannot be regarded as a reasonable time. The Court thus finds that the Respondent State has violated the Applicant's right to be tried within a reasonable time as guaranteed by Article 7(1)(d) of the Charter.

vi. Alleged violation arising from the illegality of the sentence

123. The Applicant alleges that the thirty (30) years prison sentence imposed on him in Criminal Case No. 95/2003 is unlawful as the applicable penalty was fifteen (15) years imprisonment in accordance with the law in force at the time of his conviction in 2005 by the District Magistrate Court. He claims that the thirty (30) years sentence did not exist and is a violation of Article 13(6) of the Constitution of the United Republic of Tanzania and Article 7(2) of the Charter.

124. However, in his Reply, the Applicant states that he no longer wished to maintain this claim. For this reason, the Court will not address this issue.

B. Alleged violation of the right to equality before the law and equal protection of the law

125. The Applicant alleges that he was isolated by the fact-finding procedure and the examination of his appeal, contrary to the principle of equality before the law. He contends that, by this act, his rights as enshrined in Article 3(1)(2) of the Charter have been violated.

126. The Respondent State did not respond to this allegation but it asserts in general that its Constitution guarantees full equality before the law, equal protection of the law and the right to a fair trial in accordance with Article 13(1)(6) thereof.

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127. Article 3 of the Charter provides that: "1. Every individual shall be equal before the law; 2. Every individual shall be entitled to equal protection of the law".

128. In its jurisprudence, the Court has established that the *onus* is on the Applicant to demonstrate how the guarantees of equality before the law and equal protection of the law have resulted in a violation of Article 3 of the Charter.[38]

129. In the instant case, the Court notes that the Applicant has failed to show how he was treated differently from other litigants in the same situation as he was. In this regard, the Court reiterates its position that "General statements to the effect that his right has been violated are not enough. More concrete evidence is required".

130. Accordingly, the Court holds that the Respondent State has not violated Article 3(1) and (2) of the Charter.

C. Alleged violation of the right not to be subjected to cruel, inhuman and degrading treatment

131. The Applicant alleges that the Respondent State has violated his right not to be subjected to cruel, inhuman and degrading treatment, because he was beaten up by agents of the Respondent State when he was first arrested and that he was intimidated and tortured at the police station during the investigations in order to make him confess his guilt. He also alleges that he was denied medical care while in custody.

132. According to the Applicant, such treatment constitutes a violation of Article 5 of the Charter.

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

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38 *Alex Thomas v United Republic of Tanzania* (merits), § 140; *Armand Guehi v United Republic of Tanzania* (merits and reparations) §157.

134. The Court notes that Article 5 of the Charter provides that:

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

135. The Court recalls its position that "General statements to the effect that his right has been violated are not enough.[39] More concrete evidence is required". In the instant case, the Applicant has not provided evidence in support of this allegation.

136. Accordingly, the Court finds that the Respondent State has not violated Article 5 of the Charter.

VIII. Reparations

137. Article 27(1) of the Protocol provides that: "If the Court finds that there has been violation of human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation".

138. The Court recalls its established jurisprudence 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".[40]

139. The Court also reiterates that, the purpose of reparation is to "… 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 committed."[41] Measures that a State could take to remedy a violation of human rights 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.[42]

39 *Alex Thomas v United Republic of Tanzania* (merits), § 140.

40 *Mohamed Abubakari v United Republic of Tanzania* (merits), § 242 (ix); *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations), (2018) 2 AfCLR 202, § 19.

41 Application 007/2013. Judgment of 04 July 2019 (reparations), *Mohamed Abubakari v United Republic of Tanzania*, § 21, Application 005/2013. Judgment of 04 July 2019 (reparations), *Alex Thomas v United Republic of Tanzania*, § 12; Application 006/2013. Judgment of 04 July 2019 (reparations), *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania*, § 16.

42 *Ingabire Umuhoza v Rwanda* (reparations), § 20.

