Balele v Tanzania (judgment) (2021) 5 AfCLR 338

Application 026/2016, *Bernard Balele v United Republic of Tanzania*

Judgment, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant brought this Application against the Respondent State, claiming that the domestic courts' handling of his appeal against a conviction and sentence for rape violated his human rights. The Court held that the Respondent State had not violated any rights of the Applicant.

Jurisdiction (material jurisdiction, 37, 39; appellate jurisdiction, 38)

Admissibility (exhaustion of local remedies, 53-56; submission within a reasonable time, 61-64)

Fair trial (evaluation of evidence for criminal conviction, 87-91; right to be heard, 92; right to free legal representation, 103-108, 109-111)

Procedure (application of domestic law, 102)

I. The Parties

1. Bernard Balele (hereinafter referred to as "the Applicant") is a national of Tanzania who, at the time of filing the Application was at Butimba Central Prison, Mwanza Region, serving a sentence of life imprisonment having been convicted of the offence of rape of a seven (7) year old minor.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), 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. The Court held that this withdrawal has no bearing on pending

cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. From the record before the Court, it emerges that the Applicant was arrested on 30 October 2008 and that he was charged before the District Court of Geita on 5 November 2008, in Criminal Case No. 560/2008 with the offence of rape of a seven (7) year old minor.

4. On 12 February 2009, the District Court of Geita convicted the Applicant for the offence of rape, sentenced him to serve life imprisonment and ordered him to pay Tanzanian Shillings 100,000 TSH compensation to the victim.

5. The Applicant filed an appeal before the High Court on 17 June 2009. On 24 March 2010, the High Court struck out the Applicant's appeal in Criminal Appeal No. 115/2009, because he had not filed the notice of intention to appeal as required by Section 361(1)(a) of the Criminal Procedure Act.

6. On 13 September 2010, in Misc. Criminal Application No. 31/2010, the High Court sitting at Mwanza granted the Applicant leave to file a notice of intention to appeal and to file the appeal out of time.[2]

7. The Applicant filed an Appeal on 5 October 2010, before the High Court sitting at Mwanza. On 8 December 2010, in Criminal Appeal No. 79/2010, the High Court dismissed the Applicant's appeal in Criminal Appeal No. 79/2010, due to irregularities of the dates mentioned on the appeal and because the appeal was not signed by the Applicant.

8. On 17 December 2010, the Applicant filed Criminal Appeal No. 81/2011, before the Court of Appeal. On 12 March 2013, the Court of Appeal allowed the Applicant's appeal because it found that the High Court should have struck out the appeal due to the irregularities, rather than dismiss it.

9. Accordingly, the Court of Appeal granted the Applicant leave to lodge a fresh petition of appeal at the High Court, which he did

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

2 The date of filing of this Application is not indicated anywhere on the record.

on 19 March 2013. On 7 August 2013, in Criminal Appeal No. 17/2013, the High Court at Mwanza dismissed the Applicant's appeal.

10. On 9 October 2014, the Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Mwanza. In its judgment of 28 October 2014, in Criminal Appeal No. 319/2013, the Court of Appeal dismissed his appeal in its entirety.

11. The Applicant alleges that he has filed an application seeking a review of the Court of Appeal's decision. While this submission by the Applicant is not contested by the Respondent State, the Court notes that evidence of this application for a review of the Court of Appeal judgment is not indicated anywhere on the record before the Court.

B. Alleged violations

12. In his Application, the Applicant alleges that his right to be heard was violated because the Court of Appeal had allegedly not considered all the grounds of appeal separately and instead combined them, and that this constituted a violation of Article 3(2) of the Charter.

13. The Applicant further alleges in his Application that his right to be heard under Article 7(1)(c) and 8 (d) of the Charter and Article 1 and 107A(2)(d) of the Constitution of the Respondent State was violated, as he had no legal representation during the proceedings against him.

14. In his Reply, the Applicant specified that his claim concerning the alleged violation of his right to legal representation concerns the procedure to review the Court of Appeal judgment and not the lack of representation during the trial and appeal procedures.

