# Elisamehe v Tanzania (judgment) (2020) 4 AfCLR 265

Application 028/2015, *Kalebi Elisamehe 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, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, and ANUKAM

Recused under Article 22: ABOUD

The Applicant, convicted and serving terms for the rape of a minor, brought this action alleging that aspects of the proceedings before the national courts violated some of his Charter protected rights. The Court held that Applicant's right to free legal assistance was violated.

**Jurisdiction** (scope, 18,19; personal jurisdiction 23; continuous violations, 25)

**Admissibility** (exhaustion of local remedies 35, 36; submission within reasonable time, 41-43, 47)

**Fair trial** (free legal assistance 55, 57; evaluation of evidence 65, 78; right to appeal 69,70)

**Reparation**s (basis for, 95; purpose of,97; measures 96; material prejudice, 97; moral damage, 97; non-pecuniary reparations, 110,111)

## I. The Parties

**1.** Kalebi Elisamehe (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania who, at the time of filing this Application, was serving a thirty (30) year prison sentence at Maweni Central Prison in Tanga for the rape of a twelve (12) year old girl.

**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 the Protocol on 10 February 2006. It also deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol by which it accepts the jurisdiction of the Court to receive cases 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 record that, on 6 March 2004, the Applicant was convicted and sentenced by the District Magistrate's Court of Monduli at Monduli District, (hereinafter referred to as "the District Court") to a thirty (30) year prison sentence for the rape of a twelve (12) year old minor, in Criminal Case No. 39/2003. He was also ordered to pay the victim one cow valued at Tanzania Shillings Two Hundred Thousand (TZS 200,000) as compensation.

**4.** The Applicant appealed against the judgment by Criminal Appeal No. 03/2006 before the High Court of Tanzania at Arusha (hereinafter referred to as "the High Court"). He subsequently appealed against the decision of the High Court by Criminal Appeal No. 315/2009 before the Court of Appeal of Tanzania at Arusha (hereinafter referred to as the "Court of Appeal"). The High Court and the Court of Appeal upheld the conviction and the sentence on 9 July 2009 and 24 February 2012, respectively.

**5.** On 9 January 2013, the Applicant allegedly lodged a Notice of Motion for Review of the Court of Appeal's judgment, which was still pending at the time of filing the Application before this Court.

### B. Alleged violations

**6.** The Applicant alleges:

i. That the Court of Appeal delayed in hearing his Application for Review to date;

ii. That he was wrongly deprived of the right to be heard, specifically that:

a. He was deprived of his right to legal assistance throughout the trial and appeals, contrary to Article 13 of the Tanzanian Constitution, Section 310 of Criminal Procedure Act (Cap 20 R.E. 2002) (hereinafter referred to as "the CPA"), and Articles 1, 2, 3, 5, 7(1)(b), 13 and 18(I) of the Charter;

b. He was wrongly deprived of the right to be heard and to defend himself;

c. The charge sheet was defective under Section 132 of the CPA, because of the variance between the charge sheet and evidence; and the charge sheet also bore no stamp or signature of the public prosecutor;

d. The appellate courts based their decisions on the findings of the lower courts, which, in his view, violates his right to have his sentence reviewed.

iii. That the decision of the Court of Appeal was contrary to Rule 66(1) of the Court of Appeal Rules due to the following:

a. "the court failed to evaluate the evidence of PW1 and PW2 to reach a just decision…";

b. the decision was based on uncorroborated evidence by the prosecution witnesses;

c. throughout the trial, there was no investigator of the case and the PF 3 form[1] was not listed during the preliminary hearing or in the charge sheet nor were the authors of the documents (police officer and doctor) called as witnesses;

d. the burden of proof was shifted to the defence contrary to Section 110(2) of the Evidence Act 1967 (Cap. 6 R.E. 2002);

e. there was insufficient evidence to connect the Applicant with the offence of rape because of the quarrel with PW3 who testified before the trial court that she bore grudges with the Applicant;

f. the "trial Court and Appellate Court erred in law and fact when they discarded the Applicant's unshaken defence and believed the prosecution's theory."

## III. Summary of the Procedure before the Court

**7.** The Application was filed at the Registry on 23 November 2015 and was served on the Respondent State on 25 January 2016. The Applicant filed an amended Application on 28 January 2016, which was served on the Respondent State on 15 February 2016.

**8.** Following various extensions of time at the parties' request, they filed their pleadings on the merits and reparations within the time stipulated by the Court. The said pleadings were duly exchanged.

**9.** On 5 March 2020, the pleadings were closed and the Parties were duly notified.

## IV. Prayers of the Parties

**10.** The Applicant prays the Court to "… allow [his] submission of complaints of violations of Human Rights and Justice by quashing decision of Lower courts and set aside the conviction imposed against [him]."

**11.** On reparations, the Applicant prays the Court to issue an order for pecuniary and non-pecuniary damages.

1 Police Form (PF) 3 is a form by which the Police request for Medical Examination.

**12.** The Respondent State prays the Court to:

i. declare that it has no jurisdiction and the Application has not met the admissibility requirements under Rule 40(5) and (6) of the Rules;

ii. declare that it has not violated Article 7(1), 7(1)(c) and 7(1)(d) of the Charter;

iii. dismiss the Application for lack of merit;

iv. dismiss the Applicant's prayers;

v. rule that the Applicant shall bear the costs.

