Faustin v Tanzania (judgment) (2021) 5 AfCLR 386

Application 018/2016, *Cosma Faustin 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 had unsuccessfully appealed against his conviction and death sentence before domestic courts of the Respondent State. He brought this Application claiming that the manner in which his case was handled by the domestic courts was a violation of his human rights. The Court held that the Respondent State had not violated any of the Applicant's rights.

Jurisdiction (material jurisdiction, 31-33; withdrawal of article 34(6) declaration, 36)

Admissibility (exhaustion of local remedies, 51-55; submission within a reasonable time, 60 -64)

Fair trial (evaluation of evidence for criminal conviction, 79-80, 84-87, 97-100; right to free legal representation, 106-110)

Equality before the law and non-discrimination (burden of proof, 114-116)

I. The Parties

1. Mr Cosma Faustin (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Butimba Central Prison having been convicted of murder and sentenced to death.

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 further deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") through which it accepted 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. The Court has held that this withdrawal had no effect on pending cases as well as all new

cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one (1) year after its deposit. [1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record, that on 10 April 1999, the Applicant went to the house of Prosecution Witness (PW1) in pursuit of one Petro Nzeimana, in Kijumbula village in Kagera, in a bid to collect money that he was owed. The Applicant having not found Mr. Nzeimana, engaged in a heated argument with Mr. Pereuse Stanslaus, Mr. Nzeimana's brother. The argument subsequently, resulted in the Applicant chasing after the deceased, to a point where they fell into a ditch and he stabbed him, leaving a deep wound to the neck that led to his death.

4. On 5 December 2000, the Applicant was charged with premeditated murder even though, according to him, he had killed the victim accidentally, and that he had carried a knife that day for the purpose of filleting some fish which he had bought from a nearby lake, and not to kill the victim. He considers that the testimony of prosecution witnesses PW1 and PW3, were contradictory and inconsistent due to the lack of coherence in their testimony and, therefore, were not credible. He further submits that PW1 entered the house after the victim had been stabbed, while PW3's testimony before the High Court, contradicted his statements in the police report regarding the incident.

5. On 29 August 2006, the Applicant appealed the death sentence before the Court of Appeal in Mwanza in Appeal No. 103/2007. On 8 November 2011, the Court of Appeal confirmed the death sentence rendered by the High Court and maintained the conviction of premeditated murder.

6. The Applicant further applied to the Court of Appeal in Application No.6 of 2012 for review of its judgment and he alleges that, as at the date of filing the Application before this Court, the review was still pending.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No.004/2015, Judgment of 26 June 2020 (merits and reparations) §39. Also see *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

B. Alleged violations

7. The Applicant alleges that his rights guaranteed under Articles, 3 and 7(1)(a) and (c) of the Charter were violated as follows:

i. The domestic courts failed to take into account the fact that he was provoked by the victim. He avers that he had no intention of killing the victim, but that the latter died as a result of wrongful killing during their quarrel;

ii. The testimonies of the prosecution witnesses were not credible, as they were unreliable. For instance, PW1 arrived at the murder scene after the victim had been stabbed and PW3 changed his statements in the police report;

iii. The domestic courts did not grant him the right to be represented by a lawyer of his choice;

iv. The Court of Appeal did not consider his application to review its judgment, which violated his basic rights.

III. Summary of the Procedure before the Court

8. On 12 April 2016, the Application was filed at the Court and served on the Respondent State on 10 May 2016. The Respondent State was requested to file its Response within sixty (60) days of receipt of the Application.

9. On 3 June 2016, the Court issued a Ruling on Provisional Measures ordering the Respondent State to stay the execution of the death sentence pending a decision on the merits of the case.[2]

10. On 10 June 2016, the Registry transmitted the Application to the entities listed under Rule 42(4) of the Rules.[3]

11. The Respondent State filed its Response on 23 May 2017, which was transmitted to the Applicant for him to submit his Reply within thirty (30) days of the notification. The Applicant filed his Reply on 13 June 2017 and this was served on the Respondent State on 28 June 2017.

12. Written pleadings were closed on 7 February 2018 and the Parties were duly notified. On 12 November 2018, the Registry notified the parties of the reopening of pleadings, for them to file submissions on reparations.

13. On 11 December 2018, the Applicant filed his submissions on reparations which was served on the Respondent State on 20

2 *Cosma Faustin v United Republic of Tanzania,* Application No.018/2016 (provisional measures) (3 June 2016) 1 AfCLR 652.