III. Summary of the Procedure before the Court

15. The Application was filed on 22 April 2016 and was served on the Respondent State on 7 June 2016.

16. The parties filed their pleadings within the time stipulated by the Court.

17. Pleadings were closed on 23 July 2019 and the parties were duly notified.

IV. Prayers of the Parties

18. In his Application, the Applicant prayed the Court to restore justice where it was overlooked, quash both the conviction and

the sentence imposed upon him and set him at liberty. He further prayed the Court to grant reparations pursuant to Article 27(1) of the Protocol and grant any other order(s) or relief(s) sought that may be appropriate in the circumstances of this Application.

19. In a subsequent submission, filed on 17 August 2017, the Applicant informed the Court that he decided to withdraw in part his request to be granted reparations and only retain the prayers for the Court to restore justice where it was overlooked by quashing both the conviction and sentence, and setting him at liberty.

20. In its Response, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to order as follows:

i. That, the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate on this Application;

ii. That, the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;

iii. That, the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;

iv. That, the Application is inadmissible and duly dismissed;

v. That, the Application is dismissed with costs.

21. With regard to the merits of the Application, the Respondent State prays that the Court grants the following orders:

i. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 1 of the African Charter on Human and Peoples' Rights;

ii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 2 of the African Charter on Human and Peoples' Rights;

iii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 3(1)(2) of the African Charter on Human and Peoples' Rights;

iv. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 7(1)(c) of the African Charter on Human and Peoples' Rights;

v. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 8(d) of the African Charter on Human and Peoples' Rights;

vi. That, the Application be dismissed for lack of merit;

vii. That, the Applicant's prayers not be granted;

viii. That, the Applicant not be awarded reparations;

ix. That, costs be borne by the Applicant.

V. Jurisdiction

22. The Court observes 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.

23. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[3]

24. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

25. In the present Application, the Court notes that the Respondent State has raised two objections to its material jurisdiction.

A. Objections to material jurisdiction

26. The Respondent State argues that the Court is not vested with jurisdiction to adjudicate on this matter. According to the Respondent State, the present Application calls for the Court to sit as an appellate court and adjudicate on matters of law and evidence already finalised by the Respondent State's highest court, the Court of Appeal of Tanzania.

27. Citing the Court's jurisprudence in *Ernest Francis Mtingwi v Malawi,*[4] the Respondent State claims that the Court does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and/or regional courts.

28. The Respondent State also asserts that the Court has no jurisdiction to quash the conviction and the sentence imposed on the Applicant and to set him at liberty.

29. Furthermore, the Respondent State asserts that this Application calls for the Court to sit as a Court of first instance and adjudicate on matters that have never been raised before the municipal courts.

3 Formerly, Rule 39(1), Rules of Court, 2 June 2010.

4 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190.

30. For the preceding reasons, the Respondent State prays that the Application should be dismissed.

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31. In his Reply, the Applicant states that the Court does not have a similar jurisdiction or mandate as that of a court of appeal. The Applicant furthers asserts that the Court is not an appellate body nor does this Application call for the Court to sit as an appellate court. However, he claims that the Court has jurisdiction to adjudicate over this Application because the rights that he alleges to have been violated are protected by the African Charter and by other human rights instruments ratified by the Respondent State.

32. Citing the Court's jurisprudence in *Alex Thomas v Tanzania,*[5] the Applicant clarifies that he is claiming before this Court that the judgment from the Respondent State's Court of Appeal was procured by error and that this Court has jurisdiction to examine whether relevant domestic proceedings are in accordance with the standards set out in the Charter and other human rights instruments ratified by the Respondent State.

33. The Applicant further specified that his claim concerning the prejudice caused by not having legal representation does not concern his past trial and appeal cases, but instead it relates to the absence of legal representation in the proceedings concerning his application for a review of the Court of Appeal's judgment. He claims that due to a lack of representation in this application for review no follow up was undertaken and therefore it is taking a long time for the hearing to take place.

34. For these reasons, the Applicant submits that the Court is vested with jurisdiction to adjudicate on this matter.

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5 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465.

35. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[6]

36. The Court notes that the Respondent State's objection is two–pronged in that it simultaneously questions the Court's jurisdiction to sit as a first instance court as well as its power to sit as an appellate court.

