Kisase v Tanzania (judgment) (2021) 5 AfCLR 728

Application 005/2016, *Sadick Marwa Kisase v United Republic of Tanzania*

Judgment, 2 December 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 been tried, convicted, and sentenced for armed robbery by the domestic courts of the Respondent State. His appeal before the national courts had failed and he was serving a 30-year term of imprisonment when he filed this Application. The Applicant claimed that the domestic legal processes from his trial to the denial of his appeal were in violation of his human rights. The Court held that the Respondent State had violated the Applicant's right to defence due to the failure to provide free legal representation to the Applicant. The Court therefore granted the Applicant damages for the moral prejudice he suffered.

Jurisdiction (material jurisdiction, 19-22)

Admissibility (exhaustion of local remedies, 35-45; submission within a reasonable time, 48-53)

Fair trial (right to be heard, 65-70, 73-74; free legal assistance, 77-79; equal protection of law, 82-84)

Reparations (state responsibility to make reparation, 88; moral prejudice, 91; non-pecuniary measures,93)

I. The Parties

1. Sadick Marwa Kisase (hereinafter referred to as "the Applicant") is a Tanzanian national who, at the time of filing the Application, was serving a thirty (30) years' imprisonment sentence at Butimba Central Prison, Mwanza, after being convicted for the offence of armed robbery. The Applicant alleges the violation of his rights to a fair trial in relation to proceedings before domestic courts.

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 this Court, it emerges that the Applicant was convicted and sentenced on 30 June 2008 by the District Court of Geita to thirty (30) years imprisonment and twelve (12) strokes of the cane in criminal case N° 598 of 2007 for having committed the crime of armed robbery, an offence punishable under sections 287 A of the Tanzanian Penal Code.

4. Dissatisfied with this decision, the Applicant filed criminal appeal No. 85/2009 of 17 August 2009 before the High Court of Tanzania, which on 18 March 2011 upheld the judgment of the District Court.

5. The Applicant then appealed the High Court's judgment before the Court of Appeal, which on 26 July 2013 upheld the lower court's decision. The Applicant avers that, on 21 March 2014, he filed an application for review of the judgment of the Court of Appeal, which he states was pending at the time of submitting the present Application.

B. Alleged Violations

6. The Applicant alleges that:

i. The Court of Appeal of Tanzania in Mwanza "handed down erroneously its judgment against the applicant on 26 July 2013 and then caused him severe harm when it did not schedule for a hearing of his review request, whereas other applications lodged after his had been registered and scheduled for hearing".

ii. The Court of Appeal "had not considered all the grounds of this defense and clustered them in to nine grounds. This legal proceeding was detrimental to the applicant insofar as it violated his fundamental

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

right to have his cause heard by a court of law as provided for in article 3(2) of the Charter".

iii. As the Respondent State did not offer him legal representation during his trial, he "was deprived of his right to have his cause heard, which had a prejudicial effect on him; and this constitutes a violation of his fundamental rights as set out in article 7(1)(c) and (d) of the Charter and articles 1 and 107 (2) (b) of the Tanzanian Constitution of 1997".

III. Summary of the Procedure before the Court

7. This Application was filed on 13 January 2016 and served on the Respondent State on 15 February 2016.

8. The Parties filed their pleadings within the time stipulated by the Court.

9. Pleadings were closed on 26 April 2020 and the Parties were duly notified.

IV. Prayers of the Parties

10. The Applicant prays the Court to

i. Render justice by annulling the guilty verdict and the sentence meted out to him and order his release;

ii. Grant him reparation for the violation of his rights; and

iii. Order such other measures or remedies that the Court may deem fit to grant.

11. The Respondent State prays the Court the rule that

i. The Court does have jurisdiction to hear the matter and that the application is inadmissible;

ii. The Respondent State has not violated Articles 3(1)(2) and 7(1)(c) of the African Charter on Human and Peoples' Rights;

iii. The Respondent State should not pay reparations to the Applicant;

iv. The Application should be dismissed as being baseless.

