Zuberi v Tanzania (judgment) (2021) 5 AfCLR 58

Application 054/2016, *Mhina Zuberi v United Republic of Tanzania*

Judgment, 26 February 2021. Done in English and French, the English text being authoritative.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, and ANUKAM

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced for rape by a court in the Respondent State. Following an unsuccessful appeal before the national courts, he brought this Application asking the Court to quash his conviction and sentence on the grounds that the domestic proceedings violated his Charter protected rights. The Court held that the Respondent State had only violated the Applicant's right to free legal reprsentation.

Jurisdiction (material jurisdiction, 23)

Admissibility (exhaustion of local remedies, 36-40)

Fair trial (free legal assistance, 61-64; right to defence, 71-74; domestic assessment of evidence, 88-92)

Reparations (basis for, 94; measures of, 95; proof, 96; moral prejudice, 105-106; non-pecuniary reparations, 109-111; fair compensation, violation of right to free legal assistance, 105-106; quashing of conviction and sentence, exceptional remedy, 109-110)

I. The Parties

1. Mhina Zuberi (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who, at the time of filing the Application, was serving a thirty (30) year prison sentence at Maweni Central Prison in Tanga, for the rape of a 10-year-old girl.

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 deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol by which it accepts 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 held that this withdrawal did not have any effect on pending cases as well as new

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

II. Subject of the Application

A. Facts of the matter

3. It emerges from the records before this Court that the Applicant was convicted and sentenced on 30 September 2014, in Criminal Case No. 38/2014 before the District Court of Muheza (hereinafter referred to as "the District Court"), to thirty (30) years in prison for the rape of a 10-year-old girl, an offence punishable under Sections 130(2)(e) and 131(1) of the Tanzania Penal Code (hereinafter referred to as the "Penal Code").

4. On 4 May 2015, the Applicant appealed against this judgment by Criminal Appeal No. 24/2015 before the High Court of Tanzania at Tanga (hereinafter referred to as "the High Court"), which upheld the decision of the District Court on 9 September 2015.

5. On 10 September 2015, the Applicant subsequently appealed against the decision of the High Court by Criminal Appeal No. 36/2016 before the Court of Appeal of Tanzania at Tanga (hereinafter referred to as the "Court of Appeal"). The Court of Appeal upheld the Applicant's conviction and the sentence by its judgment of 30 June 2016.

B. Alleged violations

6. The Applicant alleges the following violations:

i. That he was not assisted by counsel before domestic courts;

ii. That he was deprived of his right to summon witnesses in his defence as an accused person, an appellant and defendant, in violation of Section 13 of the Respondent State's Constitution of 1977 (hereinafter referred to as "the Constitution"), Section 310 of the Criminal Procedure Act and the Universal Declaration of Human Rights;

iii. That there were errors of law and fact in the assessment of the evidence adduced.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020, §§ 35-39. See also *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

III. Summary of the Procedure before the Court

7. The Application was filed on 2 September 2016, and served on the Respondent State on 15 November 2016. On 24 January 2017, the Application was transmitted to the entities referred to in Rule 35(3) of the Rules.[2]

8. The Parties filed their submissions on the merits within the time limits set by the Court.

9. Following various extensions of time at the parties' request, they filed their pleadings on the reparations within the time stipulated by the Court. These pleadings were duly exchanged.

10. Pleadings were closed and the Parties were informed accordingly.

IV. Prayers of the Parties

11. The Applicant prays the Court to "uphold all the rights flouted by the Respondent State, quash the guilty verdict and the sentence meted to him by the lower courts and order the Respondent State to pay reparations for all the damages he suffered."

12. The Applicant prays the Court for the total award of Tanzanian Shillings Four Million and Six Hundred Thousand (TZS 4,600,000) with any adjustments to this amounts as necessary and to order his release.

13. The Respondent State prays the Court to:

i. Declare that it has no jurisdiction and that Application is not Admissible;

ii. Declare that it has not violated Articles 3 and 7(1)(c) of the Charter;

iii. Declare that it has not deprived the Applicant of his right to legal representation;

iv. Dismiss the Application as unfounded;

v. Rule that the Applicant should not be awarded damages;

vi. Dismiss all the Applicant's prayers;

vii. Rule that the costs of the proceedings be borne by the Applicant.

V. Jurisdiction

14. The Court notes 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 Rule 42(4) of the current Rules of 25 September 2020.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

15. In accordance with Rule 49(1) of the Rules[3] "[t]he Court shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules."

16. On the basis of the above-cited provisions, therefore, the Court must, preliminarily conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

17. The Court notes that the Respondent State raised objections to the Court's material jurisdiction on the grounds that it is neither a court of first instance, nor an appellate court.