## V. Jurisdiction

**13.** 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.

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

**15.** On the basis of the above-cited provisions, therefore, the Court must, preliminarily conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

### A. Objection to material jurisdiction

**16.** Citing the Court's decision in the matter of *Ernest Francis Mtingwi v Republic of Malawi*, the Respondent State claims that by praying the Court to review the points of fact and law already examined by the domestic courts, the Applicant is asking the Court to sit as an appellate court. According to the Respondent State, this is not within its jurisdiction as set out in Article 3(1) of the Protocol and Rule 26 of the Rules.

**17.** The Applicant states that "It is common knowledge that this Court is not an Appellate Court in terms of the decisions rendered by the national Courts. However, this position does not preclude the jurisdiction of this … Court to examine whether the procedures before the national courts are consistent with the international standards required by the applicable human rights instruments." Citing the Court's judgment of 3 June 2016, in the matter of *Mohamed Abubakari v United Republic of Tanzania*, the Applicant concludes that the "Court has jurisdiction over the matter under Article 3 and 5 of the Protocol…"

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**18.** With respect to the Respondent State's objection that this Court is being asked to act as an appellate court, the Court notes that Article 3(1) of the Protocol states that it has jurisdiction to consider any Application filed before it provided that it contains allegations of violation of rights protected by the Charter, or any other human rights instruments ratified by a Respondent State.[2] Moreover, in accordance with Article 7 of the Protocol, it applies the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned.

**19.** The Court has previously underlined that it is empowered by the above cited Articles of the Protocol to examine the conformity of the proceedings of the Respondent State's courts with human rights standards set out in the instruments ratified by a State.[3]

**20.** In the instant case, the Applicant alleges violation by the Respondent State of rights protected by the Charter. Therefore, the Court, as it has consistently held, cannot be said to exercise appellate jurisdiction with respect to decisions of national courts. Consequently, the Court holds that it has material jurisdiction.

**21.** In view of the foregoing, the Court holds that it has material jurisdiction.

## B. Personal jurisdiction

**22.** While the Respondent State has not raised any objection to the personal jurisdiction of the Court, the Court notes that, on 21 November 2019, it filed with the Chairperson of the African Union Commission, a notice of withdrawal of the Declaration, as referred to in paragraph 2 of this Judgment, of which the Court was informed by the Legal Counsel of the African Union Commission, on 4 December 2019.

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

3 *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465, § 130. See also *Mohamed Abubakari v United Republic of Tanzania* (merits) (2016) 1 AfCLR 599, § 29; *Christopher Jonas v United Republic of Tanzania* (merits) (2017) 2 AfCLR 101, § 28; and *Ingabire Victoire Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165, §§ 53 and 54.

**23.** The Court recalls that in *Andrew Ambrose Cheusi v United Republic of Tanzania*,[4] it held, reaffirming its earlier decision in *Ingabire Victoire Umuhoza v Rwanda*,[5] that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the Declaration, as is the case of the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is filed. In respect of the Respondent State, therefore, its withdrawal will take effect on 22 November 2020.

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

## C. Other aspects of jurisdiction

**25.** The Court notes that nothing on file indicates that the Court does not have jurisdiction in respect of the temporal and territorial aspects thereof. The Court therefore holds that:

i. it has temporal jurisdiction in as much as the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[6]

ii. it has territorial jurisdiction given that the facts of the matter occurred in the territory of the Respondent State.

**26.** In view of the aforesaid, the Court holds that it has jurisdiction to hear the instant case.

# VI. Admissibility

**27.** Pursuant to 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". In accordance with Rule 39(1) of the Rules, "the Court shall undertake a preliminary examination of … the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of the Rules."

4 *Andrew Ambrose Cheusi v United Republic of Tanzania*, AfCHPR, Application 004/2015, Judgment of 26 June 2020, §§ 35-39.

5 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (procedure) (2016) 1 AfCLR 562, § 67.

6 See *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (2013) 1 AfCLR 197, §§ 71-77.

**28.** Rule 40 of the Rules, which in essence restates 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 is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; 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.

**29.** While some of the above conditions are not in contention between the parties, the Respondent State has raised two (2) objections to the admissibility of the Application.

## A. Conditions of admissibility in contention between the Parties

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

### i. Objection based on non-exhaustion of local remedies

**31.** The Respondent State submits that the right to seek review of a judgment of the Court of Appeal is not automatic. It depends on the conditions set out in Rule 66 of the Rules of Procedure of the Court of Appeal. They claim that one of the conditions to be met is that an application for review must be filed within sixty (60) days of the decision which is sought to be reviewed. The Respondent State argues that the Applicant has not produced any evidence to prove that he has complied with this condition and further, he has

not attached any evidence to prove that he sought leave of the Court of Appeal to file the application for review.

**32.** Citing the African Commission on Human and Peoples Rights' decision in the Communication *SAHRINGON & ors v Tanzania*, *Article 19 v Eritrea and Kenyan Section of the International Commission of Jurists & ors v Kenya*, the Respondent State submits that the exhaustion of domestic remedies is a fundamental principle in international law. Therefore, the Applicant may still file a constitutional petition under the Basic Rights and Duties Enforcement Act or apply for review under the Appellate Jurisdiction Act.