3 Formerly Rule 35(3) of the Rules of Court, 2 June 2010.

December 2018. It was requested to file its Response within thirty (30) days of the notification.

14. Pleadings were closed on 16 December 2020 and the Parties were duly notified after the Respondent State failed to file a Response to the submissions on reparations despite several extensions of time by the Court.

IV. Prayers of the Parties

15. The Applicant prays the Court to:

i. Reverse the injustice suffered by ordering the Respondent State to quash both the conviction and sentence and set him free owing to the time he has spent in custody because he was denied free legal representation of his choice during the trial;

ii. Award him reparations proportionate to an individual's annual income for the time he has served in prison;

iii. Issue any order for reparation as it deems appropriate in the circumstances of the case.

16. The Respondent State, on its part, prays the Court to make the following orders:

i. That the Honourable Court does not have jurisdiction to hear the 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 be dismissed in accordance with Rule 38 of the Rules of Court;

v. That the costs of this procedure be borne by the Applicant.

17. On the merits, the Respondent State prays the Court to dismiss all of the Applicant's allegations and to find that:

i. The Respondent State has not violated Article 2 of the Charter.

ii. The Respondent State has not violated any of the rights of the Applicant guaranteed by Article 3(1) (2) of the Charter.

iii. The Respondent State has not violated any of the rights of the Applicant guaranteed by Article 7 (1) (d) of the Charter.

iv. Dismiss all the Applicant's prayers.

v. Dismiss the Application in its entirety for lack of merit.

V. Jurisdiction

18. Article 3 of the Protocol provides that:

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

19. Furthermore, Rule 49(1) of the Rules of Court[4] provides that "the Court shall conduct preliminarily examination of its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

20. It follows from the above provisions that the Court must, conduct an examination of its jurisdiction and rule on any objections raised, if any.

21. The Court notes that, in this case, the Respondent State raises an objection to its material jurisdiction.

A. Objection to material jurisdiction

22. The Respondent State submits that the Court lacks material jurisdiction in accordance with the provisions of Articles 3(1) of the Protocol and Rule 26(1)(a)[5] of the Rules, as the Applicant has not raised any point in his Application dealing with the interpretation or application of the Charter, the Protocol or any other human rights instrument ratified by the Respondent State.

23. According to the Respondent State, the Applicant's complaint relates to how the criminal procedure law of the Respondent State was applied in Criminal Case No. 91 of 2000. Furthermore, that, Rule 26 of the Rules lists the issues that fall under the jurisdiction of the Court, which the Applicant failed to invoke. For instance, the Applicant neither requests the Court to consider a case concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the Respondent State, nor does he request an advisory opinion on a legal matter related to the Charter or any other instrument as provided for in Rule 26(1) (b)[6] of the Rules.

24. In addition, the Respondent State submits that the Applicant is neither requesting the Court to initiate an amicable settlement in

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

5 Rule 29(1)(a) of the Rules of Court, 25 September 2020.

6 Rule 29(1)(b) of the Rules of Court, 25 September 2020.

a case before it, in accordance with Rule 26 (1) (c)[7] of the Rules, nor is he requesting for the interpretation of a judgment rendered by the Court in accordance with Rule 26 (1) (d)[8] of the Rules. Furthermore, that he is also not seeking a review of the Court's judgment due to the emergence of new evidence in accordance with Rule 26(1)(e) of the Rules.

25. The Respondent State contends that the Court cannot grant the Applicant's prayer to "quash both the conviction and sentence imposed upon the Applicant and set him at liberty" because it is not within the Court's jurisdiction to act as an appellate court. Also, that the Applicant is asking the Court to sit as an appellate court on matters of evidence and procedures that have already been settled by its Court of Appeal.

26. The Respondent State submits that the Court of Appeal convicted the Applicant of premeditated murder after examining the facts in which the Court of Appeal concluded, that the Applicant's chasing of the fleeing victim and jumping on him after falling into a ditch and stabbing him in the neck indicates an act of malicious aforethought.

27. The Respondent State further contends that the Court of Appeal took into account the Applicant's defence. However, that the Applicant raises before this Court, matters that he did not raise before the High Court, such as the matter of prosecution witnesses before the Court of Appeal. The Respondent State therefore concludes that this Court does not have jurisdiction to hear the instant case.