A. Objection to material jurisdiction

18. The Respondent State also disputes the jurisdiction of the Court claiming that the Court is not a court of first instance to hear claims that have not been raised before the domestic courts. It submits that the Applicant is raising for the first time the alleged contradiction between PW1's (the victim) and PW2's (the victim's schoolmate) testimonies. The Respondent State also submits that as a result, the domestic courts did not have the opportunity to examine this allegation.

19. Citing the Court's decision in the matter of *Ernest Francis Mtingwi v Republic of Malawi*, the Respondent State claims that, by praying the Court to review the points of fact and law examined by its judicial bodies, overturn their rulings and order his release, the Applicant is asking the Court to act as an appellate body, which according to the Respondent State, is not within its jurisdiction as set out in Article 3(1) of the Protocol and Rule 26 of the Rules.[4]

20. The Applicant refutes in general terms the Respondent State's claim and contends that the Court has jurisdiction.

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21. The Court notes that the Respondent State's objection suggests that this Court does not have jurisdiction to entertain the

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

4 Rule 29 of the current Rules of 25 September 2020.

Application before it, since it is neither a court of first instance nor an appellate court with respect to decisions of national courts.

22. The Court recalls that, in accordance with its established case-law on the application of Articles 3(1) and 7 of the Protocol, it is competent to examine relevant proceedings before domestic courts to determine whether they comply with the standards set out in the Charter or any other instrument ratified by the State concerned. [5]

23. In the present case, the Court notes that the Applicant alleges that the Respondent State violated certain aspects of his right to a fair trial protected by Article 7 of the Charter, in particular the lack of legal assistance, the deprivation of his right to summon witnesses in his defence and that there were errors of law and fact in the assessment of the evidence adduced. The Court observes that by invoking these violations, the Applicant does not invite the Court to sit as a court of first instance, or a court of appeal. Rather, the Court is called upon to exercise its material jurisdiction, pursuant to Articles 3(1) and 7 of the Protocol.

24. In view of the foregoing, the Court dismisses this objection and holds that it has material jurisdiction.

B. Other aspects of jurisdiction

25. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on record indicates that the Court does not have jurisdiction. The Court thus holds that it has:

i. Personal jurisdiction, insofar as stated in paragraph 2 of this Judgment, the effective date of the withdrawal of the Declaration by the Respondent State being 22 November 2020;

ii. Temporal jurisdiction in as much as the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers an unfair process;[6] and

iii. Territorial jurisdiction given that the facts of the matter occurred in the territory of the Respondent State.

5 *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.

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

26. In view of the aforesaid, the Court declares that it has jurisdiction to hear the instant case.

VI. Admissibility

27. 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".

28. Pursuant to Rule 50(1) of the Rules,[7] "[t]he 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."

29. Rule 50(2) of the Rules,[8] which in essence restates Article 56 of the Charter, provides that:

> Applications filed before the Court shall comply with all the following conditions:
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> a. Indicate their authors even if the latter request anonymity,
> b. Are compatible with the Constitutive Act of the African Union and with the Charter,
> 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 Court is seized with the matter, and
> g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.

30. The Court notes that the Respondent State raised an objection to the admissibility of the Application in relation to exhaustion of local remedies.

A. Objection based on failure to exhaust local remedies

31. Citing the jurisprudence of the African Commission on Human

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

8 Formerly, Rule 40 of the Rules of 2 June 2010.

and Peoples' Rights,[9] the Respondent State alleges that "the exhaustion of domestic remedies is a fundamental principle of international law and that the Applicant should have used all existing domestic remedies before submitting the case to an international body such as the African Court on Human and Peoples' Rights."

32. The Respondent State claims that the Applicant had the possibility of applying for a review of the judgment to the Court of Appeal in accordance with Part III B, Rules 65 and 66 of the Rules of Procedure of that court.

33. The Respondent State further submits that the Applicant ought to have addressed the alleged violation of Article 13 of the Constitution through a constitutional petition, as provided for in Article 30(3) of Respondent State's Constitution and its Basic Rights and Duties Enforcement Act.

34. The Respondent State also claims that the right to legal assistance is provided for under the Legal Aid Act, yet the Applicant never requested for legal aid at the domestic courts.

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35. In his Reply, the Applicant refutes in general terms the Respondent State's contention without specifically responding to this objection.

