Rajabu v Tanzania (judgment) (2021) 5 AfCLR 282

Application 008/2016, *Masoud Rajabu 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 Applicant had been convicted and sentenced for rape by a domestic court in the Respondent State. Failing to secure a reversal of the conviction and sentence on appeal, the Applicant brought this Application claiming several violations of his right to fair trial. The Court held that the Respondent State had only violated the Applicant's right to free legal assistance and granted the Applicant damages for moral prejudice.

Jurisdiction (appellate jurisdiction, 21-22; material jurisdiction, 24-26; withdrawal of article 34(6) declaration, 28)

Admissibility (exhaustion of local remedies, 42-44; submission within reasonable time, 49-53)

Fair hearing (evaluation of evidence before domestic courts, 70-72; right to participate in one's trial, 77-81; right to free legal representation, 86-88; right to trial within a reasonable time, 92-94)

Reparations (state responsibility to make reparations, 100; nature and scope of reparations, 101-102; moral prejudice, 104; fair compensation violation of right to free legal assistance, 104; non-pecuniary reparations, 105)

I. The Parties

1. Mr. Masoud Rajabu (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who at the time of the filing of this Application was serving thirty (30) years' prison sentence having been convicted and sentenced before the District Court at Tanga for the offence of rape of a minor.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations (hereinafter referred to

as "Declaration"). On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission (hereinafter referred to as "AUC"), an instrument withdrawing its Declaration under Article 34(6) of the Protocol. In accordance with the applicable law, the Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, one year after its deposit, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. The record before this Court indicates that, on 21 December 2009, the Applicant, who was a tailor, invited an eleven (11) year old minor to his home for her to try out a gown that he had sown. It is in the Applicant's house that he was said to have committed rape of the minor. This incident was later reported to the village chairman who directed that the Applicant be taken to the police station, where he was subsequently charged with the offence of rape on 23 December 2009.

4. On 8 April 2010, the Applicant was convicted of rape by the District Court at Tanga and sentenced to thirty (30) years' imprisonment. Being dissatisfied with the conviction and sentence, the Applicant appealed to the High Court of Tanzania sitting at Tanga, which delivered judgment on 4 May 2012, dismissing his appeal.

5. On 8 May 2012, the Applicant appealed before the Court of Appeal, which upheld the judgment of the High Court on 29 July 2013. On 6 August 2013, he filed a motion in the Court of Appeal for "revision" of his case which was rejected on 19 November 2013.

B. Alleged violations

6. The Applicant alleges :

i. That his conviction was based on insufficient evidence;

ii. That the delivery of the judgment that convicted him *in absentia* violates his rights under Section 226(2) of the Respondent State's Criminal Procedure Act;

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

iii. That he was denied free legal representation during his trial and appeals in violation of Article 7(1)(c) of the Charter;

iv. That his application for review of the Court of Appeal's judgment had not been decided at the time of filing the Application before this Court, which he considers as unreasonable delay contrary to Article 7(1)(d) of the Charter.

III. Summary of the Procedure before the Court

7. The Application was filed on 10 February 2016 and served on the Respondent State on 15 March 2016 and it was transmitted to the entities listed in Rules 42(4) of the Rules on 31 March 2016. The Respondent State filed its response on 14 July 2016 and this was transmitted to the Applicant on the same date.

8. The Parties filed other pleadings on the merits of the Application in accordance within the time stipulated by the Court.

9. Written pleadings were closed with effect of 10 September 2020 and the Parties were notified thereof.

IV. Prayers of the Parties

10. The Applicant prays the Court to, find the violations of his rights, quash his conviction and set aside his sentence.

11. In its response, the Respondent State prays the Court to grant the following orders:

i. That, the Honourable Court is not vested with jurisdiction to adjudicate the Application;

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

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

iv. That, the Application be dismissed in accordance with Rule 38 of the Rules of Court;

v. That, the costs of this Application be borne by the Applicant;

vi. That, the Application lacks merit…

12. The Respondent State further prays the Court to declare that it has not violated any of the rights alleged by the Applicant.

V. Jurisdiction

13. 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.