V. Jurisdiction

12. 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.

13. 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."[2]

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

15. In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction.

A. Objection to material jurisdiction

16. The Respondent State objects to this Court's jurisdiction to consider the present Application on the ground that the Applicant is in effect asking the Court to exercise appellate jurisdiction that is to examine matters of facts and law already settled by domestic courts. Relying on the Court's ruling in the matter of *Ernest Francis Mtingwi v Republic of Malawi*, the Respondent State avers that it is not within the powers of this Court to set aside decisions of domestic courts and order the release of a convicted person.

17. The Applicant rebuts the Respondent State's objection and asserts that the Court has jurisdiction to review decisions of domestic courts as long as there is a violation of provisions of the Charter or of any other relevant human right instrument.

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18. 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.[3]

19. The issue arising is whether by examining the present Application, this Court exercises appellate jurisdiction vis-à-vis domestic courts.

20. The Court recalls that, as is now firmly established in its case-law, it does not exercise appellate jurisdiction with respect to

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

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

claims already examined by national courts.[4] However, the Court reiterates its position that 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.[5]

21. In the present matter, the Applicant is asking this Court to determine whether the proceedings before domestic courts were conducted in line with the Respondent State's obligations under the Charter. Furthermore, the allegations made by the Applicant related to fair trial rights guaranteed under Article 7(1) of the Charter. It cannot therefore be said that this Court is exercising appellate jurisdiction.

22. In light of the above, the Respondent State's objection is dismissed; and the Court consequently holds that it has material jurisdiction to hear this Application.

B. Other aspects of jurisdiction

23. 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.

24. 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.[6] 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

4 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.

5 *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.

6 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations) §§ 35-39.

November 2020.[7] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.

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

26. 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.[8] Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

27. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred within the territory of the Respondent State, which is a state party to the Protocol. In the circumstances, the Court holds that it has territorial jurisdiction.

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

VI. Admissibility

29. 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".

30. In line with Rule 50(1) of the Rules,[9] "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."

31. 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;
>
> b. Are compatible with the Constitutive Act of the African Union and with the Charter;

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

8 *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.

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

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

32. The Respondent State raises two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies while the second one relates to whether the Application was filed within a reasonable time.

B. Objection based on non-exhaustion of local remedies

33. The Respondent State argues that the Application does not meet the requirement of exhaustion of local remedies as the Applicant should have challenged the alleged violations of his rights under the Basic Rights and Duties Enforcement Act. The Respondent State also avers that local remedies were not exhausted because the Applicant never requested for legal aid in the course of domestic proceedings and that he is therefore raising the issue of legal aid for the first time before this Court.

34. The Applicant refutes the Respondent State's objection and argues that he could not file a constitutional petition under the Basic Rights and Duties Enforcement Act since the concerned violations are alleged to have been committed in the proceedings before the Court of Appeal. The Applicant contends that such petition could not be filed before a single High Court judge to challenge the ruling of the Court of Appeal which is the highest court of the land made up of a panel of three judges.

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35. 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.[10]

36. The Court observes that the issues arising for determination regarding admissibility in the present case are firstly, whether the Applicant did not exhaust local remedies by failing to request for legal aid in the course of domestic proceedings prior to raising it before this Court, and secondly, whether the Applicant ought to have challenged the alleged violations under the Basic Rights and Duties Enforcement Act.

