Makame & Ors v Tanzania (judgment) (2021) 5 AfCLR 257

Application 023/2016, *Yahaya Zumo Makame & Three (3) Others v United Republic of Tanzania*

Judgment, 25 June 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 Applicants, who were unsuccessful in an appeal against their domestic conviction and sentence for drug related offences brought this Application claiming *inter alia*, that the denial of opportunity for further appeal from the Court of Appeal in the Respondent State was a violation of their human rights. The Applicants also sought provisional measures to suspend fines imposed by the domestic court. The Court held that the Respondent State had not violated the rights of the Applicants.

Jurisdiction (appellate jurisdiction, 27; review jurisdiction, 28-29; material jurisdiction, 28-29; withdrawal of article 34(6) Declaration, 31)

Admissibility (exhaustion of local remedies, 45-47; submission within reasonable time, 51-53)

Provisional measures (simultaneous consideration with merits, 63)

Fair hearing (right to appeal, 74-75; evaluation of evidence before domestic courts, 82-84, 87; right to interpreter, 90-93)

Equality (different treatment of convicts, 76)

Separate Opinion: BENSAOULA

Fair hearing (right to interpreter, 5-8)

I. The Parties

1. Yahaya Zumo Makame, Salum Mohamed Mpakarasi and Said Ibrahim, all Tanzanian nationals, and Mohamedi Gholumgader Pourdad, a national of the Islamic Republic of Iran, (hereinafter referred to as "the Applicants") were, at the time of filing the Application, incarcerated at Maweni Central Prison, Tanga, after having been convicted and sentenced to twenty-five (25) years imprisonment each, for the offence of trafficking narcotic drugs.

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 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 original Application that on 10 August 2012 the High Court of Tanzania sitting at Tanga convicted the Applicants, together with a co-accused who is not an Applicant before this Court, of trafficking narcotic drugs and sentenced them to twenty-five (25) years imprisonment each. The Applicants were also ordered to pay a fine of Tanzanian Shillings One Billion, Four Hundred Thirty Eight Million, Three Hundred and Sixty-four Thousand and Four hundred (TZS 1, 438,364,400).

4. Dissatisfied with the High Court's decision, the Applicants appealed to the Court of Appeal of Tanzania against both their sentence and conviction. On 8 September 2015, the Court of Appeal dismissed the appeal in its entirety.

B. Alleged violations

5. The Applicants contend that the Respondent State's legal system only permits one appeal from a decision of the High Court. The absence of a higher court, above the Court of Appeal, the Applicants submit, violates their right to fair trial and is contrary to Articles 3 and 7 of the Charter, Article 14 (1) and (5) of the International Convention on Civil and Political Rights (hereinafter referred to as "the ICCPR") and Article 10 of the Universal Declaration of

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) § 38.

Human Rights (hereinafter referred to as "the UDHR").

6. The Applicants also allege a violation of their right to fair trial as a result of the manner in which the Court of Appeal dealt with the evidence adduced in support of their conviction. It is also their contention that the Court of Appeal was partial in its assessment of the evidence.

7. The Applicants further argue that the Court of Appeal heard their appeal without due consideration for whether the Fourth Applicant, Mohamedi Gholumgader Pourdad, who is an Iranian national, could understand the proceedings. The Applicants submit that the failure to provide the Fourth Applicant with an interpreter, violates Article 7 of the Charter, Article 14(3)(a) and 14(3)(f) of the ICCPR and Article 10 of the UDHR.

III. Summary of the Procedure before the Court

8. The Application was filed on 13 April 2016 and it was served on the Respondent State on 7 June 2016. The Respondent State was requested to file its Response within sixty (60) days of receipt of the Application.

9. After several extensions of time, the Respondent State filed its Response to the Application on 25 May 2017.

10. On 8 October 2018 the Court, *suo motu*, granted the Applicants legal aid under its legal aid scheme.

11. On 19 November 2018, the Applicants were granted leave to file additional submissions and a time limit of thirty (30), from the date of notification, was set.

12. On 21 December 2018 the Applicants filed additional submissions and also included therein a request for provisional measures. The additional submissions, together with the request for provisional measures, were served on the Respondent State on 16 January 2019. The Respondent State was given thirty (30) days to respond but it did not file a response.