14. In accordance with Rule 49(1) of the Rules, "the Court shall primarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules."[2]

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

16. The Respondent State raises an objection to the material jurisdiction of the Court on two grounds.

A. Objection to material jurisdiction

17. The Respondent State submits that the Applicant is asking the Court to sit as an appellate court on matters that have already been concluded by its Court of Appeal, the highest Court in its judicial system.

18. The Respondent State contends that the Court cannot grant the Applicant's prayer to "quash both the conviction and sentence imposed upon the Applicant and set him at liberty" because, Article 3(1) of the Protocol does not grant the Court the jurisdiction to act as an appellate court.

19. According to the Respondent State, this Application is also calling on the Court to sit as a Court of first instance contrary to Article 3(1) of the Protocol as the Applicant is raising issues that he never raised at the municipal courts. The Respondent State argues that the issues raised for the first time concern: the right to be defended by counsel of his choice, the right to be tried within a reasonable time and the right to free legal representation. Consequently, the Court lacks material jurisdiction to examine the allegations of violations of these rights.

20. The Applicant did not address these issues.

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

21. On the objection by the Respondent State, that the Court is being asked to sit as an appellate court, The Court notes in accordance with its established jurisprudence that, it is competent to examine 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 instruments related to human rights ratified by the State concerned.[3]

22. Furthermore, the alleged violations relating to the procedures at the domestic courts are of rights provided for in the Charter. Thus, the Court is not being required to sit as an appellate court but to act within the confines of its powers.

23. The Court notes that the Applicant raises allegations of violations of the human rights enshrined in Article 7 of the Charter, whose interpretation and application falls within its jurisdiction. The Respondent State's objection in this respect is therefore dismissed.

24. As regards the objection that the Court lacks jurisdiction since it is not a court of first instance, the Court recalls that it has jurisdiction as long as the rights alleged by an Applicant as having been violated, fall under a bundle of rights and guarantees invoked at the national courts.

25. In the instant case, the Court notes that the Applicant has alleged the violation of rights guaranteed by the Charter and by other international human rights instruments ratified by the Respondent State. It therefore rejects the Respondent State's objection on this point.

26. Consequently, the Court holds that it has material jurisdiction.

B. Other aspects of jurisdiction

27. The Court notes that its personal, temporal and territorial jurisdiction are not disputed by the Respondent State and that nothing on the record indicates that the Court lacks such jurisdiction. The Court further notes that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited the Declaration with the AUC. Subsequently, on 21 November 2019, it deposited an instrument

3 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14.; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations) *§ 26; Armand Guehi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 477 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018), 2 AfCLR 287 § 35.

withdrawing its Declaration.

28. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.[4]

29. In view of the above, the Court finds that it has personal jurisdiction.

30. The Court notes that it has temporal jurisdiction on the basis that the alleged violations are continuing in nature, in that the Applicant remains convicted and is serving a sentence of thirty (30) years' imprisonment on grounds which he considers are wrong and indefensible;[5] thus the Application can still be considered by the Court.

31. The Court also notes that it has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

32. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Admissibility

33. In terms of 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."

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

35. Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
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> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
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> b. comply with the Constitutive Act of the Union and the Charter;
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> c. not contain any disparaging or insulting language;
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> d. not based exclusively on news disseminated through the mass media;

4 *Cheusi v Tanzania* (merits) §§ 35-39.

5 *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.

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

e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

f. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter;

g. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

36. The Respondent State raises an objection to the admissibility of the Application on two grounds in regards to non-exhaustion local remedies and non-compliance with filing an application within a reasonable time.

A. Conditions of admissibility in contention between the Parties

37. The Respondent State submits that the Application does not comply with Rule 40(5) and 40(6) of the Rules[7] regarding exhaustion of local remedies and on the requirement to file applications within a reasonable time after exhaustion of local remedies.

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

38. The Respondent State contends that the Applicant has raised some allegations of human rights violations in this Court, for the first time. The Respondent State is of the view, that the Applicant only raised two grounds in his appeal before the Court of Appeal, that is, that the "trial magistrate and appellate Court erred in law by failing to scrutinize the credibility of the prosecution witnesses and that the case was not proven beyond reasonable doubt." Therefore, he did not fully utilize the Court of Appeal to address the other grievances that he raises before this Court.