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36. The Court notes that the issue for determination is whether the Applicant exhausted local remedies as required under Article 56(5) of the Charter and as restated in substance by Rule 50(2)(e) of the Rules. On this issue, the Court recalls that the

9 ACHPR, Communication No. 333/02 – ***Southern African Human rights NGO Network and Others v United Republic of Tanzania;*** Communication No. 275/02 – ***Article 19 v Eritrea***; and on Communication No. 263/02 – ***Kenyan Section of the International Commission of Jurists, Law Society of Kenya, Kituo cha Sheria v Kenya***.

local remedies that must be exhausted are judicial remedies.[10] Moreover, the Court has consistently held that the Constitutional petition and review, as provided for in the judicial system of the Respondent State, are extraordinary remedies that the Applicant is not required to exhaust prior to seizing this Court.[11]

37. In the instant case, the Court notes from the record that the Applicant filed an appeal before the Court of Appeal, the highest judicial organ of the Respondent State and that on 30 June 2016, the Court of Appeal upheld the judgments of the High Court and the District Court.

38. On the issue of legal assistance not having been requested for at the domestic courts, the Court notes that the Applicant complained about it during the appeal before the High Court, which complaint was dismissed. Subsequently, the Court of Appeal also upheld the sentence delivered by the High Court.

39. The Court recalls that it has held that in so far as the matter had been referred to the national courts, the latter had the opportunity to hear the alleged violation and to redress the same.[12] Therefore, the Court rejects the claim that the Applicant is raising the issue of lack of provision of legal assistance for the first time.

40. Consequently, the Court finds that the Applicant has exhausted local remedies and therefore the Application complies with Article 56 (5) of the Charter and Rule 50(2) (e) of the Rules.

B. Other conditions of admissibility

41. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 50(2), Sub-rules a), b), c), d), f) and g) of the Rules.[13] However, the Court must examine whether these conditions are met.

42. The Court notes that the Applicant has indicated his identity, and finds that the condition set out in Rule 50(2)(a) of the Rules has been met.

10 *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 82.1.

11 *Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 65; *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Wilfred Onyango Nganyi & 9 Others v Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95; *Christopher Jonas v Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44; and *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 36.

12 *Mohamed Abubakari v Tanzania* (merits), § 76.

13 Formerly, Rule 40(1)(2)(3)(4)(6) and (7) of the Rules of 2 June 2010.

43. The Court notes that the claims made by the Applicant seeks to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the African Union stated in Article 3(h) of its Constitutive Act is the promotion and protection of human and peoples' rights. As a consequence, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and therefore finds that it meets the requirement specified in Rule 50(2)(b) of the Rules.

44. With respect to the requirement set out under Rule 50(2)(c), the Court notes that the Application does not contain terms that undermine the dignity, reputation or integrity of persons and institutions of the Respondent State. The Court therefore finds that the Application meets the said requirement.

45. Regarding the condition prescribed in Rule 50(2)(d) of the Rules, the Court notes that the Application involves decisions made by the judicial authorities of the Respondent State, including the Court of Appeal. The Court therefore considers that the Application is not based exclusively on news disseminated through the mass media and finds that it meets the requirement under consideration.

46. With respect to the filing of the Application within a reasonable period of time, the Court notes that the Court of Appeal, which is the highest judicial authority of the Respondent State, rendered its decision on 30 June 2016, while the Application was filed on 2 September 2016. The Application was therefore filed two months and two days after the exhaustion of domestic remedies. The Court considers that such time is manifestly reasonable and therefore finds that the condition of admissibility set out in Rule 50(2)(f) of the Rules is met.

47. The Court notes that nothing in the file indicates that the Application concerns a case which had been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitution of the African Union or the provisions of the Charter. Accordingly, it finds that the Application fulfils the condition of admissibility under Rule 50(2)(g) of the Rules.

48. Based on the foregoing, the Court finds that all the admissibility conditions set out in Article 56(5) of the Charter and as restated in substance by Rule 50(2) of the Rules have been met, and accordingly declares it admissible.

VII. Merits

49. The Applicant alleges the violations that fall within the scope of the right to a fair trial, namely, (A) lack of legal assistance, (B) failure to hear his witnesses, and (C) inadequate assessment of the evidence.

A. The alleged violation of the right to legal assistance

50. In his Application, the Applicant claims that: "He was not assisted by counsel during the hearings and during the appeals' phase."

51. In his Reply, the Applicant submits that he did not receive legal assistance and that, had he been assisted by a lawyer, he would have informed the Court that the victim's mother had bribed an officer by the name of Zainabu with Forty Thousand (TZS 40,000) Tanzanian Shillings, to incriminate him.

52. The Applicant further contends that the procedure for obtaining legal assistance is very complicated and that he was not afforded such service. He further states that the domestic courts registries had been instructed to provide legal assistance only in cases of murder or manslaughter.

53. The Respondent State refutes the Applicant's allegations and submit that he should provide evidence thereof. It claims that there is provision for legal assistance under Section 310 of the Criminal Procedure Act, Section 3 of the Legal Aid Act, and Rule 31(1) of the Rules of Procedure of the Court of Appeal, 2009.

