AFRICAN UNION

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME DES PEUPLES

IN THE MATTER OF

ALEX THOMAS

V

UNITED REPUBLIC OF TANZANIA

APPLICATION NO.005/2013

The Court composed of: Elsie N. THOMPSON, Vice-President; Gérard NIYUNGEKO, Duncan TAMBALA, Sylvain ORÉ, El Hadji GUISSE, Ben KIOKO, Rafâa Ben ACHOUR and Solomy B. BOSSA Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("hereinafter referred to as the Protocol") and Rule 8 (2) of the Rules of Court ("hereinafter referred to as the Rules"), Justice Augustino S.L. RAMADHANI, President of the Court and a national of Tanzania, did not hear the Application.

In the matter of:

Alex Thomas

Represented by:

Pan African Lawyers' Union (PALU)

v.

United Republic of Tanzania,

Represented by:

i. Ambassador Irene Kasyanju
Head of Legal Division
Ministry of Foreign Affairs and International Cooperation

Dar es Salaam, Tanzania

ii. Ms. Sarah D. Mwaipopo
Acting Director
Division of Constitutional Affairs and Human Rights
Attorney General's Chambers
Dar es Salaam, Tanzania

iii. Mr. Edson Mweyunge
Assistant Director
Division of Contracts and Treaties
Attorney General's Chambers
Dar es Salaam, Tanzania

iv. Ms. Nkasori Sarakikya
Principal State Attorney
Attorney General's Chambers
Dar es Salaam, Tanzania

v. Mr. Mark Mulwambo
Senior State Attorney
Attorney General's Chambers
Dar es Salaam, Tanzania

vi. Ms. Sylvia Matiku
Senior State Attorney
Attorney General's Chambers
Dar es Salaam, Tanzania

vii. Mr. Benedict T. Msuya
Second Secretary - Legal Officer
Ministry of Foreign Affairs and International Cooperation
Dar es Salaam, Tanzania

After deliberation,

delivers the following judgment:

The Parties

1. Mr. Alex Thomas, ("hereinafter referred to as the Applicant") is a citizen of the United Republic of Tanzania ("hereinafter referred to as the Respondent"), who at the time of filing his application is a convict serving a thirty (30) year custodial sentence at Karanga Central Prison at Moshi, Kilimanjaro Region, United Republic of Tanzania. He is convict number 355/2009.

2. The Applicant filed his application against the United Republic of Tanzania through the Attorney General of the United Republic of Tanzania, being the Principal Legal Adviser to the Government of the United Republic of Tanzania.

Nature of the Application

3. The Applicant brings the application on the basis of Criminal Case Number 321 of 1996 in the District Court of Rombo at Mkuu, Criminal Appeal Number 82 of 1998 in the High Court of Tanzania at Moshi and Criminal Appeal Number 230 of 2008 in the Court of

Appeal of Tanzania at Arusha, in respect of which he was convicted of armed robbery and sentenced to thirty (30) years' imprisonment.

4. The Applicant alleges that the trial and Appellate Courts wrongfully convicted him because, he alleges that, in accordance with Sections 181 and 387 of the Criminal Procedure Act, the Respondent's courts lacked jurisdiction to try him as the alleged robbery occurred in Kenya. He also alleges that he was wrongly convicted because the charges against him were defective, contrary to Section 132 of the Criminal Procedure Act because, there were inconsistencies between the charge sheet and the evidence. In this regard therefore, the Applicant claims that the prosecution did not prove the case against him beyond reasonable doubt. The Applicant alleges that this is particularly so, with regard to the ownership of the property alleged to have been stolen, the actual property alleged to have been stolen, the value of the property and whether or not the Applicant attacked the complainants with a gun.

5. The Applicant also alleges that he was not given an opportunity to defend himself during the trial. In addition, the Applicant states that, after being denied the right to defend himself and subsequently being convicted for robbery with violence, he was still denied the opportunity to explain the reasons for his absence during the defence, contrary to Section 226(2) of the Criminal Procedure Act.

6. The Applicant further states that he was not provided with a lawyer to defend him during the trial and appeal as required by Article 13 of the Constitution of the United Republic of Tanzania and by the Universal Declaration of Human Rights, as he had been charged with

the serious offence of armed robbery. This situation resulted in contravention of the principle of equality of arms. In addition, the Applicant alleges that he was not given the opportunity to make a rejoinder to the prosecution's statement during the hearing of his appeal.