13. Pleadings were closed on 28 May 2019 and the Parties were duly notified.

IV. Prayers of the Parties

14. On the merits of the Application, the Applicants pray the Court for the following:

i. A declaration that the Respondent State has violated Articles 1, 3 and 7 of the Charter, Article 14 of the ICCPR and Article 10 of the UDHR;

ii. An order to the Respondent State to release the Applicants from prison;

iii. In the event that prayer (ii) is not granted, an order for the Respondent to revisit the case and order a retrial;

iv. An order directing the Respondent State to take legislative or remedial measures to give effect to the Court's findings in their application to others;

v. An order for costs;

vi. An order for such reparations as the Court sees fit.

15. In relation to provisional measures, the Applicants pray the Court for the following:

i. An order that the Respondent shall not seek to recover the outstanding fine currently forming part of the Applicants' sentence;

ii. An order that the Respondent State shall report to the Court within 30 days of the interim order on the measures taken for its implementation.

16. The Respondent State prays the Court for the following, in respect of jurisdiction and the admissibility of the Application:

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

ii. That, the application has not met the admissibility requirement provided by Rule 40(5) of the Rules of Court.

iii. That, the Application has not met the admissibility requirement provided by Rule 40(6) of the Rules of Court.

iv. That, the Application be declared inadmissible and duly dismissed.

17. As to the merits of the Application, the Respondent State prays the Court to order that:

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

ii. That, the United Republic of Tanzania did not violate the Applicant's Rights provided under Article 7 of the African Charter on Human and Peoples' Rights.

iii. That, the Application be dismissed for lack of merit.

iv. That, the Applicants' prayers be dismissed in their entirety.

v. That, the Applicants continue to serve their sentence.

vi. That, the Applicants not be awarded reparations.

V. Jurisdiction

18. 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.

19. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules." [2]

20. On the basis of the above-cited provisions, the Court must preliminarily ascertain its jurisdiction and dispose of objections to its jurisdiction, if there are any.

21. In the present Application, the Respondent State has raised an objection to the Court's material jurisdiction and this will be addressed next.

A. Objections to material jurisdiction

i. Objection alleging that the Court is being called to assume appellate jurisdiction

22. The Respondent State avers that the Court lacks jurisdiction to examine the Application as the Applicants are asking it to sit as an appellate court and deliberate on matters of evidence and procedure already finalised by its Court of Appeal.

23. In support of its position, the Respondent State cites the judgment of the Court in *Ernest Francis Mtingwi v Republic of Malawi* where the Court held that "it does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and or regional courts."[3]

24. In reply, the Applicants submit that the Court has jurisdiction as per Article 3 of the Protocol since the violations alleged and the rights invoked in the Application are protected under the Charter. The Applicants further submit that although the Court is not an appeal court it has confirmed that this does not preclude it from examining whether the procedures before a national court are in accordance with the Charter or other international human rights

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

3 (jurisdiction) (15 March 2013) 1 AfCLR 190.

instruments ratified by the State in question.

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25. 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.[4]

26. The Court notes that Respondent State's objection in the instant Application raised two issues, first, that the Applicants are inviting it to sit as an appellate court when it is not empowered to do so. Second, that the Applicants are asking it to evaluate the evidence and procedures already finalised by its domestic courts.

27. On the objection that the Court is being asked to sit as an appellate court, the Court notes, in accordance with its established jurisprudence, "…that it is not an appellate body with respect to decisions of national courts.[5] However, as the Court emphasised in *Alex Thomas v United Republic of Tanzania* that: "… this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[6] Consequently, the Court dismisses the objection alleging that it would be sitting as an appellate court in adjudicating this case.

ii. Objection alleging that the Court is being asked to evaluate evidence and procedures finalised by domestic courts

28. As regards the objection that the Court lacks jurisdiction since the

4 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18.

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

6 *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations) *§ 26; Armand Guehi v United Republic of Tanzania* (merits and reparations) 7 December 2018, 2 AfCLR 247 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287 § 35.

Applicants are asking it to evaluate the evidence and procedures already finalised by its domestic courts, the Court recalls that it has jurisdiction as long as the rights alleged by an Applicant as having been violated fall under the bundle of rights and guarantees invoked at the national courts. In the present case, the Court notes that the allegations made by the Applicants involve violations of the Charter, the ICCPR and the UDHR all of which are instruments applicable to the Respondent State.[7] Given this context, the Court holds that the allegations raised by the Applicants are within the purview of its jurisdiction.