39. The Respondent State citing the decision of the African Commission on Human and Peoples' Rights of *Southern African Human rights NGO Network and others v Tanzania* submits that the exhaustion of local remedies is an essential principle in international law and that the principle requires a complainant to "utilise all legal remedies" in the municipal courts before seizing

7 Rule 50(2)(e) and (f) of the Rules of Court, 25 September 2020.

the international body like the Court.[8]

40. Referring to *Article 19 v Eritrea*, the Respondent State submits that the onus is on the Applicant to demonstrate that he took all the steps to exhaust the domestic remedies and not merely cast aspersions on the effectiveness of those remedies.[9] It submits that the legal remedies available to the Applicant which he should have exhausted were never prolonged and thus he should have pursued them.

41. The Applicant did not reply to this objection.

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42. The Court notes that pursuant to Rule 50(2)(e) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are not available, they are ineffective, insufficient or the procedure to pursue them is unduly prolonged.[10] This rule aims at providing States the opportunity to deal with human rights violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations.[11]

43. In the instant case, the Court notes from the record that, on 8 May 2012, the Applicant appealed against his conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 29 July 2013, the Court of Appeal upheld the judgment of the High Court. The Court further notes that, the Applicant's alleged violations herein form part of the bundle of rights and guarantees that were related to or were the basis of his appeals in the national courts.[12] Therefore, the

8 ACHPR, *Southern African Human rights NGO Network and others v Tanzania* Communication No. 333/2006.

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

10 *Norbert Zongo and Others v Burkina Faso* (preliminary objections) *op. cit.* § 84.

11 *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94; *Dismas Bunyerere v United Republic of Tanzania* (merits and reparations), ACtHPR, Application No. 031/2015, Judgment of 28 November 2019 § 35.

12 See *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465, § 60; *Kennedy Owino Onyanchi and Njoka v United Republic of Tanzania* (merits) (2017) 2 AfCLR 65 § 54.

Respondent State had ample opportunity to redress the alleged violations even without the Applicant raising them explicitly. Furthermore, the Applicant applied for "revision" of his matter in the Court of Appeal, even though it is an extra-ordinary remedy. It is thus clear that the Applicant exhausted all the available domestic remedies.

44. For this reason, the Court dismisses the objection that the Applicant did not exhaust local remedies.

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

45. The Respondent State argues that in the event the Court finds that the Applicant exhausted local remedies; the Court should find that the Application fails to comply with the provisions of Rule 40(6) of the Rules.[13] The Respondent State argues that the Application was not filed within a reasonable time after the local remedies were exhausted.

46. In this regard, the Respondent State recalls that the judgment of the Court of Appeal was delivered on 29 July 2013, and that this Application was filed on 10 February 2016. The Respondent State notes that a period of two (2) years and six (6) months elapsed in between. Furthermore, the Respondent State submits that even though the Applicant had filed an application for "revision" on 6 August 2013, he filed the present Application, "two (2) years and two (2) months after he was informed on 19 November 2013 that his application for "revision" was improper before the Court of Appeal.

47. The Respondent State is of the view that the established international human rights jurisprudence considers six (6) months as reasonable time for filing such an application.[14]

48. The Applicant did not make a submission on this issue.

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49. The Court notes that Rule 50(2)(f) of the Rules which restates the

13 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

14 ACHPR, *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

contents of Article 56(6) of the Charter, requires an Application to be filed within: "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

50. In the instant Application, the Court observes that the judgment of the Court of Appeal was delivered on 29 July 2013. The Court notes that two (2) years, six (6) months and five (5) days elapsed between 29 July 2013 and 10 February 2016, when the Applicant filed the Application before this Court. The issue for determination is whether the two (2) years, six (6) months and five (5) days that the Applicant took to file the Application before the Court is reasonable in the circumstances.

51. The Court recalls its jurisprudence that: "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[15] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[16] indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal[17] and the use of extra-ordinary remedies.[18] Nevertheless, these circumstances must be proven.