140. 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.[43] With regard to moral prejudice, presumptions are made in favour of the Applicant.[44]

141. The Court will consider the Applicant's claims for compensation on the basis of these principles.

A. Pecuniary reparations

142. The Court has already found that the Respondent State violated the Applicant's rights to free legal assistance, and the right to be tried within a reasonable time contrary to Article 7(1)(c) and (d) of the Charter, respectively.

i. Material prejudice

143. The Applicant claims that as a result of his incarceration, his health declined, that he lost his job as a metal mechanic, and suffered financial loss and that his life plans have been severely disrupted. He claims that the indirect victims he has listed in his claim for reparations, that is, his wife, son, mother, two (2) sisters, and two (2) brothers incurred financial loss by constantly visiting him in prison. The Applicant claims United States Dollars Five Thousand (US$ 5,000) as material prejudice suffered by his wife. He also prays the Court to grant him United States Dollars two thousand (US$ 2,000) for legal fees he incurred during the proceedings in the domestic courts.

144. The Respondent State contends that the Applicant has not adduced any evidence to substantiate the life plan he had and how this was disrupted; the Applicant has not adduced any document to substantiate the ownership of any property that has been disposed of; and the Applicant has neither adduced nor established any social status he had prior to his arrest. The Respondent State further avers that the Applicant cannot claim to have lost his social status while he has not even produced any evidence to show what social status he had prior to his arrest

43 *Reverend Christopher R. Mtikila v United Republic of Tanzania (reparations) (2*014) 1 AfCLR 72 § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346, § 15.

44 *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) § 55.

and imprisonment. The Respondent State also argues that the Applicant did not provide any evidence to support his claim that he incurred legal costs in the national courts.

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145. The Court reiterates its position that, as regards the income lost due to the proceedings before the High Court[45] and the claim for lawyers' fees during domestic proceedings, such loss should be proven before this Court with evidence of financial returns that could have been realised as well as evidence of payments to his counsel. In the instant case, the prejudice resulting from the lengthy judicial proceedings could also have been supported by proof of payment of lawyers' fees, as well as procedural and other related costs. The Court notes that, the Applicant provided no such evidence in support of his claims. Consequently, these claims are dismissed.

146. With respect to the claim for compensation based on the disruption of his life plan, chronic illness and poor health, the Court notes that the Applicant's allegation is simply a general statement that is not supported by any evidence. Consequently, this claim is also dismissed.

ii. Moral prejudice

a. Moral prejudice suffered by the Applicant

147. In his claims for reparations, the Applicant argues that he suffered undue stress from the lack of provision of legal assistance during the various stages of his case, as a result of the failure of the Respondent State to recognise the rights, duties and freedoms enshrined in the Charter. The Applicant further argues that the Respondent State's failure to try him within a reasonable time and provide him with equal protection of the law and its violation of his dignity by degrading him through torture, caused him serious stress.

45 *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations), § 126.

148. The Applicant adds that he suffered a wide range of injuries during his arrest and sickness since his incarceration such as hypertension and cardiomegaly. He further submits that he lost his social status and standing in the community due to his imprisonment. Citing the Court's jurisprudence in *Lohé Issa Konaté v Burkina Faso*, the Applicant prays the Court to grant him United States Dollars Twenty Thousand (USD $20,000) in moral damages. The Applicant requests the Court to also take into account the thirteen (13) years he spent in prison.

149. In its Response, the Respondent State contends that for moral damages to be claimed, the alleged moral prejudice should be directly caused by the facts of the case. It asserts that it is not the duty of the Court to speculate on the existence, seriousness and magnitude of the moral damages claimed. In this regard, the Respondent State argues that the Applicant has not adduced any proof of emotional anguish or chronic diseases suffered due to imprisonment or in relation to his rights. To substantiate its contention, the Respondent State claims that there is no medical certificate showing the existence of a chronic disease suffered or emotional anguish the Applicant encountered while in prison or following the violation of his rights.