**33.** The Respondent State argues that the Applicant is raising the claim of denial of legal assistance for the first time before this Court whereas he ought to have raised it before domestic courts. It states that if the "court entertains this matter it will be unclothing the domestic court of the jurisdiction to adjudicate on domestic issues and clothing itself with jurisdiction of a first instance domestic court which is contrary to the command of the Charter, Protocol and Rules of the Court."

**34.** Concerning the application for review, the Applicant avers that according to the Court's judgment of 3 June 2016, in the matter of *Mohamed Abubakari v United Republic of Tanzania*, it "… is an extraordinary remedy because the granting of leave by the Court of Appeal of Tanzania to lodge an Application for Review of its decision is based on specific grounds and is granted at the discretion of the Court..." The Applicant did not submit on the issue of constitutional petition as maintained by the Respondent State.

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**35.** The Court notes that the issue for determination is whether the Applicant exhausted local remedies as required under Rule 40 of the Rules. On this issue, the Court recalls that the local remedies that must be exhausted are judicial remedies.[7] In the instant case, the Court notes that the Applicant went up to the Court of Appeal,

7 *Tanganyika Law Society, the Legal and Human Rights Centre v United Republic of Tanzania* and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (merits) (2013) 1 AfCLR 34, § 82.1.

the highest court in the Respondent State which delivered its judgment on the Applicant's case on 24 February 2012.

**36.** In relation to the filing of the constitutional petition and an application for review, the Court has held that regarding the Respondent State, these are extraordinary remedies which the Applicant is not required to exhaust.[8]

**37.** Concerning the allegation that the Respondent State failed to grant the Applicant legal assistance, the Court has previously stated that this is part of the bundle of rights relating to fair trial.[9]The judicial authorities of the Respondent State therefore had the opportunity to address this matter in the course of proceedings before the domestic courts and the Respondent State cannot therefore claim that it became aware of the claim relating to legal assistance for the first time in this Court.

**38.** In light of the above, the Court dismisses the objection herein and holds that the Applicant has exhausted all the available domestic remedies.

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

**39.** The Respondent State argues that the period of sixteen (16) months, from the time the Court of Appeal delivered its judgment, to when the Applicant filed this Application is way beyond the reasonable time of six (6) months suggested by the Commission in *Majuru v Zimbabwe (2008).*

**40.** The Applicant does not make a specific response to this allegation but maintains that he filed the Notice of Motion for Review before the Court of Appeal on 9 January 2013, which the Respondent State dismisses by contending that, the Applicant failed to submit before this Court the copy of the said notice.

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8 See *Alex Thomas v Tanzania* (merits), § 65; *Mohamed Abubakari v Tanzania* (merits), §§ 66 – 70; *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania* (merits) (2016) 1 AfCLR 507, § 95; *Christopher Jonas v United Republic of Tanzania* (merits) (2017) 2 AfCLR 101, § 44.

9 See *Alex Thomas v Tanzania* (merits), § 60. See also *Minani Evarist v Tanzania* (merits) 2018) 2 AfCLR 402, § 35; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v Tanzania* (merits), (2018) 2 AfCLR 314, § 46; and *Diocles William v United Republic of Tanzania* (merits) (2018) 2 AfCLR 426, § 43.

**41.** The Court notes that Article 56(6) of the Charter does not stipulate a precise time limit within which an Application shall be filed before the Court. Rule 40(6) of the Rules refers to 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 of the matter."

**42.** The Court has established that the reasonable period to seize the Court in accordance with Article 56(6) of the Charter and Rule 40(6) of the Rules depends on the particular circumstances of each case and must be determined on a case-by-case basis.[10] Among the relevant factors, the Court has based its evaluation for this assessment, on the situation of the Applicants, including whether they attempted to exhaust extraordinary remedies, or if they were lay, indigent, incarcerated persons who had not benefited from free legal assistance.[11]

**43.** The Court has also taken into consideration the fact that the Applicant attempted to exhaust extraordinary remedies. In the instant case, the Court notes that the Applicant claims to have submitted the Notice for Review before the Court of Appeal on 9 January 2013. The Respondent State rebuts this allegation, claiming that the Applicant has not submitted before this Court the copy of the said Notice.

**44.** According to the general principle of law espoused in the Court's jurisprudence, the Court has consistently held that the burden of proof lies with the person who alleges a fact.[12] In the instant case, the Applicant alleges that, on 9 January 2013, he filed a Notice for Review through the District Registrar of the High Court of Tanzania at Tanga, with Ref. No. TAN/209/TAN/I/IV54. The Court notes that the Applicant has not furnished the Court with a copy of the said notice nor has he provided any justification for not doing so. The Court further notes that the Notice for Review to which the Applicant refers was filed at the High Court on 9 January 2013,

10 *Nobert Zongo v Burkina Faso* (preliminary objections), § 121. See also *Armand Guehi v United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 477, §§ 55-57; *Werema Wangoko Werema & anor v United Republic of Tanzania* (merits) (2018) 2 AfCLR 520, §§ 40-50; and *Alex Thomas v Tanzania* (merits), §§ 73-74.