54. The Respondent State contends that, in any case, the competent judicial authorities are required to offer legal assistance to an accused person provided the requisite conditions are met, namely that: the defendant lacks the means to hire a lawyer; the accused has requested the competent authorities to grant legal assistance; and that granting legal assistance is in the interest of justice.

55. The Respondent State requests the Court to take into account the fact that legal assistance is provided progressively and is mandatory in cases of murder and manslaughter. It further submits that legal assistance is granted by all courts, but that there are constraints that hamper its systematic provision in all cases, especially concerning the inadequate number of lawyers to cover legal assistance requests across the country, as well as financial and resource constraints.

56. The Respondent State argues that the right to legal representation is guaranteed for all those who can afford it. For legal assistance, it is not easy or practical to provide the defendant with a counsel

of his choice. The Respondent State prays the Court to take into account the fact that legal assistance is not an absolute right and that States exercise discretionary powers in this regard depending on their capacity; and this is how the current legal assistance system operates in the country.

57. The Respondent State further states that its legal assistance system review process was ongoing, and that the outcome would be communicated to the Court in due course.

58. The Respondent State submits that the fact that the Applicant had no counsel does not mean that he was disadvantaged, given that Section 196 of the Criminal Procedure Act provides that all evidence must be taken in the presence of the accused. According to Section 231(1)(a) of the said Act, the accused shall also be informed of his right to give evidence whether or not on oath or affirmation on his own behalf, and the answer shall be recorded; the court shall then call on the accused to plead his case save for where he does not wish to exercise any of the above rights.

59. The Respondent State contends, in conclusion, that all accused persons enjoy the aforementioned right to defence, and that no exception has been made in respect of the Applicant.

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

61. The Court further notes that although Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal aid, it has consistently determined that this Article, interpreted in light of Article 14(3)(d)[14] of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR"),[15]

14 "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality: …to defend himself in person or through legal assistance of his own choosing, to be informed if he does not have legal assistance assigned to him, in any case where the interest of justice so require and without payment by him in any such case, if he does not have sufficient means to pay for it."

15 The Respondent State became a party to the International Covenant on Civil and Political Rights on 11 June 1976.

establishes the right to free legal assistance where a person is charged with a serious criminal offence, and cannot afford to pay for legal representation and where the interest of justice so requires.[16] The interest of justice includes where the Applicant is indigent, the offence is serious and the penalty provided by the law is severe.[17]

62. The Court observes from the records[18] that the Applicant was not afforded free legal assistance throughout the proceedings at the national courts. The Court further notes that the Respondent State does not dispute that the Applicant is indigent, that the offence is serious and the penalty provided by law is severe, carrying a minimum punishment of thirty (30) years imprisonment. The Respondent State rather contends that the Applicant did not request for legal assistance and that States have a margin of discretion in the application of the right to legal assistance. It also avers that the right to legal assistance is not absolute and this depends on the financial means which are limited in the country.

63. Given that the Applicant was charged with a serious offence and that the Applicant's indigence is not contested by the Respondent State, the Court is of the view that the interest of justice required that the Applicant should have been provided with free legal assistance, regardless of whether he requested for such assistance or not.

64. The Court notes that the allegations relating to the discretion of the States in the implementation of the right to legal assistance, its non-absolute nature and the lack of financial means are not part of conditions for granting legal assistance as indicated in its jurisprudence above.[19] Moreover, it is a general principle of law that a State cannot rely on its internal laws and circumstances to evade its international obligations.

16 *Alex Thomas v Tanzania* (merits), § 114.

17 *Alex Thomas v Tanzania* (merits), § 123. See also *Mohamed Abubakari v Tanzania* (merits), §§ 138-139; *Minani Evarist v United Republic of Tanzania (merits)* (21 September 2018) 2 AfCLR 402, § 68; *Diocles William v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 85; Anaclet *Paulo v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 92; and *Kalebi Elisamehe v Tanzania*, § 55.

18 In particular, submissions from the parties, judgments of the District Court of 30 September 2014, the High Court of 9 September 2015 and the Court of Appeal of 30 June 2016.

19 See *Minani Evarist v Tanzania* (merits)*, § 70 and Diocles William v Tanzania* (merits), § 87.

65. The Court therefore finds that the Respondent State has violated Article 7(1)(c) of the Charter.

B. Alleged violation of the right to summon the defence witnesses

66. The Applicant alleges that "[T]he Court of First Instance deprived him of the right to summon witnesses as an accused person, appellant and defendant ... contrary to Article 13 of the Constitution …, the Universal Declaration of Human Rights and Section 310 of the Criminal Procedure Act …".

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67. The Respondent State contests the Applicant's claim, arguing that Article 13 of the Constitution provides for non-discrimination and equal protection of the law, and that at no time has the Applicant been discriminated against, but has always enjoyed equal protection of the law.