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150. The Court notes that, moral prejudice involves the suffering, anguish and changes in the living conditions of an Applicant and his family.[46] As such, the causal link between the wrongful act and moral prejudice "can result from the human rights violation, as a consequence thereof, without a need to establish causality as such".[47] The Court has held previously that the evaluation of *quantum* in cases of moral prejudice must be done in fairness and taking into account the circumstances of the case.[48] In such instances, awarding lump sums would generally apply as the

46 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (2014) 1 AfCLR 72 § 34.

47 *Beneficiaries of late Norbert Zongo* (reparations) § 55; and *Lohé Issa Konaté v Burkina Faso* (reparations), § 58.

48 *Armand Guehi v United Republic of Tanzania*, § 157; *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258, § 61.

standard.[49]

151. The Court has already found that the Respondent State has violated the Applicant's rights to free legal assistance, and the right to be tried within a reasonable time contrary to Article 7(1)(c) and (d) of the Charter. Accordingly, there is a presumption that the Applicant has suffered some form of moral prejudice as a result of such violation.

152. With respect to the currency in which the *quantum* of damages will be assessed, the Court is of the view that, taking fairness into account and considering that the Applicant should not be made to bear the fluctuations inherent in financial activities, determination should be made on a case-by-case basis. As a general rule, damages should be awarded, as far as possible, in the currency in which the loss was incurred.[50]

153. Accordingly, the Court exercising its discretion awards the Applicant an amount of Tanzanian Shillings Five Million Seven Hundred and Twenty-Five Thousand (TZS 5,725,000) as compensation.

b. Moral prejudice to indirect victims

154. The Applicant alleges that his wife, Mrs Fatuma Bakari; son, Azizi Andrew Ambrose; mother, Ms Altha Lukwandali; his sisters Esther Ambrose and Donata Ambrose; and brothers Benjamin Ambrose and Barnabas Ambrose have indirectly been affected by his incarceration. He argues that they were emotionally distressed, suffered from emotional pain and anguish as a result of the physical condition he was forced to endure. Accordingly, he prays the Court to grant him United States Dollars Five Thousand (US$ 5,000) as moral damages for the prejudice suffered by each indirect victim.

155. The Respondent State argues that any claim for compensation for suffering that the indirect victims might have undergone is not justifiable because the Applicant has not submitted any document to prove the existence of a relationship between him and the indirect victims and there is no connection between the prejudice suffered by the indirect victims and the violation suffered by the Applicant.

49 *Lucien Ikili Rashidi vUnited Republic of Tanzania* (merits and reparations), § 116-117; *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258, § 62.

50 *Lucien Ikili Rashidi v United Republic of Tanzani*a (merits and reparations) § 120.

156. Relying on the Court's judgment in *Lucien Ikili Rashid v Tanzania*, the Respondent State further asserts that indirect victims must prove their relation to the Applicant in order to be entitled to damages. The Respondent State submits that, since the Applicant failed to submit a marriage certificate, birth certificate or any document showing the level of dependency or previous record of dependency of the alleged indirect victims on him, there is no causal link between the said indirect victims and the prejudice suffered.

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157. With regard to the moral prejudice suffered by indirect victims, the Court reiterates its jurisprudence as established as regards indirect victims that, to be entitled to reparations, the indirect victims must prove their filiation with the Applicant. An Applicant's parentage should be proved with a birth certificate or any other equivalent proof; spouses must produce their marriage certificate or any other equivalent proof; the siblings must provide a birth certificate or any other equivalent document attesting to their filial link with the Applicant.[51]

158. In the instant case, the Court notes that the Applicant provided the names of his wife, son, mother and siblings, but has not provided any evidence of their identification and proof of his filiation with the alleged indirect victims.