52. From the record, the Applicant is self-represented, incarcerated, restricted in his movements and with limited access to information. Ultimately, the above mentioned circumstances delayed the Applicant in filing his claim before this Court. Thus, the Court finds that the two (2) years, six (6) months and five (5) days taken to file the Application before this Court after exhaustion of local remedies is reasonable.

53. Accordingly, the Court dismisses the objection relating to the non-compliance with the requirement of filing the Application within a

15 *Zongo v Burkina Faso* (merits), *op. cit*, § 92. See also *Thomas v Tanzania (*merits) *op.cit*,, § 73;

16 *Thomas v Tanzania* (merits) *op. cit*, § 73, *Christopher Jonas v Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 54, *Ramadhani v Tanzania* (merits) (11 May 2018), 2 AfCLR 344 § 83.

17 *Association Pour le progress et la Defense des droit des Femme Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (11 May 2018) 2 AfCLR 380 § 54.

18 *Armand Guehi v Tanzania* (merits and reparations) *op.cit*, § 56; *Werema Wangoko v Tanzania* (merits) (7 December 2018) 2 AfCLR 520 § 49; *Alfred Agbes Woyome v Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits and reparations), §§ 83-86.

reasonable time after exhaustion of local remedies.

iii. Other conditions of admissibility

54. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2) (a), (b), (c), (d) and (g) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.

55. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

56. The Application is in compliance with the Constitutive Act of the African Union and the Charter because it raises alleged violations of human rights in fulfilment of Rule 50(2)(b) of the Rules.

57. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

58. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment with Rule 50(2)(d) of the Rules.

59. Further, the Application 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 in fulfilment of Rule 50(2)(g) of the Rules.

60. The Court, therefore, finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

61. The Applicant avers the violations of Article 7(1), 7(1)(c) and (d) of the Charter in relation to the following allegations:

i. That the Applicant's conviction was based on insufficient evidence;

ii. His conviction and sentencing at the District Court *in absentia*;

iii. The denial of the right to free legal representation; and

iv. Delay of the determination of his application for "revision" of the Court of Appeal judgment.

A. Allegation relating to the conviction based on insufficient evidence

62. The Applicant contends that he was charged with having committed the offence of rape in the absence of a government representative, such as the Village Chairman who should have been a witness in the case. He also states that the doctor who examined the complainant did not mention that he found blood in the underwear worn by the complainant even though the witnesses testified to that fact, during the trial. The Applicant maintains that the evidence adduced was false and should not have been taken into consideration by the municipal courts.

63. Furthermore, the Applicant alleges that evidence adduced during the trial and appeal was insufficient for the judges to convict him of rape and to sentence him to thirty (30) years imprisonment. He alleges that Prosecution Witness 2 (PW2) only testified that she heard him call the complainant by name but did not "directly" see them together. Moreover, he avers that the testimony of the complainant, Prosecution Witness 1 (PW1), is "illegal" because it was not procured according to the national laws and should therefore be disregarded. He also contends that, some "elements" relating to the charge, were not produced before the District Court as exhibits for the purpose of proving the charge beyond reasonable doubt.

64. According to the Applicant, the District Court also erred by not taking into consideration the fact that, during his arrest, the Police failed to comply with the provisions of the Respondent State's Criminal Procedure Act.

65. The Respondent State denies these allegations and avers that the charge was properly proffered and contained all elements of the offence of rape as required by law. Further, the Respondent State contends that Police Form (PF3) was the pertinent documentary evidence and it was tendered in court. Also, that the evidence adduced in the court was strong enough to sustain the conviction thus the appeals were dismissed.

66. According to the Respondent State, the Applicant has not explained how the provisions of its Criminal Procedure Act were violated and furthermore, that the Applicant should have raised the issue at the municipal courts if he felt that his rights under these provisions were violated.

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67. Article 7(1) of the Charter provides: "every individual shall have the right to have his cause heard."

68. The Court notes that the Applicant's contention herein is that the evidence presented against him was insufficient to sustain a conviction of rape against him.