11 See *Alex Thomas v Tanzania* (merits), § 74. See also *Jibu Amir Mussa and Saidi Ally alias Mang'ara v United Republic of Tanzania*, AfCHPR, Application 014/2015, Judgment of 28 November 2019 (merits), § 50; *Christopher Jonas v Tanzania* (merits), § 53; and *Mohamed Abubakari v Tanzania* (merits), § 92.

12 See *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (2017) 2 AfCLR 65, § 142; *Robert John Penessis v United Republic of Tanzania*, AfCHPR, Application 13/2015, Judgment of 28 November 2019, § 91; and *Alex Thomas v Tanzania* (merits), § 140.

and not the Court of Appeal as the Applicant alleges.

**45.** The Court considers therefore that the allegation that the Applicant filed a Notice for Review at the Court of Appeal has not been established. Accordingly, this factor cannot be considered in establishing whether or not the Application was submitted within a reasonable time.

**46.** From the aforesaid, the time within which the Application should have been filed is to be computed from the date of the judgment of the Court of Appeal, which is 24 February 2012. Since the Application was filed before this Court on 23 November 2015, the period to be assessed is three (3) years, eight (8) months and twenty-nine (29) days.

**47.** The Court notes that, in the instant case, the Applicant is lay, indigent, incarcerated and was not represented by a lawyer before the national courts. As a result of his situation, the Court granted the Applicant legal assistance through its legal aid scheme.

**48.** In these circumstances, the Court holds that the Application was filed within a reasonable time and therefore, dismisses the Respondent State's objection.

### B. Other conditions of admissibility

**49.** The Court notes that the parties do not dispute the fact that the Application fulfils the conditions set out in Articles 56 sub-articles (1),(2),(3),(4) and (7) of the Charter and Rule 40, sub-rules 1, 2, 3, 4 and 7 of the Rules, on the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language of the Application, the nature of the evidence adduced and the previous settlement of the case, and that nothing on the record indicates that these requirements have not been complied with.

**50.** As a consequence of the foregoing, the Court finds that the Application fulfils all the admissibility conditions set out under Article 56 of the Charter as restated in Rule 40 of the Rules and accordingly declares it admissible.

## VII. Merits

**51.** The Applicant alleges a number of violations of the right to a fair trial, namely: i) the right to legal assistance, ii) the right to defence, iii) alleged defectiveness of the charge sheet, iv) failure to review decisions of the lower courts, v) poor assessment of the evidence, vi) delay in determining the request for review.

## A. Alleged violation of the right to legal assistance

**52.** The Applicant alleges that he was deprived of his right to legal assistance during the trial and appeals, contrary to Article 13 of the Tanzanian Constitution, Section 310 of CPA , and "Articles 1, 2, 3, 5, 7(1)(b), 13 and 18(I) of the African Charter on Human and People's Rights". He further alleges that "the charge against him was a serious offence and carried a heavy custodial sentence."

**53.** The Respondent State claims, on the contrary, that, in accordance with the Legal Aid (Criminal Proceedings) Act, legal aid is provided based on the request of the accused and the Applicant did not make such a request. The Respondent State citing Article 107A of its Constitution which, *inter alia*, empowers the national judiciary with the final decision in the dispensation of justice in its territory, prays the Court to respect its Constitution and to exercise restraint on the issue of legal assistance.

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**54.** The Court notes that apart from the provisions of Tanzanian law, the Applicant cites Article 7(1)b of the Charter to support his allegation of the violation of his right to legal assistance. For the Court, the relevant provision for the alleged violation is Article 7(1)(c) of the Charter, which provides that: "Every individual shall have the right to have his cause heard. This comprises: … c) the right to defence, including the right to be defended by Counsel of his choice".

**55.** The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance. Nevertheless, the Court held that Article 7(1)(c) of the Charter as read together with Article 14(3)(d)[13] of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR"),[14] establishes

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

14 The Respondent State became a party to the International Covenant on Civil and Political Rights on 11 June 1976.

the right to free legal assistance where a person cannot afford to pay for legal representation and where the interest of justice so requires.[15] The interest of justice includes where the Applicant is indigent, the offence is serious and the penalty provided by the law is severe.[16]

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

**57.** Given that the Applicant was charged with the serious offence of rape, carrying a minimum sentence of thirty (30) years imprisonment, and his assertion of indigence was not contested by the Respondent State, the interest of justice required that the Applicant should have been provided with free legal assistance, regardless of whether or not he requested for such assistance.

**58.** The Court therefore finds that the Respondent State has violated Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

## i. Alleged violation of the right to defence

**59.** The Applicant alleges the deprivation of his right to a fair trial on the basis that judgment was delivered without him being given an opportunity to be heard and to defend himself. The Respondent State disputes this allegation without substantiation.

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**60.** The Court notes that the relevant provision relating to the alleged violation is Article 7(1)(c) of the Charter, which provides that: "Every individual shall have the right to have his cause heard. This comprises: … c) the right to defence, including the right to be

15 *Alex Thomas v Tanzania* (merits), § 114.