159. In light of the foregoing, the Court holds that the Applicant has failed to provide evidence of filiation between him and the alleged indirect victims. Consequently, the Court dismisses the claims for compensation for the alleged moral prejudice suffered by the indirect victims.

51 *Ibid* § 135; *Alex Thomas v United Republic of Tanzania* (reparations), § 51; *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania* § 71; *Mohamed Abubakari v United Republic of Tanzania*, § 60; *Armand Guehi v United Republic of Tanzania* (merits and reparations) §§ 183 and 186.

B. Non-pecuniary reparations

i. Restitution

160. The Applicant prays the Court to quash his conviction and sentence and order his release.

161. The Applicant also prays the Court to make a restitution order, arguing that compensation should be paid in lieu of restitution, given that he cannot return to the position in which he was prior to the decisions of the Respondent State's courts.

162. The Respondent State, for its part, submits that the Applicant is serving the prison sentence legally and in accordance with the laws in force in the United Republic of Tanzania for the crimes he committed.

163. The Respondent State avers that the Applicant's prayer to have his liberty restored is misconceived and that the Court lacks jurisdiction to restore the Applicant's liberty.

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164. With respect to the Applicant's request for the conviction and sentence to be quashed, the Court reiterates its previous jurisprudence that it does not examine details of matters of fact and law that national courts are entitled to address.[52]

165. As for the Applicant's request for a direct order for his release or to set aside the sentence, as the Court stated in its previous cases, such a measure may be ordered by the Court itself only in special and compelling circumstances.[53] Regarding the quashing of the sentence, the Court has held that this would be warranted only in cases where the violation noted was such that it had necessarily vitiated the conviction and sentencing. Regarding the question of release, in particular, the Court has held that this would be the case "if an Applicant sufficiently demonstrates or the Court itself establishes from its findings that the Applicant's arrest or

52 *Mohamed Abubakari v United Republic of Tanzania* (merits) (2016) 1 AfCLR 599, § 28; *Minani Evarist v United Republic of Tanzania* (merits) 2 RJCA 415, § 81.

53 *Alex Thomas v United Republic of Tanzania* Judgment (merits), § 234. *Armand Guéhi v United Republic of Tanzania* (merits and reparations) § 160.

conviction is based entirely on arbitrary considerations and that his continued imprisonment would occasion a miscarriage of justice."[54]

166. In the instant case, the Applicant has not proven the existence of such exceptional circumstances, and given that the Court has not established the said circumstances *proprio motu,* it dismisses the prayer for release.

ii. Guarantees of non-repetition and report on implementation

167. The Applicant prays the Court to order the Respondent State to guarantee the non-repetition of the violations of which he has been a victim and to report to the Court every six (6) months until its orders are fully implemented.

168. The Respondent State argues that the Applicant's prayer for a guarantee of non-repetition of the violations is untenable, baseless and misconceived.

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169. The Court has already noted that, if the set objective is to prevent future violations, guarantees of non-repetition are usually ordered in order to eradicate structural and systemic violations of human rights. Such measures are therefore not generally intended to repair individual prejudice but rather to remedy the underlying causes of the violation. However, the Court considers that guarantees of non-repetition may also be relevant, particularly in individual cases where it is established that the violation will not cease or is likely to reoccur. These entail cases where the Respondent State has challenged or has not complied with the previous findings and orders of the Court.[55]

170. In the instant case, the Court notes that the nature of the violations found, that is, the Applicant's rights to free legal assistance and to be tried within a reasonable, are unlikely to recur as

54 *Mgosi Mwita Makungu v United Republic of Tanzania*, § 84, *Diocles William v United Republic of Tanzania* § 101; Application 027/2015, Judgment of 21 September 2018, *Minani Evarist v United Republic of Tanzania* (merits) § 82.