37. In relation to the allegation that the Court is being invited to sit as a court of first instance, the Court reaffirms that its jurisdiction, under Article 3 of the Protocol, extends to any application submitted to it, provided that an applicant invokes a violation of rights protected by the Charter or any other human rights instrument ratified by the Respondent State.

38. As regards the contention that the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's domestic courts, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[7] At the same time, however, and even though it is not an appellate court *vis a vis* domestic courts, it retains the power to assess the propriety of domestic proceedings as against standards set out in international human rights instruments ratified by the State concerned.[8] In conducting the aforementioned task, the Court does not thereby become an appellate court and neither does it need to sit as one.

39. Considering the allegations made by the Applicant, which all implicate the right to a fair trial which is protected under Article 7 of the Charter, the Court finds that the said allegations are within the purview of its material jurisdiction.[9] The Court, therefore,

6 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 18.

7 *Ernest Francis Mtingwi v Malawi* (jurisdiction) §§ 14-16.

8 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Werema Wangoko Werema and Another v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520 § 29 and *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.

9 *Alex Thomas v Tanzania* (merits) § 130. See also, *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 29; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 28; and *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits) (24 November 2017) 2 AfCLR 165 § 54.

holds that it has material jurisdiction in this matter and dismisses the Respondent State's objection.

B. Other aspects of jurisdiction

40. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

41. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further recalls that it has held that the withdrawal of a Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect.[10] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[11] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.

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

43. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicant arose after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[12] Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

44. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that it

10 *Andrew Ambrose Cheusi v United Republic of Tanzania,* §§ 35-39.

11 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

12 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

has territorial jurisdiction.

45. In light of the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

46. 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".

47. In line with Rule 50(1) of the Rules,[13] "the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

48. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all of the following conditions:
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> a. Indicate their authors even if the latter request anonymity;
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> b. Are compatible with the Constitutive Act of the African Union and with the Charter;
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> c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
>
> d. Are not based exclusively on news disseminated through the mass media;
>
> e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
>
> f. Are submitted 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
>
> g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

49. The Respondent State has raised two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies and the second relates to whether

13 Formerly Rule 40 of the Rules of Court, 2 June 2010.

the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of local remedies

50. The Respondent State argues that the Applicant is raising before this Court, allegations of violations of fair trial rights, specifically the right to legal representation, which he never raised before the High Court and the Court of Appeal of Tanzania. The Respondent argues that the Applicant could have filed a constitutional petition or raised his grievance as a ground of appeal before the High Court or the Court of Appeal.

51. The Respondent State submits that since the Applicant did not pursue any of these available remedies, this Application has not met the admissibility requirement under Rule 40(5) of the Rules[14] and should therefore be dismissed.

52. In his Reply, the Applicant objects to the submissions by the Respondent State. He asserts that he did not apply for legal aid because the legal aid act does not provide for any direction or procedure for applying for the aid. Furthermore, the Applicant alleges that the violation of his right to be granted legal aid relates to his Application for a review of the Court of Appeal's judgment and not to the procedure before the trial court or before the appellate courts.

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53. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2) (e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.[15]

54. The Court recalls that it has held that, in so far as the criminal proceedings against an applicant have been determined by the

14 Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.

15 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

highest appellate court, the Respondent State will be deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[16]

55. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 28 October 2014. Therefore, the Respondent State had the opportunity to address the violations allegedly arising from the Applicant's trial and appeals.

56. Regarding the Respondent State's contention that the Applicant ought to have filed a constitutional petition to seek redress for not having been provided legal aid during his trial and appeals, the Court has previously held that the constitutional petition within the Respondent State's judicial system is an extraordinary remedy which applicants are not required to exhaust before filing their applications before this Court.[17] Similarly, the Court has held that an application for review of the Court of Appeal's judgment is an extraordinary remedy which applicants are not required to exhaust.[18] The Court therefore finds that, although the Applicant's application for review was allegedly pending by the time he filed this Application, he is deemed to have exhausted local remedies since the Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had upheld his conviction and sentence, following proceedings which allegedly violated his rights.