28. The Applicant submits that, this Court has jurisdiction to decide cases brought before it when a state is a signatory to the Charter. With regard to the instant case, the Applicant invokes specific provisions of the Charter allegedly violated by the Respondent State and submits, on that basis, that the Court has material jurisdiction to hear the case.

29. Moreover, the Applicant avers that the Court has the jurisdiction to examine relevant proceedings in the domestic courts in order to determine whether they are in compliance with the standards set out in the Charter or any other human rights instruments ratified by the Respondent State in accordance with its established jurisprudence in the Court's ruling in *Alex Thomas v The United Republic of Tanzania*.

7 Rule 29(2)(a) of the Rules of Court, 25 September 2020.

8 Rule 29(2)(b) of the Rules of Court, 25 September 2020.

30. The Applicant argues that the alleged violations are of rights provided for in the Charter, which this Court has the jurisdiction to consider.

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31. The Court recalls that, in accordance with its established jurisdiction on the application of Article 3(1) of the Protocol, it has jurisdiction to examine the relevant proceedings before the domestic courts to determine whether they comply with the standards set out in the Charter or in any other human rights instrument to which the State concerned is a party.[9]

32. In the instant case, the Court notes that the Applicant has alleged the violation of rights guaranteed by Articles 3 and 7 (1)(c) of the Charter.

33. Consequently, the Court finds that it has material jurisdiction and dismisses the Respondent State's objection on this point.

B. Other aspects of jurisdiction

34. The Court notes that its personal, temporal and territorial jurisdiction are not contested by the Respondent State. Nonetheless, in line with Rule 49(1) of the Rules,[10] it must ensure that all aspects of its jurisdiction are fulfilled before ruling on the Application.

35. With regard to its personal jurisdiction, the Court recalls that the Respondent State is a Party to the Protocol and that it deposited the Declaration provided for in Article 34(6) of the Protocol with the Chairperson of the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument of withdrawal

9 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190, § 14; *Armand Guéhi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 493, §33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35; *Kenedy Ivan v Tanzania*, ACtHPR, Application No. 025/2016, Judgment of 28 March 2019, (merits and reparations) § 26; *Mhina Zuberi v United Republic of Tanzania*, ACtHPR, Application No. 054/2016, Judgment of 26 February 2021 (merits and reparations), § 22; and *Masoud Rajabu v United Republic of Tanzania*, Application No.008/2016, Judgment of 25 June 2021 (merits and reparations), §§ 21 - 23.

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

of the said Declaration.[11]

36. The Court recalls its jurisprudence that the withdrawal of the Declaration does not have retroactive effect and that it does not come into force until twelve (12) months after its notification, that is, 22 November 2020.[12] The instant Application was filed before the Respondent State deposited its notice of withdrawal, and is, therefore, not affected by the said withdrawal. Accordingly, the Court concludes that it has personal jurisdiction in this case.

37. With respect to its temporal jurisdiction, the Court notes that the alleged violations are based on the Court of Appeal Judgment of 8 November 2011, that is, after the Respondent State had become a party to the Charter and the Protocol and had deposited the Declaration. Moreover, the alleged violations are continuing in nature, with the Applicant remaining convicted after what he considers to be an unfair trial.[13]

38. In view of the foregoing, the Court finds that it has temporal jurisdiction to hear the instant Application.

39. With regard to its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred in the territory of the Respondent State. The Court therefore holds that it has territorial jurisdiction.

40. In view of the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility

41. Article 6(2) of the Protocol stipulates that, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

42. Pursuant to Rule 50(1) of the Rules, "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."[14]

11 See paragraph 2 above.

12 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 35 to 39.

13 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des froits de l'homme et des peuples v Burkina Faso* Application (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

14 Formerly Rule 40 Rules of Court, 2 June 2010.

43. 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 of the following conditions:
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> a. Indicate their authors even if the latter requests anonymity,
>
> b. Are compatible with the Constitutive Act of the African Union and with the Charter,
>
> c. Not contain any disparaging or insulting language;
>
> 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 the Court is 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 Charter of the Organization of African Unity or the provisions of the Charter.