55 *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 191.

the proceedings in respect of which they arose have already been completed. Furthermore, the Court has already awarded compensation for the moral prejudice the Applicant suffered as a result of the said violations. The Court therefore holds that in the circumstances, the request is not justified and the same is therefore dismissed.

iii. Measures of satisfaction

171. The Applicant prays the Court to order the Respondent State to publish the decision on the merits of the Application in the Official Gazette within one (1) month from the date of delivery of the judgment as a measure of satisfaction.

172. The Respondent State did not make any submission in this respect.

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173. Even though the Court considers that a judgment in itself, can constitute a sufficient form of reparation, it can *suo motu*, order such other measures of satisfaction as it deems fit.[56]

174. In the instant case, the Court considers that there is need to emphasise and raise awareness as regards the Respondent State's obligations to make reparations for the violations established with a view to enhancing implementation of the judgment. To ensure that the judgment is publicised as widely as possible, the Court finds that the publication of the judgment on the merits on the websites of the Judiciary and the Ministry of Constitutional and Legal Affairs to be accessible for at least one (1) year after the date of publication, is an appropriate additional measure of satisfaction.

56 *Armand Guéhi v United Republic of Tanzania*, § 194; *Reverend Christopher Mtikila v United Republic of Tanzania* (reparations) §§ 45 and 46 (5) and *Beneficiaries of late Norbert Zongo*, (reparations) (2015) 1 AfCLR 258 § 95; *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations), §151; *Wilfred Onyango Nganyi v United Republic of Tanzania* (reparations) § 86; *Alex Thomas v United Republic of Tanzania* (reparations), § 74.

IX. COSTS

175. In accordance with Rule 30 of the Rules, "Unless otherwise decided by the Court, each party shall bear its own costs".

176. The Court reiterates, as has already been established, that reparations may include legal costs and other costs incurred in international proceedings.[57] It is up to the Applicant to provide justification for the sums claimed.[58]

A. Legal fees related to proceedings before this Court

177. The Applicant prays the Court to award him United States Dollars Twenty Thousand (US$ 20,000) as lawyers' fees for the proceedings before this Court. This is calculated on the basis of 300 hours of legal work, of which 200 hours are for the assistant counsel and 100 hours for the lead counsel, thus accounting for United States Dollars Fifty (US$ 50) an hour for the assistant counsel, and United States Dollars One Hundred (US$ 100) an hour for the lead counsel, and totalling United States Dollars Ten Thousand (US$ 10,000) for the assistant counsel and United States Dollars Ten Thousand (US$ 10,000) for the lead counsel.

178. For its part, the Respondent State avers that the Applicant was provided legal assistance by PALU, hence, he did not incur any legal expenses in conducting his case. Relying on the *Norbert Zongo v Burkina Faso* Case, the Respondent State argues that it is not sufficient to remit probative documents, rather, the parties must develop the reasons that relate the evidence to the facts under consideration, and in the case of alleged financial disbursement, the items and justification must be clearly described. The Respondent State submits that the claims for legal fees should be disregarded.

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179. With regard to legal fees, "while the reparation paid to the victims of human rights violations may also include reimbursement

57 *Armand Guéhi v United Republic of Tanzania* (merits and reparations) §188; and *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) § 77-93.

58 *Armand Guéhi v United Republic of Tanzania* (merits and reparations) §197.

of lawyer's fees",[59] the Court notes in the instant case that the Applicant was represented by PALU throughout the proceedings under the Court's legal assistance scheme. As the Court has previously held,[60] the Court's legal assistance scheme is *pro bono* in nature and thus this claim lacks merit and is dismissed.

B. Transport and stationery costs

180. The Applicant also seeks compensation for other costs incurred in this case, that is, United States Dollars Two Hundred (US$ 200) for postage costs, United States Dollars, Two Hundred (US$ 200) for printing and photocopying costs, United States Dollars One Thousand (US$ 1,000) for transportation costs to and from the seat of the Court and from the PALU secretariat to Ukonga prison and United States Dollars Two Hundred (US$ 200) representing communication costs.