Procedure

7. The Application was filed on 2 August 2013 and served on the Respondent by a letter dated 10 September 2013. Pursuant to the Rules of Court, by a letter dated 10 September 2013, the Application was notified to the Chairperson of the African Union Commission and through the Chairperson of the African Union Commission, to the Executive Council of the African Union and State Parties to the Protocol and requesting that any State Party to the Protocol wishing to intervene in the proceedings should do so as soon as possible, and in any case, before the closure of the written proceedings.

8. At the request of the Court, Pan African Lawyers' Union (PALU) is representing the Applicant.

9. On 11 December 2013, and following the decision of the Court taken at its 31st Ordinary Session, the Registrar reminded the Respondent that it is yet to file a Response to the Application, that it had fifteen (15) days from receipt of the reminder within which to do so and to note the provisions of Rule 55 of the Rules of Court. Thereafter, on 16 December 2013, the Respondent requested an extension of time to file the Response, which the Court granted by thirty (30) days.

10. The Respondent's Response dated 23 January 2014, was received at the Registry on 5 February 2014, out of time. The Court, in the interest of justice, accepted the Respondent's response out of time and served it on the Applicant by a letter of the same date and giving the Applicant thirty (30) days from receipt thereof to file his Reply.

11. At the request of the Applicant, on 7 March 2014, the Court granted the Applicant's request for extension of time to file its Reply to the Respondent's Response on or before 7 April 2014. The Applicant filed his response on 8 April 2014, within time. Pleadings were closed on 17 April 2014 after the Applicant's Reply to the Respondent's Response was duly filed.

12. During the public hearing on the matter held on 3 December 2014 at the Headquarters of the African Union in Addis Ababa, Ethiopia, the parties made oral submissions in support of their positions. The appearances were as follows:

For the Applicant:

i. Mr. Donald Deya
ii. Ms. Evelyn H. Chijarira

For the Respondent:

i. Ms. Sarah D. Mwaipopo
ii. Ms. Nkasori Sarakikya
iii. Mr. Jumanne Ramadhan Mziray
iv. Mr. Mark Mulwambo

v. Mr. Elisha Suka

13. Further, the parties were directed to provide additional documents within thirty (30) days from the date of the hearing. The Applicant was to provide a copy of the Applicant's Notice of Motion for Review of the decision of the Court of Appeal in Criminal Appeal Number 230 of 2008. The Respondent was to provide a certified copy of the record of proceedings in Criminal Appeal Number 230 of 2008 of the Court of Appeal and a certified copy of warrant of commitment on a sentence of imprisonment issued.

14. On 22 January 2015, PALU submitted the documents requested by the Court during the public hearing.

15. On 5 February 2015, the Respondent submitted to the Registrar, a certified copy of the record of proceedings at the Court of Appeal in Criminal Appeal Number 230 of 2008 and its observations on the authenticity of the copy of the Applicant's Notice of Motion for Review of the decision of the Court of Appeal in Criminal Appeal Number 230 of 2008 submitted to the Registrar by PALU.

16. On 24 February 2015, PALU objected to the Respondent's purported explanation of some of the issues arising from the record of proceedings in Criminal Application Number 230 of 2008. The Respondent did not respond to PALU's contention. The decision of the Court on this objection follows in this judgment (infra paragraphs 79-80).

The Applicant's Prayers

17. In his Application dated 2 August 2013, the Applicant asks that the Court makes any orders and reliefs that it may deem fit to grant, The Applicant also requests that the Court quashes the decisions by the trial court and the Appellate courts convicting him of the offences he was charged with, acquits him and sets him free.

18. The Applicant filed the Application and subsequently, PALU started representing him.

19. In the Reply to the Respondent's Response dated 8 April 2014, filed by PALU, the prayers are that:

> "The Applicant seeks the following reliefs from this Honourable Court;
>
> a. A Declaration that the Respondent State has violated the Applicant's rights as guaranteed under Articles 1, 3, 5, 6, 7(1), and 9(1) of the African Charter on Human and Peoples' Rights.
>
> b. An Order compelling the Respondent State to release the Applicant from detention.
>
> c. An Order for reparations.
>
> d. An Order compelling the Respondent State to report to this Honourable Court every six (6) months on the implementation of its decision.
>
> e. Any other Order or remedy that this Honourable Court may deem fit."

20. During the public hearing, the Applicant reiterated his prayers, and specifically with regard to reparations, requested that if the Court

finds for the Applicant, it should schedule a public hearing on reparations.