16 *Alex Thomas v Tanzania* (merits), § 123. See also *Mohamed Abubakari v Tanzania* (merits), §§ 138-139; *Minani Evarist v Tanzania* (merits), § 68; *Diocles William v Tanzania* (merits), § 85; *Anaclet Paulo v United Republic of Tanzania* (merits) (2018) 2 AfCLR 446, § 92.

defended by Counsel of his choice."

**61.** The Court notes that in the instant case, the Applicant makes a general allegation without demonstrating how he was not accorded the opportunity to be heard or to defend himself. On the contrary, the record shows that the Applicant was heard and had the opportunity to defend himself at all levels of the proceedings. The Applicant listed the absence of proof of his guilt beyond reasonable doubt, the lack of credibility of the prosecution witnesses and the collusion between PW1, PW2 and PW3 to incriminate him, as the grounds of appeal. He also appeared in person during the hearing of his appeal during which he supplemented his written submissions with the assertion that the victim's parents and the police officers were never called to testify.

**62.** This Court notes that the Court of Appeal observed that the Applicant's case "… rests wholly on the credibility of witnesses. All things being equal, the credibility of a witness is always in the province of a trial court". Considering, *inter alia*, the case of *Godi Kasenegala v the Republic* – Criminal Appeal No. 10 of 2008, the Court of Appeal noted that "It is now settled law that the proof of rape comes from the victim herself. Other witnesses who did not witness the incident, such as doctors, may provide corroborating evidence."

**63.** For the above reasons, the Court finds that the Applicant's claim is unfounded and is consequently, dismissed.

## ii. Alleged defective charge sheet

**64.** The Applicant alleges that the charge sheet was defective, it was at variance with the evidence and was neither stamped nor signed by the public prosecutor. The Respondent State disputes this allegation without substantiation.

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**65.** The Court notes that the main issue for determination is whether the assessment of the prosecution's evidence against the Applicant complied with the international standards required by Article 7(1) of the Charter, which provides that "Every individual shall have the right to have his cause heard". The Court considers that such a determination falls within the competence of the domestic courts when they examine the various pieces of evidence that constitute

proof of commission of an offence. The Court's intervention will only be necessary where there are irregularities in the domestic courts' determination resulting in a miscarriage of justice.[17]

**66.** The Court notes that the High Court found the admission of PF3 into the evidence was irregular because it contravened the procedure provided under Section 240 (3) of the CPA but that this irregularity was not fatal to the prosecution's case. Furthermore, the Court notes that as already stated in paragraphs 61 and 62 of this judgment, the Court of Appeal also found that these irregularities did not have any adverse impact on the prosecution's case given that the main testimony to prove the case came from the victim herself.

**67.** In view of the above, the Court is of the view that the manner in which the domestic courts examined the evidence as regards the proof of the offence that the Applicant was charged with did not constitute a miscarriage of justice. Consequently, the Court holds that the alleged violation has not been established and accordingly dismisses it.

### iii. Alleged failure to review decisions of lower courts

**68.** The Applicant alleges that the appellate courts based their decisions on the findings of the lower courts without reviewing them, thus violating his right to have his sentence reviewed by appellate courts. The Respondent State disputed the Applicant's allegation generally without substantiation.

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**69.** The Court notes that the right to have one's case heard by a higher court is provided for under Article 14(5) of ICCPR which provides that: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

17 *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (2018) 2 AfCLR 287, § 89.

**70.** The Court notes that Article 14(5) of ICCPR, cited above, empowers appellate courts to review contested decisions, which they may or may not decide to uphold. In the instant case, the record indicates that the High Court and the Court of Appeal reviewed the decisions of the lower courts and decided to uphold them.

**71.** The Court further notes that the Applicant does not demonstrate how the upholding of the decisions of the lower courts by the appellate courts constitutes a violation of his right to appeal.

**72.** The Court therefore finds that the alleged violation has not been established and accordingly dismisses it.

## iv Alleged poor assessment of evidence

**73.** The Applicant alleges that the judgment of the Court of Appeal was contrary to Rule 66(1) of its Rules due to the court's failure to evaluate the evidence of PW1 and PW2 to reach a just decision. He states that the decision was based on prosecution witnesses' uncorroborated evidence. He further states that the investigating officer was never summoned to testify in the course of the trial; the PF3 was not listed as part of the evidence during the preliminary hearing or on the charge sheet, and the police officer and doctor who were the authors of the documents to be relied on as evidence were never called as witnesses.

**74.** The Applicant further submits that the burden of proof was shifted to the defence contrary to Section 110(2) of the Evidence Act. He states that there was insufficient evidence to connect the Applicant with the commission of the offence of rape because PW3 who testified before the District Court bore grudges with the Applicant. The Applicant claims that the District Court and Appellate Courts erred in law and in fact when they discarded the Applicant's unshaken defence and believed the prosecution's view.

**75.** The Respondent State rebuts the Applicant's claims and submits that the Court of Appeal examined all the Applicant's claims except those which had not previously been raised before the lower courts and were therefore, disregarded.