69. On the evidence used to convict the Applicant, the Court restates its position, that:

> [a]s regards, in particular, the evidence relied on in convicting the Applicant, the Court holds that, it was indeed not incumbent on it to decide on their value for the purposes of reviewing the said conviction. It is however of the opinion that, nothing prevents it from examining such evidence as part of the evidence laid before it so as to ascertain in general, whether consideration of the said evidence by the national Judge was in conformity with the requirements of fair trial within the meaning of Article 7 of the Charter in particular.[19]

70. In this regard, the Court reiterates that:

> …municipal courts enjoy a wide margin of discretion in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the municipal courts and investigate the details and particularities of evidence used in domestic proceedings.[20]

71. Furthermore, the Court observes from the record that, the municipal courts analysed the evidence adduced by the six (6) prosecution witnesses including, the complainant, her grandmother, the doctor who examined the complainant and the police officer who proffered the charge and concluded that the minor had been raped and the perpetrator was the Applicant. The Applicant in the presentation of his defence case, did not rebut the evidence adduced by the prosecution. The Court further notes that, the municipal courts relied on precedents such as *Selemani Makumba v the Republic*, *Petro Andrea v the Republic*, and *Hassani Amiri v the Republic*, which explain and expound on the elements of the offence of rape, applied them to the circumstances of the Applicant's case and found that the prosecution had proved its case beyond reasonable doubt and the Applicant was rightly sentenced to the mandatory sentence of thirty years' imprisonment.

72. In light of the foregoing, the Court finds that the manner in which the municipal courts handled the Applicant's trial, conviction and

19 *Mohammed Abubakari v Tanzania* (merits) *op. cit*., §§ 26 and 173. See also *Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 65.

20 *Kijiji Isiaga v Tanzania* (merits) *op. cit*. § 66; *Majid Goa v United Republic of Tanzania*, ACtHPR, Application No.025/2015. Judgment of 26 September 2019 (merits) § 52.

sentence does not disclose any manifest error or miscarriage of justice to the Applicant that required its intervention. The Court therefore dismisses this allegation and finds that the Respondent State has not violated Article 7(1) of the Charter.

B. Allegation relating to the Applicant's absence in the delivery of the judgment

73. The Applicant alleges that, at the close of oral proceedings in his case, to which he had participated in all the proceedings, he was notified that the pronouncement of judgment would take place on 7 April 2010. Nevertheless, the judgment was pronounced on 8 April 2010, in his absence. As a result of the pronouncement of the judgment *in absentia*, he alleges that the District Court denied him the chance to defend himself.

74. The Respondent State argues that the date of delivery of the judgment was moved to 8 April 2010, because the date when it was originally set down for delivery was a public holiday. Moreover, that even though the judgment was delivered on 8 April 2010; the Applicant was informed of his right to appeal as provided for in Section 231 of the Criminal Procedure Act on the day that he was taken into custody to start serving his sentence, that is, on 15 April 2010.

75. Lastly, it contends that Section 227 of its Criminal Procedure Act permits the Court to pronounce judgments in the absence of defendants when necessary. It concludes that there was, therefore, no miscarriage of justice.

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76. Article 7(1)(c) of the Charter provides as follows: "[e]very individual shall have the right to have his cause heard. This comprises: […] c) The right to defence, including the right to be defended by counsel of his choice."

77. The Court notes, that the Applicant's contention is that he was not present during the delivery of judgment and thus he was denied the chance to defend himself.

78. The Court observes that the right to have one's cause heard entitles the Applicant to take part in all proceedings, and to adduce his arguments and evidence in accordance with the adversarial

principle.[21]

79. The Court also recounts that right to participate effectively in a criminal trial includes not only the right of an accused to be present but also to hear and follow the proceedings.[22] This is to ensure the accused is treated as an autonomous part of the proceedings and not simply an object for imposition of punishment.

80. The Court notes in this regard, that the Applicant participated in all the proceedings of the District Court except for the delivery of judgment. The Court further notes from the record that, even though, the judgment was delivered a day after the scheduled date of delivery, the Applicant was duly informed of his sentence and his right to appeal.

81. Furthermore, the Court notes that, at the stage of delivery of judgment, the Applicant's role is limited to giving mitigation before sentencing. Consequently, the Court finds that the Respondent State did not violate the Applicant's right under Article 7(1)(c) of the Charter herein.