57. In light of the foregoing, the Court dismisses the Respondent State's objection based on the non-exhaustion of local remedies.

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

58. The Respondent State claims that since the Application was not filed within a reasonable time after the local remedies were exhausted, the Court should find that the Application has failed to comply with the provisions of Rule 40(6) of the Rules.[19]

59. The Respondent State recalls that the judgment of the Court of Appeal was delivered on 28 October 2014 and that this Application was filed on 22 April 2016. The Respondent State notes that a

16 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

17 *Alex Thomas v Tanzania* (merits) §§ 63-65.

18 *Mohamed Abubakari v Tanzania*, (merits) § 78.

19 Corresponding to Rule 50(2)(f) of the Rules of 25 September 2020.

period of one (1) year, four (4) months and 21 days elapsed in between. Relying on the African Commission on Human and Peoples' Rights' decision in *Majuru v Zimbabwe*,[20] the Respondent State argues that the time limit established for filing applications is six (6) months after exhaustion of local remedies and therefore the Applicant ought to have filed the Application within six months after the Court of Appeal's judgment.

60. The Applicant alleges that he filed his Application within a reasonable time after his appeal to the Court of Appeal, the Respondent State's highest court. Furthermore, the Applicant alleges that he was still waiting for his application for review of the Court of Appeal's judgment to be finalised.

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61. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that Applications must be filed "…within 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".

62. The Court has held "…that the reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[21]

63. From the record before the Court, the Applicant exhausted local remedies on 28 October 2014, being the date, the Court of Appeal delivered its judgment on his final appeal. The Applicant then filed the instant Application on 22 April 2016. The Court therefore must assess whether this period of 1 year, 5 months and 25 days is reasonable in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

64. The Court has previously considered the personal circumstances of applicants and found that, incarcerated, lay and indigent applicants being restricted in their movements, would have little

20 African Commission on Human and Peoples' Rights Communication 308/05 *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

21 *Norbert Zongo and Others v Burkina Faso* (preliminary objection) (25 June 2013) 1 AfCLR 197 § 121.

or no information about the existence of the Court.[22]

65. From the record before it, the Court notes that the Applicant has been incarcerated since 2008, and that he claims to be lay and indigent, which is not contested by the Respondent State. Considering these circumstances, the Court finds that the Applicant's filing of his Application after 1 year, 5 months and 25 days is within reasonable limits.

66. In light of the above, the Court, therefore, dismisses the Respondent State's objection to the admissibility of the Application based on failure to file the Application within a reasonable time.

B. Other conditions of admissibility

67. The Court notes, from the record, that the Application's compliance with the requirements in Article 56 sub-articles (1), (2), (3), (4) and (7) of the Charter, which are reiterated in sub-rules 50(2)(a), (b), (c), (d), and (g) of the Rules, are not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

68. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) of the Rules is fulfilled since the Applicant's identity is clear.

69. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

70. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.

71. Regarding the condition contained in Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

22 *Christopher Jonas v Tanzania* (merits) § 54; *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83; *Armand Guehi v Tanzania* (merits and reparations) § 56; *Werema Wangoko v Tanzania* (merits and reparations) § 49*; Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 55.

72. Finally, with respect to the requirement laid down in Rule 50(2)(g) of the Rules, the Court finds that the present case does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter.

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

VII. Merits

74. The Applicant alleges the violation of his right to equal protection of the law under Article 3(2) of the Charter and of his right to have his cause heard and his right to legal assistance under article 7(1)(c) and 8(d) of the Charter corresponding to Articles 1 and 107A(2)(d) of the Constitution of the Respondent State.

A. Alleged violation of the right to a fair trial

75. The Court will first consider the alleged violation of the right to have his cause heard and then the alleged violation of the right to legal assistance. These allegations fall within the right to a fair trial protected under Article 7(1) of the Charter.

B. Alleged violation of the right to have one's cause heard

76. The Applicant claims that the first appellate court, the High Court, erred in upholding his conviction by not taking into account that certain fundamental matters were not proven in conformity with the standards stipulated by law. He refers to the visual identification of the Applicant by the victim, taking into consideration the victim's tender age and credibility. The Applicant also claims that the case was not properly investigated and that not all evidence was adequately evaluated.