A. Objections to the admissibility of the Application

44. The Respondent State raises two objections to the admissibility of the Application related to the filing of the Application prior to the exhaustion of local remedies and the failure to file the Application within a reasonable time after the exhaustion of local remedies in accordance with Rule 50(2)(e) and (f) of the Rules.

i. Objection based on non-exhaustion of local remedies

45. The Respondent State raises an objection to the admissibility of the Application on the ground that it was filed prior to the exhaustion of local remedies. It submits that the exhaustion of local remedies available is well established in the human rights jurisprudence, and in *Communication No. 333/2006 - SAHRINGON and others v Tanzania*.[15]

46. Citing Judge Antônio Augusto Cançado Trindade on the application of the rule of exhaustion of local remedies in international law, the

15 ACHPR Communication No. 333/2006 – *Southern Africa Human Rights NGO Network v Tanzania.*

Respondent State contends as follows:

> [t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

47. Referring to *Article 19 v Eritrea*, the Respondent State submits that the onus is on the Applicant to demonstrate that he took all the steps to exhaust domestic remedies and not merely cast aspersions on the effectiveness of those remedies.[16]

48. The Respondent State submits that legal remedies are available to the Applicant before the Court of Appeal, and that the Applicant never challenged the credibility of the prosecution witnesses before the Court of Appeal, and this does not happen automatically as a basis for appeal before that court.

49. The Respondent State argues that the Applicant also had an option of filing a constitutional petition to the High Court by relying on the provisions of the Basic Rights and Duties Act No. 3, where he would have claimed that his fundamental rights had been violated. However, he did not exercise that option. Consequently, it contends that, the requirements of Rule 40(5) of the Rules on the admissibility of an Application, were not met, and it therefore prays the Court to dismiss the Application.

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50. The Applicant submits that it would have been unreasonable for him to seek recourse from the High Court, to challenge the constitutionality of the decision of the Court of Appeal, the highest judicial body in the Respondent State composed of three judges, seeking to overrule it by a ruling of the High Court, which is composed of one judge.

16 ACHPR, *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007).

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51. The Court notes that pursuant to Article 56(5) of the Charter, whose requirements 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.[17]

52. The Court notes that, in so far as criminal proceedings against an Applicant have been determined by the highest appellate court, the Respondent State is deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[18]

53. In its established jurisprudence, the Court has held that an Applicant is required to exhaust ordinary judicial remedies.[19] In addition, in several cases relating to the Respondent State, the Court has reiterated that appeals through a constitutional petition and a petition for review of the judgment of the Court of Appeal are extra-ordinary remedies, and thus the Applicant is not required to exhaust them before seizing this Court.[20]

54. In the instant case, the Court notes that the appeal before the Court of Appeal, the highest judicial body of the Respondent State, was decided on 8 November 2011 by the said Court. Therefore, the Respondent State had the opportunity to remedy the alleged violations resulting from the Applicant's trial and appeals.

55. In view of the foregoing, the Court holds that the Applicant has exhausted the local remedies provided for in Article 56(5) of the Charter and Rule 50(2)(e) of the Rules. The Court therefore dismisses the Respondent State's objection based on

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

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

19 *Alex Thomas v United Republic of Tanzania,* (merits) (20 November 2015) 1 AfCLR 465 § 64; *Wilfred Onyango Nganyi and 9 Others v United Republic of Tanzania*, (merits) (18 March 2016) 1 AfCLR 507, § 95.

20 *Alex Thomas v Tanzania* (merits) § 65; *Mohamed Abubakari v Tanzania* (merits), §§66-70; *Christopher Jonas v United Republic of Tanzania* (merits), (28 September 2017) 2 AfCLR 101 § 44.

non-exhaustion of local remedies.

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

56. The Respondent State argues that the Application was not filed within a reasonable time after the exhaustion of local remedies in accordance with the provisions of Rule 40(6) of the Rules. In this regard, it refers to the Applicant stating that he was aggrieved by the ruling of the Court of Appeal in Mwanza in the Criminal Appeal No. 103 of 2007, in which the Court of Appeal dismissed his appeal to review the sentence on 8 November 2011. Furthermore, that the Applicant submits that its application for review of the judgment of the Court of Appeal No. 6 of 2012 is still pending. The Respondent State submits that the Applicant neither indicates the date of submitting his application for review nor does he attach a copy of the application for review to the registry. Thus, it submits, that the Applicant having not heard from the Court of Appeal decided to file this case before the Court on 24 March 2016, that is, after four (4) years and seven (7) months. According to the Respondent State, this period of time, cannot be considered to be reasonable.