181. The Respondent State avers that the Applicant has not provided evidence to substantiate his allegations as regards these expenses. The Respondent State argues that all the charges for service and postage of pleadings were borne by the Court.

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182. The Court recalls its position in Reverend *Christopher Mtikila v Tanzania* case, whereby it noted that: "expenses and costs form part of the concept of reparation." The Court considers that transport costs incurred for travel within Tanzania, and stationery costs fall under the "categories of expenses that will be supported in the Legal Aid Policy of the Court".[61] Since PALU represented the Applicant on a *pro bono* basis, the claims for these costs are unjustified and are therefore dismissed.

59 *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258 § 79.

60 *Alex Thomas v United Republic of Tanzania* (reparations) § 81.

61 African Court on Human and Peoples' Rights Legal Aid Policy 2013-2014, ***Legal Aid Policy*** 2015-2016, and ***Legal Aid Policy*** 2017.

183. Accordingly, the Court holds in conclusion that each party shall bear its own costs.

X. OPERATIVE PART

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

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

On the merits
v. *Holds* that the Respondent State has not violated the Applicant's right to equality before the law and the right to equal protection of the law under Article 3 (1) and (2) of the Charter;
vi. *Holds* that the Respondent State has not violated the Applicant's right not to be subjected to cruel, inhuman and degrading treatment under Article 5 of the Charter;
vii. *Holds* that the Respondent State has not violated the Applicant's right to a fair trial under Article 7(1) of the Charter in terms of the alleged irregularities in the visual identification, and the denial of the opportunity to challenge the prosecution's evidence and the alibi defence;
viii. *Holds* that the Respondent State has violated the Applicant's right to a fair trial, provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR by failing to provide him with free legal assistance;
ix. *Holds* that the Respondent State has violated the Applicant's right to be tried within a reasonable time as regards Criminal Appeal No 58/2006 examined by the High Court of Tanzania in Dar es Salaam, contrary to Article 7(1)(d) of the Charter;

On reparations
Pecuniary reparations
x. *Does not* grant the Applicant's prayer for damages arising from material loss of income, loss of life plan, financial losses incurred by himself and his wife, and for legal costs incurred in the proceedings before the domestic courts;
xi. *Does not* grant the Applicant's prayer for damages for moral

prejudice suffered by his wife, mother, sisters, and brothers;

xii. *Grants* the Applicant's prayer for reparation for the prejudice suffered as a result of the violations found and awards him the sum of Tanzanian Shillings Five Million Seven Hundred and Twenty Five Thousand (TZS 5, 725,000);

xiii. *Orders* the Respondent State to pay the above sum tax free as a fair compensation, 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 accrued amount is fully paid.

Non-pecuniary reparations

xiv. *Dismisses* the Applicant's prayer for his conviction to be quashed.

xv. *Dismisses* the Applicants' prayer for the Court to order his release from prison;

xvi. *Dismisses* the Applicant's prayer for an order regarding non-repetition of the violations.

xvii. *Orders* the Respondent State to publish, as a measure of satisfaction, the present Judgment within three (3) months of its notification, on the official websites of the Judiciary and the Ministry of Constitutional and Legal Affairs, and ensure that the Judgment remains accessible for at least one (1) year after the date of such publication.

xviii. *Orders* the Respondent State to submit to it within six (6) months of the date of notification of this Judgment, a report on the status of implementation of the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xix. *Does not* grant the Applicant's prayer in respect of legal fees, costs and other expenses incurred in the proceedings before this Court;

xx. *Decides* that each Party shall bear its own costs.

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Separate opinion: BENSAOULA

[1] I concur with the view of the majority of the judges as to the admissibility of the application, the jurisdiction of the Court and the operative part on certain points.