C. Alleged violation of the right to free legal representation

82. The Applicant contends that he was not provided with free legal representation during the proceedings in the municipal courts in violation of Article 7(1)(c) of the Charter.

83. The Respondent State argues that according to its laws, suspects charged with rape are not automatically granted legal aid in the form of counsel to assist them. The Applicant, therefore, had to apply for legal aid from the State or from the various NGO's offering legal representation. It contends further that, the Applicant did not do so, and thus he cannot claim a right which is not provided by law.

84. The Respondent State also avers that for one to benefit from legal representation, there are two conditions: a) that the accused must lack sufficient means and b) that legal aid need only be provided "where the interests of justice so require". According to the Respondent State, the Applicant did not demonstrate that he met the two aforementioned conditions and thus this claim should be dismissed.

21 *Anaclet Paulo v Tanzania* (merits) (21 September 2018) 2 AfCLR 446 § 81.

22 ECHR, *Stanford v UK* App no 16757/90 (ECHR, 23 February 1994) § 26.

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85. Article 7(1)(c) of the Charter provides as follows: "[e]very individual shall have the right to have his cause heard. This comprises: […] c) The right to defence, including the right to be defended by counsel of his choice."

86. The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance. This Court has however, interpreted this provision in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR)[23], and determined that the right to defence includes the right to be provided with free legal assistance.[24] The Court has also held that an individual charged with a criminal offence is entitled to free legal assistance without having requested for it, provided that the interests of justice so require. This will be the case where an accused is indigent and is charged with a serious offence which carries a severe penalty.[25]

87. The Court notes, from the record, that the Applicant was not represented by counsel throughout the proceedings in the municipal courts. Given that the Applicant was charged with a serious offence, that is, rape of a minor, carrying a minimum severe punishment of thirty (30) years imprisonment; the interests of justice required that the Applicant should have been provided with free legal aid irrespective of whether he requested for such assistance.

88. The Court therefore finds that the Respondent State violated Article 7(1)(c) of the Charter and Article 14(3) of the ICCPR by failing to provide the Applicant with free legal assistance.

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

24 *Thomas v Tanzania* (merits) *op. cit,* § 114; *Kijiji Isiaga v Tanzania* (merits) *op.cit.* § 72; *Kennedy Onyachi and Njoka v Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 104.

25 *Thomas v Tanzania op.cit*., § 123, see also *Mohammed Abubakari v Tanzania* (merits) *op.cit* §§ 138-139.

D. Allegation relating to the application for "revision"

89. The Applicant alleges that "his application for review" of the Court of Appeal's decision is yet to be heard by that court. He alleges that the decision has been pending since 6 August 2013, resulting in the violation of his right to be heard and to be tried within a reasonable time.

90. The Respondent State argues that the Applicant did not file a "motion for review" of the Court of Appeal's decision, rather, that he filed a "motion for revision" at the Court of Appeal. The Respondent State argues that this is an erroneous procedure because under its laws, the Court of Appeal has no jurisdiction to revise its decisions. Furthermore, that the Applicant was informed of this error by a letter but he did not do anything to correct it. Moreover, that the decision to grant applications for revision and review is discretionary.

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91. Article 7(1)(d) of the Charter provides: "Every individual shall have the right to have his cause heard. This comprises: … (d) The right to be tried within a reasonable time...".

92. The Court observes that the right to be tried within a reasonable time is one of the cardinal principles of the right to a fair trial and that undue prolongation of the case at appellate level is contrary to the letter and spirit of Article 7(1)(d) of the Charter.[26]

93. In the instant case, the record before this Court shows that the Applicant filed his "motion for revision" of the Court of Appeal's judgment on 6 August 2013. On 19 November 2013, contrary to the Applicant's assertion, he was informed by the Deputy Registrar of the Court of Appeal that his application for "revision" had been rejected as his matter had already been heard by the same court; which is, within a period of two (2) months and twenty-eight (28) days.

94. The Court considers this period to be reasonable and holds that the Respondent State did not violate Article 7(1)(d) of the Charter in relation to the allegation herein.