57. The Respondent State contends that although Rule 40(6) of the Rules does not specify a timeframe which should be considered as reasonable time, established international human rights jurisprudence considers six (6) months as reasonable time for filing such an application. The Respondent State cites the decision of the Commission in the Communication of *Majuru v Zimbabwe (2008) AHRLR 146*, in which the Commission stated:

> The Charter does not provide for what constitutes 'reasonable period'. However, the Commission has the mandate to interpret the provisions of the Charter and in doing so, it takes cognizance of its duty to protect human and people's rights as stipulated in the Charter. The provisions of other international/regional instruments like the European Convention on Human Rights and Fundamental Freedoms and the Inter-American Convention on Human Rights, are almost similar and state that they … may only deal with the matter … within a period of six months from the date on which the final decision was taken, after this period has elapsed the Court/Commission will no longer entertain the communication.

58. The Respondent State thus submits that the Applicant should have filed his case before this Court before the expiry of the period of six (6) months rather than waiting for years to elapse. Further, that the fact that the Applicant is incarcerated, does not constitute an impediment for him to reach the Court, as he actually did in this

Application No. 018/2016. The Respondent State concludes that the admissibility requirements for an Application before this Court are cumulative, that is, a failure to fulfil one condition renders the Application inadmissible.

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59. The Applicant, on his part, avers that the Rules of Court do not provide for a specific time frame to file the case before this Court after the exhaustion of local remedies. He submits, that the Application is admissible as long as the local remedies have been exhausted. Furthermore, that this Court, in *Application No. 013/2011, Norbert Zongo and others v Burkina Faso*, concluded that the "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[21]

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60. The Court recalls that according to Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, there is no specific time frame within which the case must be brought before the Court. Rule 50(2)(f) of the Rules which restates the provision of Article 56(6) of the Charter, requires an Application to 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."

61. The Court recalls its jurisprudence that: "… the reasonableness of the timeframe for seizure depends on the specific circumstances

21 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme v Burkina Faso* (merits)(28 March 2014) 1 AfCLR 219,§ 92. See also *Thomas v Tanzania (*merits), § 73.

of the case and should be determined on a case-by-case basis."[22]

62. The Court notes that in the instant case, the Applicant filed his Application before this Court on 12 April 2016 after the Court of Appeal had dismissed his appeal on 8 November 2011, that is, four (4) years, five (5) months and four (4) days after the said dismissal. The question is therefore whether the period between the exhaustion of local remedies and the referral to the Court constitutes a reasonable time within the meaning of Article 40(6) of the Rules.[23]

63. The Court notes that, in the instant case, the Applicant is on death row, he is incarcerated and restricted in his movements with limited access to information on the Rules of this Court.[24] The Court further takes into consideration the Applicant's above-mentioned circumstances and finds that the period of four (4) years, five (5) months and four (4) days is a reasonable time.

64. The Court therefore, dismisses the Respondent State's objection to admissibility based on the fact that the Application was not filed within a reasonable time.

B. Other conditions of admissibility

65. The Court notes from the record, that the Application's compliance with the requirements in Article 56(1), (2), (3), (4), and (7) of the Charter and Rule 50(2)(a)(b)(c)(d) and (g) of the Rules[25] is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

66. 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 has clearly indicated his identity.

67. 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 finds that the Application is compatible with the Constitutive Act

22 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme v Burkina Faso* (merits), § 121.

23 Rule 50(2)(e) of the Rules of Court, 25 September 2020.

24 *Alex Thomas v Tanzania* (merits) § 74; *Evodius Rutechura v United Republic of Tanzania,* ACtHPR, Application No.004/2016, Judgment of 26 February 2021 (merits and reparations), §48.

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

of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

68. 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.

69. 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.

70. 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 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.

71. In view of the foregoing, the Court finds that all the conditions of admissibility under Rule 56 of the Charter and Rule 50 of the Rules have been met and declares the Application admissible.

VII. Merits

72. The Court notes that the allegations of violations made by the Applicant can be grouped into two claims: i) the right to a fair trial and ii) the right to equality before the law and to equal protection before the law.

A. Alleged violation of the right to a fair trial

73. The alleged violations of the right to a fair trial relate to: the right to have one's cause heard by an impartial court; the right to be represented by counsel of one's choice and the manner in which the evidence was evaluated.

i. Alleged violation of the right to have his cause heard by an impartial court

74. The Applicant contends that the Court of Appeal occasioned a miscarriage of justice by refusing to consider his defence in violation of Article 3 of the Charter.