[2] On the other hand, I believe that the manner in which the Court has:

1. dealt with the objection raised by the Respondent State as to the filing of the application within a reasonable time,
2. concluded in the same paragraph on the two cases which are the subject of the Applicant's allegations
3. dismissed the claim for reparations in respect of the material damage and the damage concerning the indirect victims alleged by the Applicant …

is inconsistent with the provisions of Article 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules of Court as regards the first point, the legal logic that would require this period to be calculated for each application before the Court and Article 61 as regards the last.

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1. As to the objection raised by the Respondent State to the filing of the application within a reasonable time

[3] Under Article 56 of the Charter and Rule 40 (6) of the Rules of Court, it is clearly stated that applications must be submitted within a reasonable time from the exhaustion of domestic remedies or from the date fixed by the Court as the date on which the time-limit for its own seizure begins to run. In the instant case, as regards the first case, the Court has set the date for the exhaustion of domestic remedies as 29 May 2009.

[4] As to the assessment of the reasonable time limit, the Court found that the period of four (4) years, nine (9) months and twenty-three (23) days that had elapsed since the Respondent State's filing of the declaration under Article 34(6) of the Protocol on 29 March 2010 and the date of referral to the Court of the Application dated 19 January 2015 was reasonable, as the Applicant was imprisoned with the likelihood of being unaware of the very existence of the

Court. The Applicant had not benefited from legal assistance during the appeal proceedings before the domestic courts[62] and was awaiting the outcome of his second appeal pending before the High Court until 19 March 2017, by which time he had already brought his case before the Court. In this regard, the Court noted that "between 2011 and 2013 he had not remained inactive and, pending the examination of his case, had sent several reminders to the various judicial authorities ...".[63]

[5] In light of Rule 40(6) of the Rules of Court, it is clearly stated that applications must be "filed within a reasonable time from the date local remedies are 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. It therefore follows that there are two *(2)* options as to how to define the starting point of the reasonable time. These are:

- Either from the date of exhaustion of domestic remedies, set, in this case, by the Court, for 29 May 2009, the date of the judgment of the Court of Appeal which also took into consideration the date of the Declaration made by the Respondent State on 29 March 2010, which gave rise to a time-limit of four (4) years, nine (9) months and twenty-three (23) days on the date of the filing of the application on 19 January 2015. Or;
- The date chosen by the Court as the starting date for the commencement of the period of its own seizure. Although it has set the date on which the period of its own seizure, the date of the Declaration, begins to run, the Court has taken into consideration facts occurring after that date (2010 and 2013) "reminders to the various judicial authorities ...." as factors that could be taken into account in assessing the reasonableness of the time limit for referral under Article 56(6)....

[6] I am of the view that this manner of interpreting the above-mentioned Article is erroneous and does not meet the spirit of the text, since the Articles of the Charter and the Rules clearly state the date chosen by the Court and not the facts....

[7] In my opinion, by taking the date of the Court of Appeal's judgment and the date of the filing of the declaration made by the Respondent State (29 March 2010) and by taking into account events occurring after that date, the Court has departed from the very meaning of the Article, since by this approach, it has not determined any date as the starting date for the commencement of the time-limit for its own seizure and has, on the other hand,

62 § 69 of the Judgement.

63 § 70 of the Judgement.

confused the two choices afforded to it by the above-mentioned Articles...

[8] It would have been more logical to consider, since the legislator recognizes this option for the Court, the date on the letters sent to the Chief Justice, November 8, 2013,[64] which would have made the time limit more reasonable since it would have been two *(*2) *y*ears.

Such an approach would have been more consistent with Article 56(6) of the Charter, which clearly specifies this choice by using the conjunction "or" and not the words "failing that".

2. The conclusion in the same paragraph made by the Court in two separate cases that were the subject of the Applicant's allegations

[9] It is clear that, in its analysis of the facts, the Court distinguished between two cases brought before it by the Applicant and that for each case it concluded.