37. On the first issue, the Court recalls its case-law that it does not necessarily exercise first instance jurisdiction when an issue is brought before it without having been expressly raised by the Applicant in the course of domestic proceedings.[11] As the Court has previously held, it can examine such issue as long as it is part of a "bundle of rights and guarantees", which the domestic courts ought to have observed while adjudicating the Applicant's case.[12]

38. In its case-law, this Court has held that the "bundle of rights and guarantees" applies, among others, in circumstances where: i) the issue to be bundled should be inherently connected to other issues that were expressly raised and adjudicated in the course of domestic proceedings;[13] or ii) the said issue was or is deemed to have been known to the domestic judicial authorities.[14] It follows that the bundle of rights and guarantees is understood to encompass all measures that the courts are meant to consider and decide on in the course of judicial proceedings without the parties having to request for them. The question is whether, in

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

11 *Ibid.*, § 60.

12 *Idem*.

13 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 53; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 46.

14 *Alex Thomas v Tanzania* (merits), § 60.

the present Application, access to legal aid meets the "bundle of rights" requirement earlier recalled.

39. In this respect, the Court first notes that, issues raised and adjudicated in domestic courts involved the Applicant's fair trial rights, including assessment of evidence, consideration of arguments, and failure to examine a request for review. The Court observes that the question of legal aid, which the Respondent State avers is being raised for the first time before this Court, is intrinsically connected to the rights whose violation is alleged in the Application before this Court.

40. Secondly, in the present Application, the Court observes that in so far as the proceedings against the Applicant have been determined by the Court of Appeal, the issue of legal aid is deemed to have been known to the domestic judicial authorities.[15] The latter therefore had an opportunity and ought to have addressed the issue even if it was not raised by the Applicant.

41. Consequently, the Court finds that, in the present Application, legal aid is inherent in the bundle of rights as earlier elaborated.

42. In light of the above, this Court dismisses the Respondent State's objection related to the request for legal aid before domestic courts.

43. On the second issue, the Court restates its established position that, the constitutional petition provided under the Basic Rights and Duties Enforcement Act of the Respondent State is an extraordinary remedy, which the Applicant is not required to exhaust.[16]

44. On the basis of the foregoing, this Court dismisses the Respondent State's objection related to the failure to file a constitutional petition.

45. As a consequence of the above, this Court finds that domestic remedies have been exhausted in this matter.

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

46. The Respondent State claims that the Application does not meet the requirement of being filed within a reasonable time given that it was filed sixteen (16) months after the judgment of the Court of Appeal whereas the African Commission's decision in the *Majuru*

15 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 624, § 76.

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

case suggests that applications should be filed within six (6) months of exhausting local remedies.

47. The Applicant on his part refutes the Respondent State's objection and argues that there is no provision in the Rules for assessing what constitutes a reasonable time to file an application. According to the Applicant, the Court should consider that his Application was filed within a reasonable time bearing in mind that he filed a review of the Court of Appeal's judgment on 26 July 2013 and had still been waiting for the review request to be listed for hearing at the time the present Application was filed before this Court.

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48. The issue arising for determination is whether the time observed by the Applicant before bringing his Application before this Court is reasonable within the meaning of Article 56(6) of the Charter.

49. From the record before the Court, the Applicant exhausted local remedies on 26 July 2013, which is the date on which the application for review of the Court of Appeal's judgment was filed. The present Application was filed on 13 January 2016. The Court therefore must assess whether the period of two (2) years, five (5) months and fifteen (15) days that elapsed between the two events is reasonable within the meaning of Article 56(6) of the Charter.

50. 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". As such, the Respondent State's reference to the period of six (6) months cannot be justified.

51. In its previous decisions, 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."[17] Circumstances considered by the Court includes the Applicants being incarcerated, lay, indigent restricted

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

in their movements or having little or no information about the existence of the Court.[18]

52. The Court notes that in the instant matter, the Applicant has been incarcerated, did not have legal representation during the proceedings before domestic courts and is self-represented before this Court. Most notably, the facts of the case occurred between 2007 and 2013, which is in the early years of the Court's operation when members of the general public, let alone persons in the situation of the Applicant in the present case, could not necessarily be presumed to have sufficient awareness of requirements governing proceedings before this Court. Finally, the Respondent State filed its Declaration in 2010. In such circumstances, this Court considers that the period of time that it took the Applicant to file the case should be considered reasonable.