68. The Respondent State argues further that the Applicant was afforded the opportunity to call other witnesses but "chose not to do so but instead represented himself as the sole witness at his trial".

69. The Respondent State submits that under Section 231(1) of the Criminal Procedure Act, the defendant has the right to call his witnesses, and hearings may be adjourned where the presiding Magistrate or Judge is of the view that the witnesses may adduce solid evidence in defence of the accused.

70. The Respondent State submits that nothing on the record indicates that the Applicant requested for any witness to be summoned in his defence, let alone that such a request was declined. On the contrary, according to the Respondent State, after the Applicant testified in his defence, he requested that the hearing proceed as he did not intend to call witnesses.

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71. The Court notes that although the Applicant merely highlighted the violation of Article 13 of the Respondent State's Constitution, the Court will, however, examine the allegation in light of Article 7(1)(c) of the Charter, which stipulates that: "Every individual shall have the right to have his cause heard." This right comprises: … c) The right to defence, including the right to be defended by counsel of his choice…".[20]

72. Article 14(3)(d) of the ICCPR is even more specific and stipulates that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … d) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

73. The Court notes that under Section 231 of the Respondent State Criminal Procedure Act, all accused persons have the right to obtain the attendance of their witnesses. The Court notes, however, that the Applicant does not refute the Respondent State's allegation that he did not request for his witnesses be summoned and that, on the contrary, after his testimony, he requested that the hearing proceeds as he did not intend to call witnesses to testify in his defence.

74. The Court notes that the Applicant did not respond to the rebuttal by the Respondent State. Therefore, in the absence of any other evidence to buttress the Applicant's allegation, namely the identity of the defence witnesses to support his case or the reference to his request for legal assistance, the Court declares the Respondent State's rebuttal is valid.[21] Accordingly, the Court dismisses the Applicant's claim that he was deprived of the opportunity to call witnesses in his defence.

C. The allegation that evidence was inadequately assessed

75. The Applicant claims that the Court of Appeal erred in law and in fact by ruling that the testimony of PW1 (the victim) was credible, strong and reliable, whereas the circumstances of the case did not corroborate the said statements. Specifically, the Applicants

20 *Minani Evarist v Tanzania* (merits), *§ 74.* See also *Diocles William v Tanzania* (merits), § 91.

21 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania (*merits*)* (28 September 2017) 2 AfCLR 65, § 142. See also *Robert John Penessis v United Republic of Tanzania*, ACtHPR, Application No. 13/2015, Judgment of 28 November 2019, § 91; *Alex Thomas v Tanzania* (merits), § 140; and *Kalebi Elisamehe v Tanzania,* § 44.

claims that:

i. The Prosecution did not adduce at the trial court substantive evidence to support the charge;

ii. The High Court Judge erred in law and in fact when he failed to take note that the Applicant's constitutional rights, under Sections 32(1) and 33 of the Criminal Procedure Act, were violated by the police;

iii. The charge was not based on facts, but on fabricated evidence, because prior to this case, there had been a quarrel between the mother of PW1 (the victim) and the Applicant over a place he rented for "showing videos to the villagers", which dispute was known to the residents and to the village chief. This fact was not taken into account by the trial court;

iv. That the trial magistrate erred in law and in fact by convicting the Applicant for the offence of rape relying on the testimony of PW1 (victim) and PW2 without taking into account the testimony of PW5, (doctor) whose testimony revealed that PW1 (victim) had fungus in her vagina; that she had lacerations on her vagina which might be due to scratching herself; ruled out any sign of intercourse as the victim's cervix was in perfect condition and her vagina was intact as stated on page 36 of the record of the proceedings.

v. The statements of PW1 (victim) and PW2 (schoolmate) differed in relation to PW1's initial account of the commission of the offence; PW1 had testified that at that time the Applicant's pants zipper was open. PW2 stated on the other hand that the Applicant had a bed sheet wrapped around his chest, which the Applicant considers as a blatant falsehood;

vi. That, the trial court erred by disregarding the lie that the accused was arrested on 2 April 2014 by Abdallah Semhando and then taken to Muheza police station where he was interrogated by WP 7237 D. C Zainabu; whereas the detailed particulars of the offence indicate that Mhina Zuberi was charged on 25 March 2014 before his arrest, thus making the charges levelled against him defective. Furthermore, police officer, Abdallah Semhando did not appear before the court to testify why he arrested the accused;

vii. That the Court of Appeal erred in its reasoning and judgment in finding, despite the contradictory and dubious evidence, that the Prosecution had proved, beyond reasonable doubt, that the accused was guilty.