29. In light of the above, the Court holds that it would neither be sitting as an appellate Court nor would it be examining afresh evidence and procedures finalised by a domestic Court if it pronounces itself in this case. The Court thus holds that it has material jurisdiction in this matter and the Respondent State's objection is, therefore, dismissed.

B. Other aspects of jurisdiction

30. The Court observes that none of the Parties has raised any objection in respect of its personal, temporal or 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.

31. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that the Respondent State, on 21 November 2019, 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.[8] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[9] This Application having been filed before the

7 The Respondent State acceded to the ICCPR on 11 June 1976. The Court has also held that the UDHR is part of customary international law, see, *Anudo Ochieng Anudo v United Republic of Tanzania* (22 March 2018) (merits) 2 AfCLR 248 § 76.

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

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

Respondent State deposited its notice of withdrawal is thus not affected by it.

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

33. In respect of its temporal jurisdiction, the Court notes all the violations alleged by the Applicants arose after the Respondent State became a Party to the Charter and also after it deposited the Declaration. Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

34. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicants happened within the territory of the Respondent State. In the circumstances, the Court holds that its territorial jurisdiction is established.

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

VI. Admissibility

36. 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".

37. Pursuant to Rule 50(1) of the Rules,[10] "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."

38. 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:

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;

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 the Commission is seized with the

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

matter, and

e. 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 Organisation of African Unity or the provisions of the Charter.

A. Conditions of admissibility in contention between the Parties

39. While some of the above-mentioned conditions are not in contention between the Parties, the Respondent State has raised two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies and the second relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of domestic remedies

40. The Court observes that the Respondent State's objection in relation to the exhaustion of local remedies is premised on the contention that the Applicants had remedies at their disposal which they did not utilise. Specifically, the Respondent State contends that the Applicants could have raised the issue of the location of the gas lighter and cassava flour before the Court of Appeal. It is also contended that questions about the authenticity of a signature on a prosecution exhibit could have been raised before the Court of Appeal.

41. The Respondent State also submits that the allegation that the Court of Appeal applied a double standard in acquitting a co-accused but convicting the Applicants could have been raised in a review application before the Court of Appeal. With regard to the allegation that the Fourth Applicant was denied the services of an interpreter, the Respondent State submits that the Applicants could have informed their defence counsel to convey this to the Court. Overall, the Respondent State prays that the Application be dismissed for failure to exhaust domestic remedies.

42. The Applicants submit that they took their case to the Court of Appeal which is the highest court in the Respondent State and that they, therefore, exhausted local remedies. The Applicants further submit that Respondent State misconstrues their argument when it argues that they could have raised the errors concerning the location of the gas lighters and cassava flour with the Court of Appeal when it is the very court which the Applicants allege

made the errors. The Applicants aver that with no higher court to challenge these alleged errors, the Applicants have exhausted local remedies.

43. The Applicants also submit that this Court has consistently ruled that the application for review of a Court of Appeal decision, within the judicial system of Respondent State, amounts to an extraordinary measure which need not be exhausted for admissibility of an application before the Court. The Applicants further refer to the principle of the bundle of the rights and guarantees, as developed by the Court, to justify that they need not have specifically raised all alleged fair trial violations at the domestic level.

44. The Applicants also aver that Respondent State's submission that the Fourth Applicant could have conveyed the need for an interpreter through defence counsel is unclear as it does not indicate the court which the Respondent State is referring to; that is whether it is the High Court or the Court of Appeal. The Applicants contend that the nationality of the Fourth Applicant was common knowledge before the Court of Appeal, yet the Court of Appeal did not seek to clarify the potential fair trial considerations.

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45. The Court notes that pursuant to Article 56(5) of the Charter, whose requirements are mirrored 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.[11]

46. With respect to whether the Applicants should have filed an application for review of the Court of Appeal's decision, this Court has consistently held that, as applied in the Respondent State's judicial system, such a process is an extraordinary remedy that the Applicants are not required to exhaust within the meaning of

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

Article 56(5) of the Charter.[12]

47. Regarding those allegations made by the Applicants, which the Respondent State contends were never raised before domestic courts, the Court notes that these happened in the course of the domestic judicial proceedings that led to the Applicants' conviction and sentence. The allegations, therefore, form part of the bundle and guarantees that were related to or were the basis of their appeals. Accordingly, the domestic courts had ample opportunity to address the allegations even without the Applicants having raised them explicitly. It would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for these claims.[13] The Applicants should thus be deemed to have exhausted local remedies with respect to these allegations.