53. In light of the foregoing, the Court dismisses the Respondent State's objection and finds that the Application has been filed within a reasonable time.

D. Other conditions of admissibility

54. 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 ascertain that these requirements have been fulfilled.

55. In particular, the Court notes that the requirement laid down in Rule 50(2)(a) of the Rules is met since the Applicant's identity is known.

56. The Court also 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. The Application also does not contain any claim or prayer that is incompatible with the said provision of the Act. Therefore, the Court considers that the

18 *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.

Application meets the requirement of Rule 50(2)(b) of the Rules.

57. 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.

58. Regarding the condition stated in Rule 50(2)(d) of the Rules, the Court notes that the Application fulfils the said condition as it is not based exclusively on news disseminated through the mass media.

59. 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. The Application therefore meets this condition.

60. 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

61. The Applicant alleges the violation of his rights to a fair trial, namely his right to have his cause heard and his right to legal assistance, protected under Article 7(1) of the Charter. The Applicant also alleges the violation of his right to equal protection of the law under Article 3(2) of the Charter

A. Alleged violation of the right to a fair trial

62. The Court will first consider the alleged violation of the right to have one's cause heard and then the alleged violation of the right to legal assistance.

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

63. The Applicant alleges that the Court of Appeal did not examine all his arguments but rather grouped them into nine clusters although each of his grounds of appeal were invoked for different purposes. According to the Applicant, this affected the merits of each of his pleas and consequently violated his right to have his cause heard. The Applicant further alleges that, although it was filed on 26 July 2013, his application for review of the Court of Appeal's judgment had not been scheduled for hearing at the time

the present Application was filed.

64. The Respondent State rebuts the Applicant's allegation, and submits that all his arguments were duly examined by the Court of Appeal. It is the Respondent State's submission that the Court of Appeal held that of the three arguments submitted only the third one was relevant, which states that "… the prosecution has not been able to gather evidence beyond reasonable doubt …". With respect to the review of the Court of Appeal's judgment, the Respondent State avers that the Applicant has failed to prove his allegation and has never produced evidence that the request for review was filed.

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65. The Court notes that Article 7(1) of the Charter provides that "every individual shall have the right to have his cause heard …". In its case law, this Court has held that such right imposes an obligation on the judicial authorities to undertake a proper assessment of arguments and evidence submitted by the Applicant.[19] The provisions of Article 7(1) are also to the effect that requests filed before courts of law must be examined and claims by the applicant be answered.

66. The Court further notes that the allegation of violation of the right to have one's cause heard is two-fold. The first limb relates to the propriety of the proceedings before the Court of Appeal, while the second limb involves the review process in the same court.

ii. Examination of the Applicant's argument in the Court of Appeal

67. The Court observes that, according to the Applicant, the Court of Appeal did not conduct a proper examination of his arguments by failing to consider that two prosecution witnesses contradicted each other, evidence of one witness was admitted contrary to the law, discrepancy in evidence of the same witness was ignored, one prosecution witness and an accused were family members,

19 See *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, §§ 97-111; *Mohmed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 559, §§ 174, 193, 194.

the applicant's defence of alibi was ignored, the generator was wrongly admitted as evidence and one witness evidence on the generator was not trustworthy, and the applicant had no legal representation throughout the trial.

68. The Court further observes that the Respondent State does not expressly make submission on each of the above points stated by the Applicant but generally avers that all arguments and evidence of the Applicant were duly considered and domestic courts gave reasons for considering only some but not all of them.