76. The Applicant specifies that the police officer named Zainabu must surely have been bribed by the victim PW1's mother with Tanzanian Shillings Forty Thousand (TZS 40,000), to implicate him in the fabricated rape crime.

77. The Applicant further alleges that he was initially arrested because of his quarrel with PW1's (the victim) mother, but on arrival at the

police station, the issue was transformed to that of rape.

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78. The Respondent State rejects the Applicant's allegations, and contends that the Court of Appeal assessed the witness's credibility and held in conclusion that "Once again, we agree with both lower courts' findings that PW1 was a credible and reliable witness and that under section 127(7) of the Evidence Act, appellant's conviction could solely be anchored on her evidence."

79. The Respondent State denies having violated Section 229(1) of the Criminal Procedure Act as alleged by the Applicant, arguing that this provision requires the prosecution to open a case against the accused, call witnesses and adduce evidence where the accused enters a plea of "not guilty". The Respondent State argues that, in the instant case, the Prosecutor acted in accordance with the provisions of that Section, having called five witnesses in support of the charges.

80. The Respondent State also denies having violated Section 32(1) and Section 33 of the Criminal Procedure Act, as alleged by the Applicant, arguing that the Sections in question confer powers on the law enforcement authorities to arrest and interrogate suspects and bring them before the court within twenty-four (24) hours or as soon as possible. In the instant case, the Respondent State holds that the police arrested the Applicant on 2 April 2014, interrogated him on 3 April 2014 and referred him to the court for examination the same day.

81. The Respondent State further contends that the allegation that there had been a quarrel between the Applicant and the victim's mother, was examined by all the courts, including the Court of Appeal which upheld the decision of the lower courts. It also claims that this Court has no jurisdiction to entertain issues pertaining to evidence.

82. The Respondent State also rejects the claim that PW5 (the doctor's) testimony was not taken into account, arguing that the testimony was duly examined by the appellate courts, including the Court of Appeal, which held that the physician's testimony, a mere expert, was not binding.

83. The Respondent State refutes the allegation of contradiction between the testimonies of PW1 (the victim) and PW2 (the victim's schoolmate) at the material time, of the former having

found the Applicant with his trouser zipper open, whereas the latter stated that she found the him with a bed sheet wrapped around his chest, and puts the Applicant to strict proof thereof.

84. The Respondent State claims that this was the first time the Applicant raised the alleged contradiction between the two witnesses' testimony and that PW1's (the victim's) credibility had been examined and confirmed by all the domestic courts.

85. The Respondent State refutes the allegation that the Applicant was arrested on 2 April 2014 and charged on 25 March 2014, and affirmed that the Applicant "was arrested on 2/4/2014 and interrogated on 3/4/2014 and brought in court on 3/4/2014."

86. The Respondent State confirms that the police officer by name Adballah Semhando who arrested the Applicant was not called to testify in court. However, it maintains that the charge levelled against the accused has been proven beyond a reasonable doubt.

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87. The Court notes that Article 7(1) of the Charter stipulates that "Every individual shall have the right to have his cause heard".

88. The Court considers that determination of the Applicant's allegations falls within the competence of the domestic courts when they examine the various pieces of evidence that constitute proof of commission of an offence. The Court's intervention will only be necessary where there are irregularities in the domestic courts' determination resulting in a miscarriage of justice.[22]

89. The Court notes that the records show that the alleged contradiction between the statements of PW1 and PW2 have been examined by all the domestic courts; that the alleged contradiction between the date of commission of the offence and that of the indictment has not been established, given that the Respondent State stated in its Response that the offence was committed on 2 April 2014, and that the Applicant was interrogated by the police on 3 April 2014 and brought before the court the same day; that the allegation of a quarrel between the Applicant and the victim's mother was also examined and dismissed by the domestic courts.

22 *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania* (merits), § 89. See also *Mohamed Abubakari v Tanzania (merits), § 26;* and *Kalebi Elisamehe v Tanzania*, § 65.

90. With regard to the issue that the results of the medical examination were not taken into account, the Court finds that the Court of Appeal examined the report and noted that a medical report is merely an opinion. The fact that the doctor ruled out the possibility of penetration does not invalidate the material act of rape, as defined under Section 130(4)[23] of the Criminal Procedure Act. Sexual contact, however slight, is sufficient to satisfy the threshold of the offence.

91. Concerning the alleged bribing of a police officer to disregard the Applicant's quarrel with the victim's mother and fabricate a rape charge against the Applicant, the Court notes that this is a general allegation which is not supported by any evidence.

92. In light of the foregoing, the Court notes that nothing on record indicates that the manner in which the national courts have examined the allegations has resulted in a miscarriage of justice.[24] The Court therefore dismisses the allegation that the evidence has not been properly assessed.