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

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

49. The Respondent State submits that the period of eight (8) months that it took the Applicants to file the Application before this Court, after the Court of Appeal delivered its judgment, is not reasonable time within the meaning of Rule 40(6) of the Rules. In support of its argument, the Respondent State refers to the decision of the African Commission in the matter of *Michael Majuru v Republic of Zimbabwe* and prays the Court to declare the matter inadmissible.[14]

50. The Applicants contend that the Application must be considered to have been filed within a reasonable time given the circumstances of the matter and their situation as lay, indigent and incarcerated persons.

12 See Application No. 025/2016. Judgment of 26 May 2019(merits and reparations), *Kenedy Ivan v United Republic of Tanzania*; *Mohamed Abubakari v Tanzania* (merits), §§ 66-70; *Christopher Jonas v Tanzania* (merits), § 44.

13 *Jibu Amir alias Mussa and another v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 § 37; *Alex Thomas v Tanzania* (merits), §§ 60-65, *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) § 54.

14 See ACHPR Communication 308/2005 *Michael Majuru v Republic of Zimbabwe*, 2008.

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51. The Court recalls that Article 56(6) of the Charter and Rule 50(2)(f) of the Rules do not specify any period within which Applicants should seize the Court. Rather, these provisions speak of filing of the Application within a reasonable time from the date when local remedies were exhausted or from the date the Commission is seized of the matter. The Court notes that, in the present matter, the time within which the Application should have been filed must be computed from the date the Court of Appeal dismissed the Applicants' appeal, which is 8 September 2015. Since the Application was filed before this Court on 13 April 2016, the period to be considered is seven (7) months and six (6) days.

52. As the Court has held "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."[15] Some of the factors that the Court considers in determining the reasonableness of time include the personal situation of the Applicant including whether he/she was a lay, indigent or incarcerated person.[16]

53. The Court notes that, in the present case, the Applicants are lay and incarcerated. Given the personal situation of the Applicants, which resulted in, among other things, limited mobility and access to information, the Court holds that they acted within reasonable time to activate the jurisdiction of this Court.[17]

54. The Court, therefore, dismisses the Respondent State's objection based on failure to file the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

55. 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 requirements are reiterated in sub-rules 50(2)(a), (b), (c), (d), and (g) of Rule 50 of the Rules, is not in contention between the Parties. Nevertheless, the Court must still

15 See Application No. 013/2011. Ruling of 28/06/2013 (Preliminary Objections), *Norbert Zongo and others v Burkina Faso* (herein after referred to as *Norbert Zongo and others v Burkina Faso* (Preliminary Objections)").

16 See, *Christopher Jonas v United Republic of Tanzania* (28 September 2017) 2 AfCLR 101 § 44.

17 See *Alex Thomas v Tanzania* (merits) § 74.

ascertain that these requirements have been fulfilled.

56. 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 Applicants have clearly indicated their identity.

57. The Court also finds that the requirement laid down in Rule 50(2)(b) of the Rules is also met, since no request made by the Applicants is incompatible with the Constitutive Act of the African Union or with the Charter.

58. 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.

59. 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.

60. 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, the provisions of the Charter or of any legal instrument of the African Union.

61. 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. On the request for provisional measures

62. The Court recalls that in their Additional Submissions, the Applicants prayed the Court for an "interim protective order pursuant to Article 27(2) of the Court Protocol and Rule 51 of the Court Rules requiring the Respondent to cease in any attempts to recover the fine element of the Applicants' sentence …pending the completion of the case".

63. The Court notes that it is disposing of the Applicants' claims on the merits simultaneously with the request for provisional measures. Consequently, the Court will pronounce itself on the request for provisional measures when it considers the merits of the Application.

VIII. Merits

64. The Applicants allege that the Respondent State has violated their rights under Articles 1, 3 and 7 of the Charter, Article 14

of the ICCPR and Article 10 of the UDHR. These violations, as alleged by the Applicants, however, all relate to the right to a fair trial. Resultantly, the Court will examine all the alleged violations under the rubric of the right to a fair trial.

A. Alleged violation of the right to a fair trial

i. Alleged violation of the right to appeal

65. The Applicants argue that having been convicted by the High Court, they were only able to avail themselves of a single appeal court; the Court of Appeal. The Applicants submit that the lack of a higher court beyond the Court of Appeal, as is the case in other countries, is a violation of their right to a fair trial and contrary to Article 7 of the Charter.