What is surprising is that, although the Court considered each case separately and found a violation in each of them on the basis of legal reasoning, when it came to the reasonable time limit, it did not specify that time limit in relation to each case. Indeed, with regard to domestic remedies, it is clear from paragraph 56 of the judgment that the Court did specify that in the second case "the Applicant did appeal to the High Court and that, despite several communications to the authorities concerned, the case was still pending at the time he brought the matter before to the Court .... The Applicant should be deemed to have exhausted local remedies".

[10] As to the discussion on reasonable time, in paragraphs 62 to 72 of the Judgment, the Court discussed this condition, which was raised by the Respondent State in relation to the first case, but failed to do so in relation to the second. It concluded[65] on the basis of the four (4) years, nine (9) months and twenty (20) days' time limit, the time limit used for the first case,[66] that if it refers[67] to the second case, it is just to consider it as a fact which will lead it to conclude that the time limit is reasonable in relation to the first case.

64 This date was referred to in § 56 of the judgment.

65 § 71 of the judgment.

66 § 71 of the judgment.

67 § 71 of the judgment.

[11] With regard to the second case, it is clear that after having concluded that domestic remedies had been exhausted as of the date of the appeal of 27/10/2006, pending before the High Court until 19 March 2017, the date on which the Court of Appeal ruled, and well after the filing of the application in this Court, the Court should have considered the time limit reasonable, as it was open until the day of the filing of the application in this Court. By concluding in the same paragraph for both cases, the Court failed in its obligation to give reasons for its judgments as set out in Rule 61 of the Rules of Court.

3. The rejection of the application for reparation in respect of the material and moral damage to the Applicant and the indirect victims alleged by the Applicant

[12] In its operative part on monetary reparations,[68] the Court concluded that the application was dismissed on the basis of insufficient information. I do not agree with this conclusion for the following reasons:

- On reading Rule 39(2) of the Rules, it is clearly stated that "the Court may request the parties to submit any factual information, documents or other material considered by the Court to be relevant".
- As for Rule 41 of the same Rules, it provides in turn that "the Court may, before or during the course of the proceedings, call on the parties to file any pertinent document or to provide any relevant explanations. The Court shall formally note any refusal to comply".

[13] Finally, it follows from Rule 45 of the said Rules that "the Court may, either on its own motion or at the request of a party or, where appropriate, of the representatives of the Commission, obtain any evidence which it deems relevant to the facts of the case. It may, notably, ...".

[14] It is apparent from paragraph 139 of the Judgment that the Court confirmed that it had established the Applicant's alleged right to free legal assistance and the right to be tried within a reasonable time. However, in paragraphs 142 and 143, the Court dismissed the Applicant's claims for material damages on the ground that he had not adduced any evidence of the alleged damages with documents proving financial income from his occupation, payments to the Advocate, costs of proceedings and the like.

[15] However, it is not apparent from the reasons for the judgment that, in accordance with the above-mentioned articles, the Court

68 Paragraph VI and VII.

asked the Applicant to submit the documents proving the harm suffered, thereby failing to comply with the rule requiring it to adduce reasons for its judgments

[16] Moreover, in relation to the non-pecuniary damage suffered by the indirect victims, the Court also considered the lack of evidence in relation to the Applicant's allegations, as it had not proved the identification or filiation of the indirect victims.[69]

[17] In my opinion, this approach is contrary to the spirit of the above-mentioned instruments and to the positive role that a judge must play for the proper administration of justice.

[18] It is worthy to mention in this respect that the application was registered on 19 January 2015 and that between 6 July 2018 and September 2019, the Respondent State had already raised this lack of evidence on the part of the Applicant and that on the closing date of the reparations proceedings, 29 September 2019, the Court could have responded by asking the Applicant to file the documents. If such a request had not been complied with, the Court would have based the dismissal of the applications on Rule 41 of the Rules.

[19] By doing so, the Court has failed in its obligation to give reasons for its judgments within the meaning of Rule 61 of the Rules of Court.

69 § 154 and ss of the judgment.