69. From the record of the case, the Court notes that the Applicant's alibi was considered and rejected by the High Court whose finding was upheld by the Court of Appeal. Similarly, on the eight grounds of appeal raised by the Applicant, the Court of Appeal, referring to domestic law and established case-law, dismissed four of them on the ground that they were never raised in the proceedings before the first appellate court that is the High Court. Besides, the Court of Appeal fully considered the eight grounds and found that the ground relating to the Applicant's conviction based on contradictory prosecution evidence constituted the most important one. On the said ground, the Court of Appeal found that there was no room to fault the first appellate court as its determination was based on the doctrine of recent possession. After dismissing that ground for having no merit, the Court of Appeal further concluded that its finding thereon sufficed to dispose of the case.[20]

70. This Court considers that, in light of the above, given that the Applicant was heard and actually reiterated his alibi, and also challenged prosecution evidence on the doctrine of recent possession, therefore the Court of Appeal cannot be said to have ignored his arguments as he avers. Furthermore, the Court of Appeal decided to not consider other arguments made by the Applicant only after demonstrating why the ground relating to the contradictory prosecution evidence was decisive in arriving at the conviction of the Applicant.

71. In the circumstances, this Court finds that the Applicant's claim is not founded and dismisses the same.

iii. Failure of the Court of Appeal to examine the Applicant's review

72. The Court notes that the Applicant's claim in respect of this

20 See *Sadick Marwa Kisase v The Republic*, Criminal Appeal No. 83 of 2012, Judgment of the Court Appeal of Tanzania at Mwanza, 26 July 2013.

allegation is that the Court of Appeal did not consider his application for review. The claim is challenged by the Respondent State on the ground that the Applicant has failed to prove that the application was ever filed.

73. The Court recalls the general principle of law that who alleges must prove.[21] In the present matter, the Applicant ought to have proved that he actually filed the application for review of the Court of Appeal's judgment. From the record of the case, such evidence is not adduced by the Applicant and therefore, the burden cannot shift to the Respondent State.

74. In light of the above, the Court dismisses the Applicant's claim in relation to his application for review of the Court of Appeal's judgment.

B. Alleged violation of the right to free legal assistance

75. The Applicant alleges that he was not afforded legal representation throughout the proceedings in domestic courts, which constitute a violation of his right to legal assistance.

76. The Respondent State refutes the Applicant's allegation and contends that the Applicant was not afforded legal representation because he did not request for it under the Legal Aid (Criminal Proceedings) Act. It is also the Respondent State's contention that the Applicant could have challenged before the trial courts the absence of legal assistance in the course of domestic proceedings, which he did not do.

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77. The Court recalls that the right to defence protected under Article 7(1)(c) of the Charter, interpreted in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[22] includes the right to be provided with free legal assistance.[23]

21 See also *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, §§ 142-146; *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, §§ 66-74.

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

23 *Alex Thomas v Tanzania* (merits) § 114; *Kijiji Isiaga v Tanzania* (merits) § 72; *Kennedy Owino Onyachi and Another v Tanzania* (merits) § 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.[24]

78. The Court notes that, in the instant matter, the Applicant was convicted of armed robbery and sentenced to thirty (30) imprisonment. It is also evident from the facts of the case that the Applicant was indigent given that he did not engage a lawyer when the Respondent State failed to grant him legal aid throughout the domestic proceedings. In the circumstances, the duty lay with the Respondent State to grant the Applicant legal aid even if he did not make a request to that effect. Failure to do so amounts to a breach of the Applicant's right to legal assistance.

79. As a consequence, the Court finds that the Respondent State has violated the Applicant's right to free legal assistance as protected under Article 7(1)(c) of the Charter, interpreted in light of Article 14(3)(d) of the ICCPR.

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

80. The Applicant submits that, although he filed his application of review before the Court of Appeal on 21 March 2014 and provided all the material and evidence to corroborate the same, the application was not scheduled for hearing, whereas other application filed subsequently were registered, set down for hearing and determined. According to the Applicant this constitutes a violation of his right to equal protection of the law.

81. The Respondent State refutes this claim and calls on the Applicant to provide proof thereof.

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82. The Court notes that the situation described by the Applicant as a violation of his right to equal protection of the law relates to Article 3(2) of the Charter, which stipulates that: "Every individual shall be entitled to equal protection of the law".