77. The Applicant further claims that the judgment of the Court of Appeal was procured and pronounced based on a manifest error which resulted in the miscarriage of justice.

78. The Applicant submits that in the memorandum of his appeal of 9 October 2014 to the Court of Appeal, he had presented three different grounds. However, the Court of Appeal did not consider all the different grounds of his appeal separately nor were all

grounds discussed by the Court.

79. The Applicant submits that the procedure of the Court of Appeal to reject the other two grounds of the appeal violated his fundamental rights of being heard in a court of law.

80. The Respondent State states that the Applicant's allegations are baseless since he has not elaborated how the judgment of the Court of Appeal was procured by error against the Applicant. The Respondent State further states that the record shows that the judgment of the Court of Appeal of 28 October 2014, was delivered in accordance with the Court of Appeal Rules of 2009.

81. The Respondent State references different sections of the Court of Appeal's judgment to substantiate the argument that this tribunal thoroughly analysed the evidence on record concerning issues of identification. According to the Respondent State, the Court of Appeal observed that the evidence of PW1 (the victim) was corroborated by the evidence of PW3. The Court of Appeal also noted that the incident took place around 6pm when it was not yet dark and that it took time for the Applicant to grab PW1 and take her to the scene of the crime which enabled PW1 to have time to identify the Applicant.

82. The Respondent State also avers that the PW1 managed to identify the Applicant one day after the incident when he was in the company of two other persons. Further, the Respondent State refers to the fact that the Applicant tried to escape after seeing PW1.

83. The Respondent State submits that the Applicant was duly given the right to be heard as he was present throughout the trial and that the record clearly indicates that he was given the opportunity to cross-examine the prosecution witnesses, to call witnesses to testify in his favour and to object to the documents tendered by the prosecution. The Respondent State references specific sections in the trial court proceedings in Criminal Case No. 560 of 2008, which indicate that the Applicant cross-examined different prosecution witnesses (pages 7, 9, 11, and 12), that he was given a chance to object to the tendering of PF3, the medical examination report, but he did not object (page 8), that he stated "my defence will be on oath" (page 13), that he defended himself (page 14), and that closed his case by stating "I have no witness to call. That is the end of my defense case" (page 14).

84. The Respondent State maintains that the trial and appeal courts properly evaluated and assessed the evidence on record before delivering their judgment. Furthermore, the Respondent State argues that the Court of Appeal delivered its judgment after going through the proceedings and judgments of the trial court and the

High Court.

85. The Respondent also states that the Court of Appeal discussed the grounds of appeal on the issue of visual identification and discussed the *voir dire* examination of the victim. According to the Respondent State, the Court of Appeal duly analysed the evidence on record and did not come to its decision by error.

86. For these reasons, the Respondent State submits that the Applicant's allegation that his right to be heard has been violated lacks merit and should be dismissed.

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87. The Court has held in its previous jurisprudence that:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings. [23]

88. The above notwithstanding, the Court can, in evaluating the manner in which domestic proceedings were conducted, intervene to assess whether domestic proceedings, including the assessment of the evidence, was done in consonance with international human rights standards.

89. The record before this Court shows that the prosecution called four (4) witnesses. Admittedly, only PW1, the victim, testified to the actual occurrence of the crime at issue, being rape. Nevertheless, the District Court considered the evidence of PW1 together with the evidence of other witnesses and concluded that PW1 had a good chance to identify her rapist and that PW1 was a credible witness. During the second appeal to the High Court, the credibility of PW1 was also considered and the High Court concluded that PW1 was a credible and reliable witness. On further appeal, the Court of Appeal held that there were no grounds for interfering with the findings of the two lower courts.

90. Given the exhaustive manner in which the question of the identification of the Applicant and the credibility of PW1 was considered by three courts within the Respondent State's system, the Court finds that the manner in which the evidence

23 *Kijiji Isiaga v Tanzania* § 65.

was evaluated does not reveal any manifest errors requiring this Court's intervention.