66. The Applicants further argue that the Respondent State's judicial system put them at a disadvantage compared to those prosecuted for other offences who can enjoy two levels of appeal. According to the Applicants, this is a violation of Article 3 of the Charter, Article 14 (1) and (5) of the ICCPR and Article 10 of the UDHR. With regard to Article 3 of the Charter, the Applicants argue that this difference in situation, compared to others passing through the Respondent's judicial system, violates their right to equality before the law.

67. The Respondent State submits that if the Applicants were aggrieved with the decision of the Court of Appeal, they had a remedy which was to file for a review. The Respondent State further avers that the Applicants' allegations lack merit and should be dismissed.

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68. 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.

69. The Court further observes that Article 7(1)(a) of the Charter provides thus:

> Every individual shall have the right to have his cause heard. This comprises (a) the right to an appeal to competent national organs

against acts of violating his fundamental rights as recognised and guaranteed by the conventions, laws, regulations and customs in force.

70. The Court notes that the Applicants are making two interrelated allegations in connection to the alleged violation of their right to appeal. Firstly, they are alleging a violation due to the failure to have their sentences reviewed by a higher court beyond the Court of Appeal. Secondly, they are alleging that they were subjected to different treatment since other convicts are able to have recourse to two levels of appeal.

71. With regard to the first allegation, the Court notes that the court system in the Respondent State is three-tiered. The Court of Appeal is the highest appellate court and below it is the High Court, with its various divisions, and further below are subordinate courts.

72. The Court also notes that section 164 of the Respondent State's Criminal Procedure Act, read together with the First Schedule of the same Act, outlines which offences are triable by the High Court exclusively or concurrently with subordinate courts and also which offences wherein the original jurisdiction lies with subordinate courts.

73. The Court further notes that the original jurisdiction for dealing with offences under section 16 of the Drugs and Prevention of Illicit Traffic in Drugs Act – under which the Applicants were charged – vests with the High Court. It is clear to the Court, therefore, that for any conviction and sentence under section 16 of the Drugs and Prevention of Illicit Traffic in Drugs Act, the right of appeal lies with Court of Appeal.

74. The Court holds that the right to an appeal or review of a decision of a lower court as provided for under Article 7 of the Charter and Article 15(5) of the ICCPR simply entails the provision of another level of judicial structures for one to have recourse to beyond the trial court. The essence of the right is that findings of a trial court should always be amenable to review by another court.[18] The right does not prescribe the number of levels at which an appeal must be processed.

75. The Court thus finds that the absence of a higher court, above the Court of Appeal, is not a violation of Article 7 of the Charter or Article 14 of the ICCPR.

18 Human Rights Committee "General Comment No. 32 – Right to equality before courts and tribunals and right to a fair trial" https://www.refworld.org/docid/478b2b2f2.html (accessed 17 November 2020).

76. The Court further notes that the Applicants alleged, relatedly, that the fact that convicts whose trials commenced at the subordinate court level are accorded two levels of appeals is a violation of their right to equality since no similar accommodation was accorded to them. In this connection, the Court notes that the Applicants did not demonstrate that there is any fault with the law that vests jurisdiction for different offences, either in the High Court only or in the subordinate courts only or concurrently in both the High Court and subordinate courts. Neither have the Applicants demonstrated that other people convicted for trafficking narcotic drugs are treated differently. For this reason, the Court holds that the different treatment of convicts, according to the offences for which they were convicted, does not violate the Charter and, consequently, dismisses the Applicants' allegation.

77. Given the above findings, the Court dismisses the Applicants' allegation of a violation of their right to fair trial by reason of there being no review of their sentences by a higher court beyond the Court of Appeal. The Court also dismisses the Applicants' allegation of their differentiated treatment as compared to other convicts who are able to have recourse to two levels of appeal.

ii. Alleged violation due to erroneous findings by the trial court

78. The Applicants allege that the Respondent State's Court of Appeal erred in failing to correctly direct itself as to the location of gas lighters (Exhibit P.9 and P.10). The Applicants submit that the errors as to the location of items seized is of fundamental importance and demonstrates their unsafe conviction. In the Applicants' view, this showed the Court of Appeal's lack of understanding of the case and also demonstrates the potential for an unsafe conviction.