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**76.** The Court notes that the Applicant did not specify the provision of the Charter or any other relevant human rights instrument violated as a result of this allegation. Nevertheless, it will examine the matter under Article 7(1) of the Charter, which stipulates that "Every individual shall have the right to have his cause heard".[18]

**77.** The Court notes that the question that arises is whether the domestic courts assessed the evidence in accordance with guarantees to the Applicant's right to a fair trial. It thus recalls that,

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

**78.** The Court has held that it would intervene regarding the assessment of evidence by domestic courts only if such domestic assessment resulted in a miscarriage of justice.[19] In the instant case, the Court notes that, as per the Judgment of the Court of Appeal, the Applicant raised three grounds in his appeal, namely: that the offence was not proven beyond reasonable doubt; the credibility of the Prosecution witnesses was not assessed; and the lack of consideration of the fact that PW3 was the one who persuaded PW1 and PW2 to trump up the case against him in order to avenge past disagreements between them.

**79.** The Court notes that the Applicant alleges that the investigating officer, the police officer and doctor who filled out the PF3 were not called as witnesses during the trial. He argues that this meant that the burden of proof was shifted to the defence contrary to Section 110(2) of the Evidence Act.

**80.** The Court notes that these are elements that were examined by the domestic courts and that there is no reason for it to interfere with that examination since these are evidentiary details, the assessment of which an international court should intervene in only if it constitutes a situation of miscarriage of justice.[20] The Court finds that this is not the case in the instant matter.

**81.** The Court also notes that the Court of Appeal upheld the lower courts' determinations on the credibility of the Prosecution

18 *Mohamed Abubakari v Tanzania* (merits), § 26.

19 *Nguza Viking & anor v Tanzania* (merits), § 89.

20 *Ibid*.

witnesses PW1, PW2, and PW3. The PW1 was the victim, PW2 was the victim's friend who claims to have witnessed the rape and PW3 was the neighbour whom the Applicant claimed fabricated the case against him because of a disagreement she had with him. The Court notes that the Court of Appeal found no reason for it to conclude that the three (3) witnesses colluded to incriminate the Applicant.

**82.** The Court further notes that the Court of Appeal examined the Applicant's *alibi* that, on the material day, the Applicant was outside the area where the crime was committed and he did not return until about 7:05 p.m. The crime was allegedly committed after 5:00 p.m. The Court of Appeal upheld the findings of the lower courts that, although the Applicant had been outside the area of the crime, by the time he left the house of his *alibi* witness, a primary court magistrate, he would still have had time to arrive at the scene of the crime, since he had a bicycle and the distance was not far.

**83.** The Court recalls that "a fair trial that requires the imposition of a sentence in a criminal offence, and in particular, a heavy prison sentence, should be based on strong and credible evidence".[21] In the instant case, the Court is of the view that nothing on the record shows that the evidence on which the domestic courts relied to convict the Applicant was not solid or credible.

**84.** In view of the aforesaid, the Court accordingly considers that the Applicant's right to a fair trial provided for in Article 7(1) of the Charter has not been violated, as the conviction was based on sufficient evidence and the circumstances of the crime were clarified.

## v Alleged undue delay of the decision on the review application

**85.** The Applicant alleges that "the Court of Appeal …delayed to review its decision … regarding (his) Application which (he) made to the court since 9 January 2013[22] although constitutional and appellate jurisdiction Act allow (him) to do so."

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21 *Mohamed Abubakari v Tanzania* (merits), § 174.

22 The Applicant mistakenly indicated 9 January 2019.

**86.** The Respondent State submits that Rule 66(2) to (6) of the Court of Appeal Rules sets conditions for the review of its judgment, one of them being the filing of the motion of appeal within six (6) months after the decision sought to be reviewed. The Respondent State alleges that in accordance with the Applicant's submissions, the notice of motion for review was filed on 21 March 2014,[23] that is, sixteen (16) months after the Court of Appeal's judgment was delivered on 26 July 2013. The Respondent State maintains that the Applicant did not submit a copy of the said notice of motion of review.

**87.** The Respondent State further submits that the Applicant ought to have filed a constitutional petition before the High Court to seek remedies for the alleged violations of his rights.

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**88.** The Court notes that there are two issues arising for determination. One concerns the delay by the Court of Appeal to decide on the application for review allegedly filed by the Applicant, and the other is on the filing of a constitutional petition regarding the alleged violation of the Applicant's rights which the Respondent State claims the Applicant ought to have filed.

**89.** Concerning the constitutional petition, the Court is of the view that this question was examined under the admissibility of the Application and it was deemed to be immaterial to the requirement of compliance with the requirement for exhaustion of local remedies. As regards the delay in the hearing of the Applicant's review of the Court of Appeal's judgment, the Court considers that, although the application for review is considered to be an extraordinary remedy, if used by the Applicant, the competent court should determine the application for review within a reasonable time, in accordance with Article 7(1) of the Charter, which provides that: "Every individual shall have the right to have his cause heard. This comprises: d) The right to be tried within a reasonable time ...".

**90.** The Court considers that in order to determine whether an application for review has been examined within a reasonable time or whether the timeframe is unduly prolonged, it is a

23 The correct date alleged by the Applicant is 9 January 2013.

prerequisite for an application to have actually been filed before the competent court. In the instant case, the Court notes that it has already examined this matter and found that the Applicant has not proved that he actually filed the application for review before the Court of Appeal. Nevertheless, the Court reiterates, as indicated in paragraph 36 above, that the filing of the application for review is an extraordinary remedy the Applicant allegedly decided to consider.