91. With regard to the Applicant's contention that the Court of Appeal did not discuss all three grounds of appeal, the Court notes that the Applicant's different grounds of appeal all relate to the evaluation of the evidence. The Court further notes from the record before it that the Court of Appeal did evaluate all the evidence available to it before delivering its judgment.

92. Accordingly, the Court holds that the Applicant has failed to prove that the Respondent State violated his right to have his cause heard and therefore dismisses his allegation.

C. Alleged violation of the right to free legal assistance

93. In his Application, the Applicant claimed that since he had no legal representative, his right to be heard, as provided under Article 7(1)(c) and 8(d) of the Charter as well as under Article 1 and 107A(2)(d) of the Constitution of the Respondent State, was violated, leading him to be prejudiced.

94. In his Reply to the Respondent State's Response, the Applicant specified that he does not complain about this issue concerning the procedure before the trial court or appellate courts. Instead, he clarified that his claim concerns the absence of representation for his Application for review of the Court of Appeal's judgment, which, according to the Applicant, had still not been heard at the time of submitting his Reply.

95. The Respondent State disputes the claim that the Applicant was denied the right to legal representation.

96. The Respondent State submits that within its jurisdiction legal aid in the form of defence counsel is automatic in murder and manslaughter cases. However, legal assistance for all other offences is subject to application by an accused person or appellant who must also prove they are indigent and unable to afford legal services.

97. The Respondent State claims that the Applicant was not denied his right to be defended by counsel of his choice. The Respondent State avers that the Applicant could have applied for legal aid during his trial and during his appeals before the High Court or before the Court of Appeal, but he did not. The Respondent State further submits that the Applicant could have contested the lack of legal assistance as a ground of appeal before the High Court or the Court of Appeal, but he did not do so. The Respondent State also asserts that the Applicant could have contested the absence of legal assistance by filing a Constitutional Petition, but that he

did not do so either.

98. The Respondent State further requests the Court to apply the principle of margin of appreciation and consider that although the Respondent State provides defence counsel for homicide offences without application, in all other instances one must apply for legal aid. The Respondent State submits that this system was deliberately chosen by policy makers and legislators after having taken into consideration the State's financial capacity and the number of lawyers available. It was therefore felt prudent that those who need legal assistance in the form of a defence counsel could apply for such aid. The Respondent State claims that it is trying to ensure a progressive realisation of rights while taking consideration its own limited capacity.

99. It is for these reasons that the Respondent State claims that this allegation lacks merit and should be dismissed.

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100. The Court notes that, Article 7(1)(c) of the Charter provides that: "Every individual shall have the right to have his cause heard. This comprises: … (c) the right to defence, including the right to be defended by counsel of his choice."

101. The Court notes that the Charter does not have a provision on Article 8(d) of the Charter, therefore this will be considered as an error on the Applicant's part.

102. The Applicant has also alleged that the failure to provide him legal assistance was a violation of Articles 1[24] and 107A(2)(d)[25] of the Constitution of the Respondent State. Although these provisions of the Respondent State's Constitution do not correspond to Article 7(1)(c) of the Charter, the Court has previously held that in determining, whether the State has complied with the Charter or any other human rights instrument it has ratified, it does not

24 Article 1 of the Respondent State's Constitution provides that: "Tanzania is one State and is a sovereign United Republic."

25 Article 107A(2) of the Respondent State's Constitution provides that: "In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say […] (d) to promote and enhance dispute resolution among persons involved in the disputes."

apply the domestic law in making this assessment.[26] The Court will therefore not apply the provisions of the Respondent State's Constitution cited by the Applicant.

103. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[27] and determined that the right to defence includes the right to be provided with free legal assistance.[28]

104. The Court has also determined that where accused persons are charged with serious offences which carry heavy sentences and they are indigent, free legal assistance should be provided as of right, regardless of whether or not the accused persons request for it.[29]

105. The Court notes the provisions of Article 14(3)(d) of the ICCPR Court which provides that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

106. The Court notes that, once a person is arrested on suspicion of having committed a serious offence which carries a heavy penalty and where they are indigent, they should promptly be provided with free legal assistance.[30]

107. The Court observes that although he faced a serious charge of rape which carries a heavy penalty, nothing on the record shows that upon his arrest he was promptly informed of the right to legal

26 *Mohamed Abubakari v Tanzania* (merits) *§* 28; *Kennedy Owino Onyachi and another v Tanzania* (merits) § 39.