26 *Thomas v Tanzania* (merits) *op.cit.* § 103.

VIII. Reparations

95. The Applicant contends that before his arrest, he was an entrepreneur and a tailor. He further avers that his income from gardening, farming and tailoring was to the tune of Tanzanian Shillings, five hundred and four thousand (TZS 504,000) per annum; Tanzanian Shillings four million (TZS 4,000,000) per annum and Tanzanian Shillings twenty-thousand (TZS 20,000) per day respectively.

96. He thus prays the Court to grant him the sum of Tanzanian Shillings one hundred and four million, one hundred and twenty thousand (TZS 104,120,000) for the prejudice suffered.

97. As regards non-pecuniary reparation, the Applicant prays the Court to quash his conviction.

98. The Respondent State prays the Court to deny the Applicant's request for reparations.

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99. Article 27(1) of the Protocol provides that:

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

100. The Court recalls its earlier judgments and restates its position that, "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim". [27]

101. The Court also restates that reparation "…must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not

27 *Mohamed Abubakari v Tanzania* (merits) *op.cit*, § 242 (ix), *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202 § 19.

been committed."[28]

102. Measures that a State may take to remedy a violation of human rights, includes: restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations taking into account the circumstances of each case.[29]

103. The Court further reiterates that the general rule with regard to material prejudice is that there must be a causal link between the established violation and the prejudice suffered by the Applicant and the onus is on the Applicant to provide evidence to justify his prayers.[30] However, with regard to moral prejudice, the Court exercises judicial discretion in equity.

A. Pecuniary Reparations

104. The Court notes that the violation it established of the right to free legal assistance caused moral prejudice to the Applicant. The Court therefore, in exercising its discretion, awards an amount of Tanzania Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[31]

B. Non-Pecuniary Reparations

105. Regarding the order to quash his conviction, the Court notes that it did not determine whether the conviction of the Applicant was warranted or not, as this is a matter to be left to the national courts. The Court is rather concerned with whether the procedures in the national courts comply with the provisions of human rights instruments ratified by the Respondent State.

106. In this regard, the Court was satisfied that the manner in which the Respondent State determined the Applicant's case did not occasion any error or miscarriage of justice to the Applicant that

28 *Mohamed Abubakari v United Republic of Tanzania*, ACtHPR, Application No. 007/2013. Judgment of 4 July 2019 (reparations) § 21; *Alex Thomas v United Republic of Tanzania*, ACtHPR, Application No. 005/2013, Judgment of 4 July 2019 (reparations) § 12; *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, ACtHPR, Application No. 006/2013, Judgment of 4 July 2019 (reparations) § 16.

29 *Ingabire Umuhoza v Rwanda* (reparations) *op.cit* § 20.

30 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72 § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346 § 15.

31 See *Paulo v Tanzania* (merits) *op.cit* § 107; *Evarist v Tanzania* (merits) *op.cit* § 85.

required its intervention.

107. Therefore, the Court rejects the Applicant's request for his conviction to be quashed.

IX. Costs

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

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

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

X. Operative part

111. For these reasons:

The Court

Unanimously,

On jurisdiction

i. *Dismisses* the objection to material jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections on admissibility;

iv. *Declares* the Application admissible.

On merits

v. *Finds* that the Respondent State has not violated Article 7(1) of the Charter as regards the alleged insufficiency of evidence;

vi. *Finds* that the Respondent State has not violated Article 7(1) of the Charter as regards the delivery of the judgment by the District Court *in absentia*;

vii. *Finds* that the Respondent State has not violated Article 7(1)(d) of the Charter in relation to the dismissal of the application for leave to review the Court of Appeal's judgment;

viii. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter and Article 14(3) of the ICCPR as the Applicant was not provided with free legal assistance.

On reparations

Pecuniary reparations

ix. *Grants* the Applicant's prayer for 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 of Tanzania Shillings Three Hundred Thousand (TZS 300,000) free from tax as fair compensation to be made 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 quashing of his sentence and the order for his release from prison.

On 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 paragraphs (ix) and (x) of this operative part and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

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