79. The Applicants also contend that the Court of Appeal erred in failing to correctly recall the location where the cassava flour was seized (Exhibit P.15) and also failed to establish the genuineness of the signature on the Exhibit P.12. The Applicants submit that the Court of Appeal was required to have mastery of the entirety of the evidence in order to safely adjudicate guilt or innocence. The errors on the part of the Court of Appeal, according to the Applicants, demonstrate that the Applicants' conviction was unsafe and, therefore, a violation of the right to a fair trial.

80. The Respondent State submits that the evidence available clearly pointed out the location of the gas lighters and the cassava flour. In the Respondent State's view, the Court of Appeal duly considered

the location of these items of evidence. The Respondent State also submits that the Applicants could have raised these issues as grounds of appeal but they did not and that these allegations are misconceived, lack merit and should be dismissed.

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81. The Court observes that the question that arises here is the manner in which the Court of Appeal dealt with the evidential contentions raised by the Applicants especially whether the same were duly examined in line with Article 7(1) of the Charter.

82. The Court recalls its established position that examination of particulars of evidence is a matter that should be left for domestic courts. However, as further acknowledged by the Court, it may nevertheless evaluate the relevant procedures before the national courts to determine whether they conform to the standards prescribed by the Charter and other international human rights instruments.[19]

83. From its perusal of the record, the Court notes that the Applicants were represented by counsel before the Court of Appeal. It also notes that the Court of Appeal analysed all the grounds of appeal as filed by the Applicants together with the counter-arguments raised by the State. In terms of the grounds of appeal raised by the Applicants, the Court notes that, before the Court of Appeal, the Applicants, among other grounds, included the generic allegation that the learned trial judge grossly misdirected himself in fact and in law in convicting them against the weight of the evidence. To respond to this allegation, the Court of Appeal went into detail analysing the manner in which the Applicants were arrested and subsequently tried before the High Court. It was only after this analysis that it dismissed the Applicants' appeal.

84. Given the manner in which the Court of Appeal dealt with the Applicants' appeal, the Court finds nothing which could merit its intervention. The Court, therefore, holds that the manner in which Court of Appeal made its findings in respect of the Applicants' appeal did not violate Article 7 of the Charter. The Applicants' allegation in this connection is thus dismissed.

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

iii. Allegation that the Applicants' conviction was based on "double-standards"

85. The Applicants submit that the acquittal of one of the co-accused due to his lack of awareness of the contents of one of the vehicles demonstrates the unsafe basis of their conviction. The Applicants also submit that the Court of Appeal erred in its recollection of the procedure by which their signatures were obtained as well as in respect of where the various items of evidence were found in the vehicles during their arrest. . In the Applicants' view, all this lends credence to the lack of safety of their conviction.

86. The Respondent State disputes this allegation and submits that the Applicants never raised this concern as a ground of appeal before the Court of Appeal. The Respondent State also submits that the allegation lacks merit and must be dismissed.

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87. The Court reiterates that it, generally, does not interfere with matters of evidence as established by domestic courts except where there are manifest errors which implicate violations of the Charter or other applicable international human rights standards. In respect of the Applicants' allegations concerning the acquittal of one of the co-accused, allegedly on the basis that he did not know the contents of the vehicle, the Court notes that this matter was also evaluated by the Court of Appeal. The Court does not find anything patently wrong with the manner in which the Court of Appeal treated the evidence in relation to this issue to warrant its interference. For this reason, the allegation by the Applicants that double standards were applied in acquitting one of the co-accused is dismissed.

iv Alleged violation due to failure to provide the Fourth Applicant with an interpreter

88. The Applicants aver that the Fourth Applicant, Mohamedi Gholumgader Pourdad, is a citizen of the Islamic Republic of Iran and his native language is Persian. The Applicants contend that the Fourth Applicant's right to fair trial was violated by reason of not being provided with an interpreter when the Court of Appeal heard the appeal.

89. The Respondent State submits that this allegation was not raised as a ground of appeal before the Court of Appeal. The Respondent State also submits that, had the Fourth Applicant made it known that he required an interpreter one would have been provided at the Respondent State's expense. The Respondent State, therefore, submits that the Applicants' allegation lacks merit and must be dismissed.