VIII. Reparations

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

94. The Court has previously held that reparations are only awarded when the responsibility of the Respondent State for an internationally wrongful act is established and a causal nexus is established between the wrongful act and the harm caused. The purpose of reparations is to ensure that the victim is placed in the situation he or she was in prior to the violation.[25]

95. The Court also restates that measures that a State could take to remedy a violation of human rights include restitution,

23 "(4) For the purposes of proving the offence of rape - (a) penetration however, slight is sufficient to constitute the sexual intercourse necessary to the offence; and I (b) evidence, of resistance such as physical, injuries to the body is not necessary to prove that sexual intercourse took place without consent."

24 *Nguza Viking and Another v Tanzania* (merits), § 90. See also *Mohammed Abubakari v Tanzania (merits), § 26; and Kalebi Elisamehe v Tanzania*, §§ 65.

25 *XYZ v Republic of Benin*, ACtHPR, Application No. 059/2019, Judgment of 27 November 2020 (merits), § 158. See also *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and reparations), §§ 116-118, and *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabe des droits de l'homme et des peuples v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, § 60.

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.[26]

96. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers.[27] With regard to moral damages, the Court has held that the requirement of proof is not rigid[28] since it is presumed that there is prejudice caused when violations are established.[29]

97. The Court has already found that the Respondent State violated the Applicant's right to a fair trial by failing to provide him with free legal assistance, contrary to Articles 7(1)(c) of the Charter, interpreted in light of Article 14(3)(d) of the ICCPR. The Court will therefore consider the Applicant's claims for compensation on the basis of the above-mentioned principles and the violation found.

A. Pecuniary reparations

i. Material prejudice

98. The Applicant alleges that he was a farmer and a businessman before his imprisonment, and that his income was as follows: Tanzanian Shillings One Hundred and Fifty Thousand (TZS 150,000) per year, as a maize producer; and Tanzanian Shillings One Million (TZS 1,000,000), from his local video entertainment business. Therefore, he prays the Court for the total award of Tanzanian Shillings Four Million and Six Hundred Thousand (TZS 4,600,000) as damages for having been imprisoned for Four (4) years.

26 *Ingabire Victoire Umuhoza v Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also *Kalebi Elisamehe v Tanzania*, § 96.

27 *Kennedy Gihana and Others v Republic of Rwanda*, ACtHPR, Application No. 017/2015, Judgment of 28 November 2019, § 139; See also *Tanganyika Law Society, the Legal and Human Rights Centre v United Republic of Tanzania and Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, § 15(d); and *Kalebi Elisamehe v Tanzania*, § 97.

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

29 *Ally Rajabu and Others v United Republic of Tanzania,* ACtHPR, Application No. 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania,* ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and reparations), § 58; *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Kalebi Elisamehe v Tanzania*, § 97.

99. Citing the Court's decision in the Matter of *Zongo and Others v Burkina Faso*, the Respondent State avers that "the Applicant has not only failed to substantiate the wrongful act committed by the Respondent State but also failed to produce evidence that he suffered damages."

100. The Respondent State avers further that the Applicant has not submitted evidence that "[he] was a farmer and that he had maize and other agricultural products business that earn him a profit of Tshs 150,000/= per year…"; or "proof such as records of business profits, business returns, receipts that [he] owned a 'video shows business' that earn him Tshs 1,000,000/= per year…"

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101. The Court notes that, the Applicant's prayer for pecuniary reparations for material prejudice is based on his imprisonment. The Court is of the view that there is no link between the violations established and the material loss which the Applicant claims he suffered as a result of his imprisonment.[30]

102. Consequently, this prayer is dismissed.

ii. Moral prejudice

103. The Applicant prays the Court to order other measures or remedies as the Court may deem appropriate.

104. The Respondent State requests the Court in general terms to reject all the measures requested by the Applicant, as baseless.

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105. The Court notes that notwithstanding the fact that the Applicant did not specifically request reparations for moral prejudice, he

30 *Robert John Penessis v Tanzania,* § 143; See also *Alex Thomas v Tanzania* (reparations), § 26; *Reverend Christopher R. Mtikila and Others v Tanzania* (reparations), § 30; *Lohé Issa Konaté v Burkina Faso* (reparations), § 17; and *Kalebi Elisamehe v Tanzania*, § 104.

asked the Court to order any other reparations that it considers appropriate. Furthermore, Article 27(1) of the Protocol empowers the Court to make appropriate orders, including the payment of fair compensation or reparation, when the Court finds that there has been violation of a human or peoples' right.