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

28 *Alex Thomas v Tanzania*, (merits) § 114; *Kijiji Isiaga v Tanzania* (merits) § 72; *Kennedy Owino Onyachi and another v Tanzania* (merits) § 104.

29 *Alex Thomas v Tanzania*, (merits) § *123*; *Kijiji Isiaga v Tanzania* (merits) § 78; *Kennedy Owino Onyachi and another v Tanzania* (merits) §§ 104 and 106.

30 See ACHPR, *Abdel Hadi Ali Radi & Others v Republic of Sudan* Communication 368/09, where the African Commission on Human and Peoples' Rights referred to Articles 25 and 26 of its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and Article 20(c) of the Robben Island Guidelines (Guidelines and Measures for the Provision and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa) which it adopted to elaborate on the right to be provided legal assistance promptly after arrest; See also ECHR Case of *Pavovits v Cyprus*, Application No. 4268/04, Judgment of 11 December 2008 (merits), § 64 and *Case of A.T. v Luxembourg*, Application No. 30460/13, Judgment of 9 April 2015 (merits), §§ 64, 65 and 75.

assistance or that should he be unable to pay for such assistance, it would be provided to him free of charge.

108. The Court further recalls that it has previously held that the obligation to provide free legal assistance to indigent persons facing serious charges which carry a heavy penalty is for both the trial and appellate stages.[31]

109. In the instant case, the Court notes that the Applicant specified in his Reply that he alleges the violation of his right to legal assistance in the procedure to seek review of the judgment of the Court of Appeal and not of his right to legal aid during his trial and appeal procedures.

110. However, from the record before it, the Court notes that the Applicant has not provided evidence that he has applied for a Review of the Court of Appeal judgment. Without such evidence the Court cannot establish that such a procedure is pending and that the Respondent State has failed to provide free legal assistance.

111. The Court, therefore, finds that the Applicant has not provided evidence to establish that the Respondent State violated the right to defence, guaranteed under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, to provide free legal assistance.

D. Alleged violation of the right to equal protection of the law

112. The Court notes that the Applicant has not provided any specific argument or evidence that he was treated differently from other persons in similar conditions and circumstances.

113. In these circumstances, the Court finds that the Respondent State did not violate the Applicant's right to equal protection of the law provided under Article 3(2) of the Charter.

VIII. Reparations

114. The Applicant partly withdrew his request for reparations. As non-pecuniary reparations, he requests the Court to quash his

31 *Alex Thomas v Tanzania* (merits) § 124; *Wilfred Onyango Nganyi 9 Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR §183.

conviction and sentence, and order his release from prison.

115. The Respondent State prays that the Court should not grant the Applicant's prayers and should not award him reparations.

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

117. Having found that the Respondent State did not violate any of the Applicants' rights, the Court dismisses the Applicant's prayers for reparations.

IX. Costs

118. The Applicant did not make any submissions on costs.

119. The Respondent State prayed that costs be borne by the Applicant.

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120. Pursuant to Rule 32 of the Rules of Court "unless otherwise decided by the Court, each party shall bear its own costs".

121. The Court finds that there is nothing in the instant case warranting it to depart from this provision.

122. Consequently, the Court orders that each party shall bear its own costs.

X. Operative part

123. 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* the Application admissible.

On merits

v. *Finds* that the Respondent State has not violated the Applicant's right to have his cause heard, as guaranteed by Article 7(1) of the Charter, due to the manner of assessment of the evidence during the domestic proceedings.

vi. *Finds* that the Respondent State has not violated the Applicant's right to defence, provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, to provide him with free legal assistance.

vii. *Finds* that the Respondent State has not violated the Applicant's right to equal protection of the law under Article 3(2) of the Charter.

On reparations

viii. *Dismisses* the Applicant's prayers for reparations.

On costs

ix. *Orders* each party to bear its own costs.