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90. The Court recalls that Article 7(1)(c) of the Charter does not expressly provide for the right to be assisted by an interpreter. However, the provision should be interpreted in light of Article 14(3)(a) of the ICCPR which provides that:

> …everyone shall be entitled to…(a) be promptly informed and in detail in a language which he understands of the nature and cause of the change against him; and (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

91. A joint reading of the above cited provisions, as confirmed by the Court, establishes that every accused person has the right to an interpreter if he/she cannot understand or speak the language being used in court.[20]

92. In the present case, the Court notes that the Applicants state that "…the issue of the 3rd Applicant the justices of the Court of Appeal of Tanzania erroneously heard the applicant's appeal without considering necessity of his nationality and language he understands by not providing him the interpreter to ease up his understanding of the appeal hearing." It is clear, therefore, that the Applicants' grievance in this regard relates specifically to the conduct of proceedings before the Court of Appeal.

93. The Court notes, as earlier pointed out, that the judgment of the Court of Appeal indicates that the Applicants had the services of counsel during the hearing of their appeal. Although the Court has acknowledged that an accused person is entitled to an interpreter if he/she cannot understand or speak the language that is being used in court, it is practically necessary that where an accused person is represented by counsel that the need for interpretation

20 See *Armand Guehi v Tanzania* (merits and reparations), § 73.

is communicated to the Court. From the Court's perusal of the record, the Court notes that the Applicants were represented by counsel during their appeal but there is no indication that a request for interpretation services on behalf of the Fourth Applicant was brought to the attention of the Court.

94. In the circumstances, therefore, the Court finds no basis for holding that the absence of an interpreter led to a violation of the Fourth Applicant's right to a fair trial. The Applicants' allegation on this point is, therefore, dismissed.

B. Alleged violation of Article 1 of the Charter

95. The Applicants submit that in the event that the Court finds violations of Articles 3 and 7 of the Charter, it should also find a violation of Article 1 of the Charter.

96. The Respondent State did not respond to the Applicants' submissions on this point.

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97. Article 1 of the Charter provides as follows:

> The Member States of the Organisation of the African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

98. The Court considers that examining an alleged violation of Article 1 of the Charter involves a determination not only of whether the measures adopted by the Respondent State are available but also if these measures were implemented in order to achieve the intended object and purpose of the Charter. As a consequence, whenever a substantive right of the Charter is violated due to the Respondent State's failure to meet these obligations, Article 1 will be violated.[21]

99. In the present case, the Court having found that the Respondent State has not violated any provisions of the Charter, the Court consequently finds that the Respondent State has also not

21 See *Armand Guehi v Tanzania* (merits and reparations), § 149-150 and *Alex Thomas v Tanzania* (merits) § 135.

violated Article 1 of the Charter.

IX. Reparations

100. In terms of reparations, the Applicants pray the Court to make "an order for such reparations as the Court sees fit."

101. The Respondent State did not make any submissions on reparations.

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102. 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.

103. The Court having found that the Respondent State has not violated any of the Applicants' rights dismisses the Applicants' claim for reparations.

104. With respect to the Applicants' request for provisional measures, the Court, having dismissed the Applicants' case on the merits, finds that the same has become moot.

X. Costs

105. The Applicants pray the Court for costs incurred by *pro bono* Counsel.

106. The Respondent State did not make any submissions on costs.

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107. The Court notes that Rule 32 of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs, if any".[22] In the present Application, considering that the Applicants benefitted from the Court's Legal Aid Scheme, the Court orders that each Party shall bear its own costs.

22 Formerly Rule 30, Rules of Court, 2 June 2010.

XI. Operative part

108. For these reasons,
The Court,
Unanimously:
On jurisdiction
i. Dismisses the objection to its material jurisdiction;
ii. Declares that it has jurisdiction.

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

On merits
v. Finds that the Respondent State has not violated the Applicants' right to equality under Article 3 of the Charter;
vi. Finds that the Respondent State has not violated the Applicants' right to a fair trial under Article 7 of the Charter;
vii. Finds that the Respondent State has not violated Article 1 of the Charter.

On reparations
viii. Dismisses the Applicants' prayers for reparations.
ix. Finds that the request for provisional measures is moot.

On costs
x. Orders each party to bear its own costs.

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Separate Opinion: BENSAOULA

1. I agree with the Operative Part of the decision rendered today regarding the majority of the allegations deemed unfounded by the Court. However, I make this statement because I am not convinced of the manner in which the allegation by the fourth Applicant that "he did not benefit from the assistance of an Interpreter" was dealt with.