83. 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. More specifically,

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

the Court recalls that, as earlier found, the Applicant did not adduce evidence that he actually filed an application for review.

84. 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

85. The Applicant prays the Court to quash his conviction and sentencing, and order the Respondent State to set him at liberty. He also requests the Court to grant him reparation for the violations suffered including the amount of Tanzanian Shilling Ninety-Eight Million (TZS 98,000,000) for loss of income, mental and stress shock, physical pain and general damages.

86. The Respondent State prays the Court to find that the Applicant is not entitled to any reparation.

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87. The Court notes that Article 27(1) of the Protocol stipulates that

> If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

88. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered. Finally, the Applicant bears the onus to justify the claims made.[25]

89. The Court has further held, with respect to moral loss, it exercises judicial discretion in equity.[26] In such instances, the Court has adopted the practice of awarding lump sums.[27]

90. As this Court has earlier found, the Respondent State violated the Applicants' right to defence, provided under Article 7(1)(c) of the

25 *Norbert Zongo and Others v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, §§ 52-59; and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§ 27-29.

26 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55. See also *Kalebi Elisamehe v Tanzania*, § 97.

27 *Ally Rajabu and Others v United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and

Charter, as read together with Article 14(3)(d) of the ICCPR, by failing to provide him with free legal assistance.

A. Pecuniary reparations

91. The Court, based on its earlier conclusions, finds that the violation of his right to free legal assistance caused moral prejudice to the Applicant. In light of its consistent case-law[28] and circumstances earlier outlined in the present judgment, the Court, therefore, in exercising its discretion, awards him the amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.

92. In respect of the pecuniary compensation sought for prejudice allegedly ensuing from loss of income, mental and stress shock, physical pain and general damages, the Court notes that the Applicant does not adduce evidence in support of the claims. They are therefore dismissed.

B. Non-pecuniary reparations

93. Regarding the order to annul his conviction and sentence, and release him from prison, and without minimising the gravity of the violation, the Court considers that the nature of the violation in the instant case does not reveal any circumstance that signifies that the Applicant's imprisonment is a miscarriage of justice or an arbitrary decision. The Applicant also failed to elaborate on specific and compelling circumstances to justify the order for his release.[29]

94. In view of the foregoing, this prayer is therefore dismissed.

IX. Costs

95. In their submissions both Parties prayed the Court to order the other pays the costs.

reparations), § 119; *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

28 *Christopher Jonas v United Republic of Tanzania*, ACtHPR, Application No. 025/2016, Judgment of 25 September 2020 (reparations); *Kenedy Ivan v United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48; *Diocles William v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 426.

29 *Alex Thomas v Tanzania* (reparations), § 157.

96. Pursuant to Rule 32(2) of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs".

97. In the instant Case, the Court decides that each Party will bear its own costs.

X. Operative Part

98. For these reasons

The Court,

Unanimously,

Jurisdiction

i. *Dismisses* the objection to its material jurisdiction;

ii. *Declares* that it has jurisdiction.

Admissibility

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

iv. *Declares* the Application admissible.

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 equal protection of the law under Article 3(2) of the Charter in respect of the alleged failure to examine the application for review.

vii. *Finds* that the Respondent State has 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, by failing to provide him with free legal assistance.

Reparations

Pecuniary reparations

viii. *Does not grant* the Applicant damages sought for loss of income, mental shock, stress, physical pain and general damages;

ix. *Grants* the Applicant damages for the moral prejudice he suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300,000);

x. *Orders* the Respondent State to pay the Applicant the sum ordered in paragraph (ix) above, free from tax and within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the

period of delayed payment until the amount is fully paid.

Non-pecuniary reparations

xi. *Dismisses* the Applicant's prayer for the annulment of his conviction and sentence and his release from prison.

Implementation and reporting

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

Costs

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