75. The Respondent State refutes the Applicant's submissions, arguing that the allegation is not substantiated. It submits that it did not violate Article 3(2) of the Charter, and its Constitution guarantees the right to equality of individuals in accordance with Article 13(1) thereof. Furthermore, that the Respondent State's

Criminal Procedure Act grants the accused the right to defend himself without discrimination and to be treated equally before the law, in accordance with Article 290 of that law. On this basis, the Respondent State contends that the Applicant was given the opportunity to consider all the testimonies of the prosecution witnesses, including the complainant. Even so, that, he did not object to these testimonies in accordance with the Respondent State's law. It further argues that the law grants the accused the right to defend his case and to present evidence in his name or through his counsel.

76. The Respondent State avers that the Applicant was present throughout the trial and was granted the right to free legal aid through a state-appointed counsel at the High Court and the Court of Appeal. The Respondent State further submits that the Applicant was capable of challenging all the witness statements through his counsel and by himself as he was granted the right of defence.

77. The Respondent State contends that these procedures can be found in the records of the High Court. The Respondent State concludes that the Applicant fails to substantiate the allegation that he was denied equal protection of the law. Accordingly, the Respondent State submits that the allegation lacks merit and should be dismissed.

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78. The Court notes that the violation alleged by the Applicant does not fall under Article 3 of the Charter,[26] but rather under Article 7(1) of the Charter, which provides that: "Every individual shall have the right to have his cause heard".

79. The Court recalls its 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.[27]

26 Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.

27 *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 65.

80. In light of the foregoing, the Court finds that the manner in which the national courts handled the Applicant's trial, conviction and sentence does not disclose any manifest error or miscarriage of justice to the Applicant that requires its intervention.

81. The Court therefore dismiss this allegation and finds that the Respondent state has not violated Article 7(1) of the Charter.

ii. Alleged failure to consider the defence of provocation

82. The Applicant submits that he was aggrieved by the fact that domestic courts did not consider his defence of provocation and that the killing of the victim occurred as a consequence of the said provocation by the deceased. He avers that he had no prior intent to kill the deceased.

83. The Respondent State refutes the Applicant's allegations that the High Court failed to consider his defence of provocation by the victim since the Applicant has not provided evidence to that effect. The Respondent State avers that the High Court considered in detail the defence of provocation on page 41 of the judgment. Furthermore, that, the two witnesses confirmed that this defence came too late after the charge had been proven.

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84. The Court has previously held 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 proceeding.[28]

85. However, that does not preclude the Court from assessing the manner in which evidence was examined by domestic courts and determine whether the domestic procedures fulfilled international human rights standards.

86. In the instant case, the Court has analyzed the proceedings not only before the High Court but also in relation to the appeal before the Court of Appeal. It emerges from the record of the trial before the High Court, that the judge heard four witnesses (4)

28 *Kijiji Isiaga v Tanania* (merits), § 65.

and concluded that PW1 had adduced credible testimony. The Court of Appeal also held that there was no reason to reject the conclusions of the High Court as the Applicant had carried a knife in his pocket and chased after the victim. In addition, it held that, the deep wound in the victim's neck dispelled all doubt about the Applicant's intent to kill. Moreover, that, the Applicant fled the scene of the crime after he had stabbed the victim with a knife in the neck, which led to his death.

87. Accordingly, the Court considers that given the manner in which the High Court and the Court of Appeal in the Respondent State handled the case, there is no indication of an error that would necessitate its intervention.

88. As for the Applicant's allegation about the contradictions in the testimony of one of the witnesses, the Court found from the records of the High Court and the judgment of the Court of Appeal that the discrepancy in the testimony of one of the witnesses does not call into question the validity of the testimonies of other witnesses, which the two courts considered coherent and convincing.

89. The Court notes that the defence of provocation was considered and dismissed by the domestic courts, after thorough deliberation, as been unsubstantiated.

90. The Court therefore holds that the assessment made by the domestic courts is not inconsistent with the required international human rights' standards.

91. Accordingly, the Court dismisses the allegation of failure by the domestic courts to consider his defence of provocation.

iii. Alleged failure to consider the Applicant's defence that a quarrel resulted in the victim's death

92. The Applicant contends that the court erred in charging him with premeditated murder instead of manslaughter.

93. The Applicant avers that the High Court erred, on the one hand, by relying on the prosecution witnesses who were not credible and, on the other hand, by refusing to consider his defence so as to alter his charge from murder to manslaughter.