2. Indeed, it appears from the facts, as related by the Applicants, that Mr. Mohamedi Gholimgader Pourdad, a national of the

Islamic Republic of Iran whose mother tongue is Persian, had his right to a fair trial violated by the fact that he was not provided an Interpreter when the Court of Appeal heard his Appeal.

3. In its response, the Respondent State merely argued that the above-mentioned Applicant did not make it known that he needed the assistance of an Interpreter, otherwise he would have been provided one at his own expense.

4. Paragraph 7 (1) (c) of the Charter states very clearly that "the right to defence including the right to be defended by a counsel of one's choice". The right to defence is often defined as "the prerogatives that a person has to defend himself in a trial". This right applies to the phase of investigation, instruction or judgment as well.

5. I conclude from the reading of the above mentioned Article of the Charter, that although the Court concluded that the article does not expressly mention the right to an Interpreter (see paragraph 90 of the Judgment), it seems to me that the Legislator makes it clear that "the right to a defence" is in a broad sense a term that includes all the mechanisms that enable the accused person and his interlocutors to understand each other, and this, in all the phases of the procedure to defend oneself. The above-mentioned Article 1 well implies the right to an interpreter when it provides for "the right to defence" even if it does not expressly mention it. The principle is that every Applicant has the choice to defend himself first or to have recourse to a defence counsel. To defend himself he can either ask for the help of an Interpreter or the Court itself appoints one if the situation of the accused so requires, either because he is not a resident of the country where the trial takes place, or a national of another country, as in the instant case!

6. The Court subsequently referred to Article 14/3C of the International Covenant on Civil and Political Rights which expressly provides for the right to an interpreter.

7. However, on reading this Article, it is clear that the Legislator first requires the accused to be informed in a language he understands and in detail, of the nature and cause for the accusation against him, and also be informed that he can have the free assistance of an interpreter if he cannot understand or speak the language used in court.

8. Therefore, the first obligation of the interlocutors, in this case the Judges, is to inform the accused of the nature and cause for the accusation against him, in his language. The second obligation is to appoint an Interpreter.

9. However, at no point, whether in the allegations of the Applicant or in the responses of the Respondent State, does it appear that

the Judges on Appeal were concerned about this obligation, and in no paragraph of the Judgment does the Court consider this obligation of the Judges.

10. The first obligation of the interlocutors confirms that at any stage of the proceedings the interlocutor of the accused must by himself ensure that the accused understands the language used in court. The interlocutor then enforces the right to an Interpreter if he establishes that the accused does not understand the language used in court.

11. From the reading of paragraph 93 of the Judgment, it appears that the Court emphasized the fact that the Applicant was provided the services of a defence counsel and that the need for the assistance of an Interpreter was not communicated to the Court, based on which it therefore concludes that the allegation is unfounded.

12. In my opinion it is imperative that the Court imposes through its jurisprudence rules regarding the necessity of an Interpreter and the conditions thereof. It is important that the accused knows that he has the right to an interpreter and he must be informed about it! This information must be communicated to him in a language he understands. The accused must be provided information on the assistance of the interpreter the same way as that of information on a Lawyer!

13. This is because in the absence of an interpreter it is doubtful that the accused could have made an informed choice in his answers to all the questions he was asked, which could be prejudicial to the fairness of the procedure as a whole.

14. Moreover, I think that the fact that the accused has a rudimentary knowledge of the language of the proceedings can in no way be an obstacle to providing him/her with interpretation into a language that he/she understands sufficiently so that the rights of the defence can be fully exercised.

15. I also think that even when the accused is represented by a Lawyer, it is not enough that the Lawyer, and not his client, knows the language used in the hearing. Hence the unconvincing ground of paragraph 93 of the Judgment!

16. It is clear that the right to a fair trial includes "the right to participate in the hearing" which requires that the accused be able to understand the pleadings and inform his lawyer of any element that should be raised in his defence.

17. This leads me to say that providing interpretation at a trial is primordial because it does not only concern the relations between the accused and his Lawyer but also those between the accused

and those who judge him.

18. I will conclude by saying that as guarantors of the rights of the accused and the fairness of proceedings, both domestic and international jurisdictions must impose the obligation of the judge to identify the needs in terms of interpretation in consultation with the accused, and to ensure that the absence of an interpreter does not jeopardise his full participation in the proceedings. It is of particular importance that courts take note of this, especially when the accused is a foreigner!