**91.** For these reasons, the allegation that there was an undue delay in the examination of the application for review is moot and, the claim is therefore dismissed.

## VIII. Reparations

**92.** The Applicant prays the Court to quash the conviction for rape, annul the sentence imposed, release him from prison immediately, grant him pecuniary reparations and any other order that it may deem fit and just to grant.

**93.** The Respondent State prays the Court to dismiss the Applicant's request for reparations.

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

**95.** 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".[24]

**96.** The Court also restates that, the purpose of reparation is to "… as far as possible, erase all the consequences of the wrongful

24 *Ingabire Victoire Umuhoza v Rwanda* (reparations) (2018) 2 AfCLR 202, § 19. See also *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, § 20; *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346, § 15(b); and *Mohamed Abubakari*

act and restore the state which would presumably have existed if that act had not been committed."[25] 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.[26]

**97.** The Court 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 and the onus is on the Applicant to provide evidence to justify his prayers.[27] With regard to moral damages the requirement of proof is not as rigid[28] since it is assumed that there was prejudice caused when violations are established.[29]

**98.** The Court will consider the Applicant's claims for compensation on the basis of the above-mentioned principles.

## A. Pecuniary reparations

**99.** The Court has already found that the Respondent State has violated the Applicant's right to free legal assistance contrary to Article 7(1)(c) of the Charter.

### i. Material prejudice

**100.** The Applicant claims that his parents who are, originally from Kilimanjaro, settled in Mto wa Mbu, Monduli District since 1951. In 1974, on the Government's directive, they moved to Majengo,

*v United Republic of Tanzania*, AfCHPR, Application 007/2013, Judgment of 4 July 2019 (reparations), § 19.

25 *Mohamed Abubakari v Tanzania* (reparations), § 20; *Alex Thomas v United Republic of Tanzania*, AfCHPR, Application No 005/2013, Judgment of 4 July 2019 (reparations), § 12; and *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania*, AfCHPR, Application 006/2013, Judgment of 4 July 2019 (reparations), § 16.

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

27 See *Kennedy Gihana & ors v Republic of Rwanda*, AfCHPR, Application 017/2015, Judgment of 28 November 2019, § 139; See also *Tanganyika Law Society, the Legal and Human Rights Centre v United Republic of Tanzania* and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v Burkina Faso* (reparations), § 15(d).

28 *Norbert Zongo v Burkina Faso* (reparations), § 55.

29 See *Ally Rajabu & ors v United Republic of Tanzania*, AfCHPR, Application 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania*, AfCHPR, Application 009/2015, Judgment of 28 March 2019 (merits and reparations), § 58; *Norbert Zongo & ors v Burkina Faso* (reparations), § 55.

where they lived until 1990, when they returned to their home village in Kilimanjaro, where his father gave him "the family plot measuring 58m by 39m" which had a rustic building. The Applicant claims that he also received from his brother, Mr. Samwel Elisamehe, "a farm with permanent crops as banana plants and mango trees measuring 94m [by] 56m".

**101.** The Applicant claims that, following his conviction, his wife had to return to her village, which led to the loss of the aforementioned rustic building which he had started rehabilitating. According to the Applicant, under Tanzanian law, leaving a rustic building unoccupied for ten (10) years shall result in its loss and all inherent rights.

**102.** The Applicant claims to have lost both the rustic building and the farm; two (2) houses with their respective furnishings; furniture; the foundation of a house which was to have had three (3) bedrooms, construction materials and various utensils; profits from banana cultivation (for fifteen (15) years), onions, rice and the lease for the farm. The Applicant claims that the total loss incurred amounts to one hundred and thirty-three million, seven hundred and sixteen thousand and five hundred Tanzanian Shillings (TZS 133, 716, 500).

**103.** The Respondent State prays the Court to dismiss the Applicant's prayers as baseless and for not complying with the applicable principles of reparation, namely: providing evidence that damage has occurred to establish the causal link between the damages and the violation and the demonstration of the status of the victim of the violation. The Respondent State relies on the judgments of this Court in the matter of *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) and *Norbert Zongo & ors v Burkina Faso* (reparations), of the ECOWAS Court of Justice in the Case No. ECW/CCAJ/11/07, *Saidykhan v The Gambia*, and of the International Criminal Court in the Case No. ICC-01-05-01/08, *Prosecutor v Bemba.*

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**104.** The Court notes that, the Applicant's prayer for pecuniary reparations for material prejudice is based on his imprisonment. The Court is of the view that there is no link between the violations established and the material loss which the Applicant claims he

suffered as a result of his imprisonment.[30] The Applicant has also not provided evidence of his earnings before his arrest. Furthermore, and most importantly, even though the Court has found violations of the Applicant's right to a fair trial, it has not concluded that he should not have been imprisoned.

**105.** Consequently, this prayer is dismissed.

### ii. Moral prejudice

**106.** The Applicant claims that his arrest led to the dissolution of his marriage and called into question his reputation, since no one in Tanzania would believe him and as such he would not be able to find a job or apply for any position, including that of village chief. He claims that all these issues caused him suffering, especially, after he learned of the death of his former wife.