94. The Respondent State submits that the Court of Appeal of Bukoba decided that the case was a matter of premeditated murder instead of manslaughter when it concluded that it was the stabbing by the knife that caused the death of the victim. Furthermore, that the chasing of the deceased and causing him to fall into the ditch, enabled the Applicant to jump on him and to stab him on the neck

with a knife, which indicates the intention to kill.

95. The Respondent State contends that the Applicant raises an allegation before this Court for the first time, which he did not raise previously before the domestic courts, namely, questioning the credibility of witnesses before the Court of Appeal.

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96. The Court observes that the question that arises here is the manner in which the High Court and the Court of Appeal dealt with the evidential contentions raised by the Applicant, especially whether the evidence was duly examined in line with Article 7(1) of the Charter.

97. The Court recalls its established position that examining the particulars of evidence is a matter that should be left to domestic courts. However, as further acknowledged by the Court, it may evaluate the relevant procedures before the domestic courts to determine whether they conform to the standards prescribed by the Charter and other international human rights instruments.[29]

98. From its perusal of the record, the Court notes that the Applicant was represented by counsel before the domestic courts. The Court also notes that both the High Court and the Court of Appeal examined and analysed all the grounds of appeal as filed by the Applicant together with the counter-arguments raised by the Respondent State. With regard to the allegation of a quarrel between the Applicant and the victim before the latter's death, the Court notes that the Applicant alleges that a quarrel occurred which led to the accidental death of the victim and that he did not intend to kill the victim. In order to consider this allegation, the Court of Appeal analyzed in detail the facts of the death through the prosecution witnesses and the arguments of the defence.

99. The Court observes that, the Court of Appeal based its reasoning on seven presumptions for which it concluded that a premeditated murder had occurred.[30] The evidence it relied upon was that the Applicant arrived at the house of PW1 in pursuit of one Petro Nzeimana, who fled after he had injured him. Also, the victim and

29 *Minani Evarist v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402 § 54.

30 Judgment of the Court of Appeal at Mwanza, pp. 9-11.

some of the eye witnesses tried to prevent the Applicant from assaulting Petro who managed to escape. Moreover, that after an argument with Mr. Stanslaus, who was Mr. Petro's brother, the Applicant drew a knife out of his pocket, pursued Mr. Stanslaus until the latter fell into a ditch and that subsequently, the Applicant stabbed him, leaving a deep wound to the neck that led to his death.

100. The Court finds that the manner in which the Court of Appeal dealt with the matter does not disclose any manifest error or miscarriage of justice to the Applicant that requires its intervention. The Court, therefore, holds that the Respondent State did not violate Article 7(1) of the Charter herein.

101. Accordingly, this court rejects the claim of the Applicant.

iv Alleged violation of the right to be defended by counsel of his choice

102. The Applicant contends that he was not provided with free legal representation of his choice during the trial proceedings in violation of Article 7(1)(c) of the Charter.

103. The Respondent State avers that throughout his trial at the High Court and the Court of Appeal, the Applicant, was provided with free legal aid services. In its Response, the Respondent State provided the names of the three lawyers who defended the Applicant, as follows, Ms. Philip, and Mr. Kabonga before the High Court and Mr. Faustin Malungu before the Court of Appeal. It submits thus, that the Applicant was provided with free legal representation throughout his trial in the domestic courts.

104. The Respondent State also avers that the Applicant fails to substantiate this allegation and that it is not clear to it on what criterion he bases his claim.

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105. Article 7(1)(c) of the Charter provides as follows: "[e]very 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."

106. Although, the Charter does not provide explicitly for the right to free legal assistance, the Court has interpreted the provision

of Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[31] and determined that the right to defence includes the right to be provided with free legal assistance.[32]

107. The Court observes as established in the jurisprudence of the European Court of Human Rights, that, the right to be defended by counsel of one's choice is not absolute when the counsel is provided through a free legal assistance scheme.[33] In this case, the important thing is to know if the Applicant was provided with effective legal representation as opposed to whether he was allowed to be represented by a lawyer of his choice.[34]

108. The Respondent State therefore bears the burden of providing adequate free legal representation to the Applicant. The Court intervenes only if the actual representation is not provided.[35]

109. The Court notes from the perusal of the record that the Applicant was represented by several lawyers during his trial before the domestic courts. These lawyers were appointed by the Respondent State at its own expense. The Court also concludes that there is nothing from the record that shows that the Applicant was not adequately represented or that he raised this issue as a complaint before the domestic courts. Moreover, the Applicant did not substantiate this allegation.[36]

110. In light of the foregoing, the Court holds that the Respondent State did not violate Article 7(1)(c) of the Charter in relation to the allegation herein.