106. In the instant case, the Court observes that, as mentioned in paragraph 96 above, the violation of the Applicant's right to free legal assistance is presumed to have caused moral prejudice to the Applicant. Consequently, the Court notes that the violation it established caused moral prejudice to the Applicant. The Court therefore, in exercising its discretion, awards an amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[31]

B. Non-Pecuniary reparations

107. The Applicant prays the Court to quash his conviction and sentence and to order his release.

108. Citing the Court's decision in the matter of *Alex Thomas v United Republic of Tanzania*, the Respondent State avers that the Applicant has not demonstrated that his request meets the criteria of exceptional and compelling circumstances to support the request to be released from prison.

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109. The Court notes that, in accordance with Article 27(1) of the Protocol, it has the power to order appropriate measures to remedy situations of human rights violations, including ordering the Respondent State to take the necessary measures to annul the Applicant's conviction and sentence as well as to release him. However, the Court has held in previous cases that such a measure can only be ordered in exceptional and compelling circumstances.[32]

31 *Anaclet Paulo v Tanzania (merits and reparations)*, § 107; *Minani Evarist v Tanzania (merits and reparations)*, § 85; *Kalebi Elisamehe v Tanzania*, § 108.

32 *Alex Thomas v Tanzania* (merits), § 157; *Diocles William v Tanzania* (merits), § 101; *Minani Evarist v Tanzania* (merits), § 82; *Jibu Amir Mussa and Saidi Ally alias Mangaya v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits), § 96; *Mgosi Mwita Makungu v United*

110. With regard to the sentence being set aside, the Court has always held that it is justified, for example, only in cases where the violation found is such that it necessarily vitiated the conviction and the sentencing. With regard specifically to the Applicant's release, the Court has established that this would be the case

> [I]f an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice.[33]

111. In the instant case, the Court recalls that it has found that the Respondent State is in violation of the right to fair trial for failing to provide the Applicant with free legal assistance. Without minimising the gravity of the violation, the Court is of the view that the nature of the violation in the instant case does not reveal any circumstance that signifies that the Applicant's imprisonment is a miscarriage of justice or an arbitrary decision. The Applicant also failed to adduce further specific and compelling circumstances to justify the order for his release. Therefore, this prayer is dismissed.

IX. Costs

112. The Applicant made no specific submission as to costs whereas the Respondent State prays the Court to rule that the costs of the proceedings should be borne by the Applicant.

113. Pursuant to Rule 32(2) of the Rules[34] "[u]nless otherwise decided by the Court, each party shall bear its own costs, if any."

114. Considering the circumstances of this case, the Court decides that each party shall bear its own costs.

Republic of Tanzania (merits) (2018) 2 AfCLR 570, § 84; *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 AfCLR 226, § 96; *Armand Guéhi v Tanzania* (merits and reparations), § 164; and *Kalebi Elisamehe v Tanzania*, § 111.

33 Jibu *Amir Mussa and Another v Tanzania,* §§ 96 and 97; *Minani Evarist v Tanzania* (merits), § 82; and *Mgosi Mwita Makungu v Tanzania* (merits), § 84; and *Kalebi Elisamehe v Tanzania*, § 110. See also ECHR: *Del Rio Prada v Spain* – 42750/09, Judgment of 10/07/2012, § 139; and *Assanidze v Georgia* (GC) - 71503/01, Judgment of 8/04/2004, § 204; IACHR, *Loayza-Tamayo v Peru,* Judgment of 17/09/1997 (merits), § 84.

34 Formerly Rule 30(2) of the Rules of 2 June 2010.

X. Operative part

115. For these reasons,
The Court,
Unanimously:
On jurisdiction
i. *Dismisses* the objection to the Court's jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objection on admissibility;
iv. *Declares* that the Application is admissible.

On merits
v. *Holds* that the Respondent State has not violated Article 7(1)(c) of the Charter as regards the Applicant's allegations that he was deprived of his right to summon witnesses in his defence.
vi. *Holds* that the Respondent State has not violated Article 7(1)(c) of the Charter as regards the assessment of evidence.
vii. *Holds* that the Respondent State has violated the Applicant's right to a fair trial as provided by Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights, by failing to provide him with free legal assistance.

On reparations
Pecuniary reparations
viii. *Dismisses* the Applicant's prayer for material damages for his imprisonment;
ix. *Grants* to the Applicant the sum of Tanzanian Shillings Three Hundred Thousand (TZS300,000) for the moral prejudice suffered as a result of the violations found;
x. *Orders* the Respondent State to pay the sum awarded under (ix) above free from tax as fair compensation 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 accrued amount is fully paid.

Non-pecuniary reparations
xi. *Dismisses* the Applicant's prayer for his conviction and sentence to be quashed.
xii. *Dismisses* the Applicant's prayer for his release from prison.

On implementation of the judgment and reporting

xiii. *Orders* the Respondent State to submit a report to it within six (6) months of the date of notification of this judgment on measures taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xiv. *Decides* that each Party shall bear its own costs.