**107.** The Respondent State argues that "there is no proof that the Applicant suffered from emotional harm as argued…" and that for the Applicant to prove emotional harm "there ought to be a medical certificate to that effect."

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**108.** The Court considers that, as earlier found, the violation of the Applicant's right to free legal assistance is assumed to have caused moral prejudice to the Applicant. The Court, therefore, in exercising its discretion, awards to the Applicant an amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[31]

## B. Non-pecuniary reparations

**109.** The Applicant prays the Court to quash his conviction and sentence, and order his release from prison. The Respondent State does not specifically respond to this prayer.

30 *Robert John Penessis v Tanzania*, § 143; See also *Alex Thomas v Tanzania* (reparations), § 26; *Reverend Christopher R. Mtikila & ors v Tanzania* (reparations), § 30; *Lohé Issa Konaté v Burkina Faso* (reparations), § 17.

31 See *Anaclet Paulo v Tanzania* (merits), § 107; and *Minani Evarist v Tanzania* (merits), § 85.

**110.** With respect to the Applicant's request for his conviction to be quashed, the Court reiterates its jurisprudence that it does not examine details of matters of fact and law that national courts are entitled to address.[32] Therefore, this prayer is dismissed.

**111.** As regards the Applicant's request for an order to have the sentence imposed on him annulled and for his release, as the Court has held in previous cases, such a measure can only be ordered in exceptional and compelling circumstances.[33] With regard to the sentence being set aside, the Court has always held that it is justified, for example, only in cases where the violation found is such that it necessarily vitiated the conviction and the sentencing. With regard specifically to the Applicant's release, the Court has established that this would be the case "if an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice".[34]

**112.** In the instant case, the Court recalls that it had already found that the Respondent State is in violation of the right to fair trial for failing to provide the Applicant with legal assistance. Without minimising the gravity of the violation, the Court is of the view that the nature of the violation in the instant case does not reveal any circumstance that signifies that the Applicant's imprisonment is a miscarriage of justice or an arbitrary decision. The Applicant also failed to adduce further specific and compelling reasons to justify the order for his release. Therefore, this prayer is dismissed.

32 See *Mohamed Abubakari v Tanzania* (merits), § 28; and *Minani Evarist v Tanzania* (merits), § 81.

33 See *Jibu Amir & anor v Tanzania*, § 96; *Alex Thomas v Tanzania* (merits), § 157; *Diocles William v Tanzania* (merits), § 101; *Minani Evarist v Tanzania* (merits), § 82; *Mgosi Mwita Makungu v United Republic of Tanzania* (Merits) (2018) 2 RJCA 570, § 84; *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 RJCA 226, § 96; et *Armand Guéhi v Tanzania* (merits and reparations), § 164.

34 *Jibu Amir Mussa & anor v Tanzania*, §§ 96 and 97; *Minani Evarist v Tanzania* (merits), § 82; and *Mgosi Mwita Makungu v Tanzania* (merits), § 84. See also *Del Rio Prada v Spain*, European Court of Human Rights, Judgment of 10/07/2012, § 139; *Assanidze v Georgia* (GC) - 71503/01, Judgment of 8/04/2004, § 204; *Loayza-Tamayo v Peru*, Inter-American Court of Human Rights, Judgment of 17/09/1987, § 84.

## IX. Costs

**113.** The Applicant made no specific submissions on costs.
**114.** The Respondent State prays the Court to rule that the costs of the proceedings should be borne by the Applicant.
**115.** Pursuant to Rule 30 of the Rules "Unless otherwise decided by the Court, each party shall bear its own costs."
**116.** Based on the foregoing, the Court rules that each Party shall bear its own costs.

## X. Operative part

**117.** For these reasons,
The Court,
*Unanimously:*
*On jurisdiction*
i. *Dismisses* the objection to the Court's 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 under Article 7(1)(c) of the Charter to be heard and defend himself.
vi. *Holds* that the Respondent State has not violated the Applicant's right under Article 7(1)(c) of the Charter as regards the charge sheet being defective.
vii. *Holds* that the Respondent State has not violated Article 14(5) of the International Covenant on Civil and Political Rights as regards the Court of Appeal and High Court basing their decisions on the findings of the District Court.
viii. *Holds* that the Respondent State has not violated the Applicant's right under Article 7(1)(d) of the Charter to be tried within a reasonable time as regards the alleged delay by the Court of Appeal to review its decision to uphold the Applicant's conviction and sentence.
ix. *Holds* that the Respondent State has not violated the Applicant's right to a fair trial as provided under Article 7(1) of the Charter as regards the sufficiency of the evidence and clarification of the circumstances of the case.

x. *Finds* 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 International Covenant on Civil and Political Rights, by failing to provide him with free legal assistance.

*On reparations*

*Pecuniary reparations*

xi. *Does not grant* the Applicant's prayer for material damages for his imprisonment.

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 Three Hundred Thousand (TZS300,000).

xiii. *Orders* the Respondent State to pay the sum awarded under (xii) above free from tax as 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 and sentence to be quashed.

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

*On implementation of the judgment and reporting*

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

*On costs*

xvii. *Decides* that each party shall bear its own costs.