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

111. The Applicant alleges that the Court of Appeal's failure to consider his notice of motion for review of the judgment constitutes a violation of the duty to administer justice and consequently, a violation of Article 3(1(2) of the Charter.

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

32 *Alex Thomas v Tanzania* (merits) §114; *Kijiji Isiaga v Tanzania* (merits) § 118; *Kennedy Onyanchi and Charles Njoka v Tanzania* (merits) §104.

33 ECHR, *Croissant v Germany* (1993) Application No.1361/89 § 29, *Kamasinski v Austria (1989)* Application No.9783/82 § 65.

34 ECHR, *Lagerblom v Sweden* (2003) Application No.26891/95 §§54-56.

35 ECHR, *Kamasinski v Austria* (1989) Application No.9783/82, §65.

36 *Evodius Rutechura v Tanzania,* §74.

112. The Respondent State submits that the Applicant neither indicates the date of submitting his application for review nor does he attach a copy of the said application for review.

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113. The Court observes that Article 3 of the Charter provides as follows:

1. Every individual shall be equal before the law
2. Every individual shall be entitled to equal protection of the law.

114. The Court notes in accordance with its established jurisprudence that the onus is on the Applicant to demonstrate how the Respondent State's conduct breached the guarantees of equality before the law and equal treatment of the law resulting in a violation of Article 3 of the Charter.[37]

115. In the instant case, the Court notes that the Applicant did not demonstrate how he was treated differently from others in the same situation. In this regard, the Court reiterates its previous position that "general statements to the effect that a right has been violated are not enough. More substantiation is required."[38]

116. The Court does not find evidence in the Applicant's pleadings nor does the Applicant show how he was treated differently from other individuals in similar circumstances[39] resulting in inequality before the law or unequal protection by the law, in violation of Article 3 of the Charter.

117. Accordingly, the Court dismisses this allegation and finds that the Respondent State did not violate the Applicants' rights under Article 3 of the Charter.

VIII. Reparations

118. The Applicant prays the Court to grant him justice where there was miscarriage, order the Respondent State to quash both the

37 *Alex Thomas v Tanzania* (merits) §140; *Armand Guéhi v Tanzania* (merits and reparations), §157.

38 *Ibid*.

39 *Mgosi Mwita Makungu v United Republic of Tanzania* (merits), (7 December 2018), 2 AfCLR 550, §70; *Alex Thomas v Tanzania* (merits), §140; *Mohamed Abubakari v Tanzania* (merits), § 154; *Kijiji Isiaga v Tanzania* (merits), § 86.

conviction and sentence and set him free. He further prays the Court to award him reparations commensurate to an individual's annual income for the time he served in prison.

119. The Respondent State prays the Court to dismiss all of the Applicant's prayers, though it did not respond specifically to the Applicant's reparation claims.

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120. 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 the fair compensation or reparation.

121. The Court, having found that the Respondent State did not violate any of the Applicant's rights, dismisses the Applicant's prayers for reparations.

IX. Costs

122. The Respondent State prays the Court to order the Applicant to bear the costs.

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123. The Court notes that Rule 32(2) of the Rules[40] provides that "unless the Court decides otherwise, each party shall bear its own costs".

124. Consequently, the Court decides that, each party shall bear its own costs.

40 Formerly Rule 30(2) of the Rules of Court, 2 June 2010.

X. Operative part

125. For these reasons,
The Court,
Unanimously:
Jurisdiction
i. *Dismisses* the objections to its jurisdiction;
ii. *Declares* that it has jurisdiction.

Admissibility
iii. *Dismisses* the objection to the admissibility of the Application;
iv. *Declares* the Application admissible.

Merits
v. *Finds* that the Respondent State has not violated Article 3 (1) and (2) of the Charter with respect to the Applicant's right to equality before the law and to equal protection of the law;
vi. *Finds* that the Respondent State has not violated Article 7(1) of the Charter with regard to the Applicant's right to have his cause heard by an impartial court;
vii. *Finds* that the Respondent State has not violated Article 7(1)(c) of the Charter with regard to the Applicant's right to free legal assistance.

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

Costs
ix. *Orders* each Party to bear its own costs.