The Respondent's Prayers

21. In its Response to the Application, dated 5 February 2014:

"The Respondent prays that the African Court on Human and Peoples' Rights grant the following orders with respect to the admissibility of the Application:

i. That the Application be dismissed as it has not met the admissibility requirements stipulated under Rule 40(1-7) of the Rules of Court, Article 56 of the Charter and Article 6(2) of the Protocol.

ii. That the Application be dismissed in accordance with Rule 38 of the Rules of Court.

iii. That the Application has not evoked (sic) the jurisdiction of the Honourable Court.

iv. That the costs of this Application be borne by the Applicant."

"The Respondent prays that the African Court on Human and Peoples' Rights grant the following orders with respect to the merits of the Application:

i. That the Government of the United Republic of Tanzania has not violated the Applicant's right to be heard.

ii. That the Government of the United Republic of Tanzania has not violated the Applicant's right to defend himself.

iii. That the Government of the United Republic of Tanzania has not violated the Applicant's right to liberty.

iv. That all aspects of the prosecution of Criminal Case No. 321 of 1996 were conducted lawfully and the prosecution proved its case against the Applicant beyond reasonable doubt.

v. That there has been no delay of justice for the Applicant."

22. During the public hearing the Respondent reiterated its prayers as stated in its Response to the Application.

Historical and factual background to the Application

23. On 31 December 1996, the Applicant was charged with the offence of armed robbery, allegedly committed along the Kenya/Tanzania border in Rombo District. It was alleged that he stole one hundred (100) sets of clutch covers valued at Tanzania Shillings Eight Hundred Thousand (Tshs. 800,000/=), the property of Mr. Elimani Maleko. He was charged with four other persons before the District Court of Rombo at Mkuu in Criminal Case Number 321 of 1996. The Applicant pleaded not guilty.

24. On 30 January 1997, the Applicant applied for bail on the grounds of ill health and this application was heard on 31 January 1997 and granted on 5 February 1997. On 20 March 1997 when the matter was mentioned, the Applicant was absent and the Magistrate ordered the arrest of the Applicant and his sureties. On 26 March 1997, when the matter came up for mention and the Court directed the Applicant to show cause why his bail should not be forfeited, he explained that he had been sick. The Court was satisfied with this explanation and, by an order of the same date, extended his bail. The prosecution opened its case on 26 March 1997 and closed its

case on 12 June 1997. The Applicant was present throughout the prosecution's case. The defence opened its case on 24 June 1997 and finalised the same on 25 June 1997.

25. When the defence opened its case on 24 June 1997, the Applicant was absent and the prosecution applied to the trial court that the trial should proceed under Section 226 of the Criminal Procedure Act and that the Applicant be arrested for jumping bail. The application was granted and the matter proceeded under Section 226 of the Criminal Procedure Act. This provision, specifically Section 226(1) thereof, allows the trial court to proceed with a hearing that had been adjourned, if an accused person is not present when the trial resumes. On 25 June 1997, the trial court ordered that a warrant of arrest be issued against the Applicant, and his sureties be summoned to show cause why their bail bond should not be forfeited. The record shows that the Applicant had been admitted to hospital on 20 June 1997, suffering from extra *pulmonary tuberculosis* and *asthmatic statae*. He was hospitalised until 21 February 1998.

26. On 30 June 1997, judgment was delivered in the absence of the Applicant, wherein he was convicted of armed robbery and sentenced to thirty (30) years imprisonment under the Minimum Sentences Act No.1 of 1972 as amended by Miscellaneous Amendment Act No. 10 of 1989. He was also to receive twelve (12) strokes of the cane. The Applicant and the first co-accused were also ordered to pay compensation in respect of the stolen properties yet to be recovered, with a total value of Tanzania Shillings One Hundred and Fifty Thousand (Tshs.150,000/=). The Applicant

commenced his sentence on 3 June 1998 and is currently serving his sentence at Karanga Central Prison at Moshi, Kilimanjaro Region.

27. The Applicant appealed against his conviction and sentence, vide Criminal Appeal Number 82 of 1998 at the High Court of Tanzania at Moshi. This appeal was dismissed on 23 March 2000. The High Court held that, as the Applicant did not appear when the case was fixed for the defence, he cannot blame the trial court for convicting him *in absentia*, on the strength of the prosecution's case. The High Court found that the trial magistrate acted properly under section 227 of the Criminal Procedure Act and that the sentence of thirty (30) years' imprisonment is the statutory minimum and therefore dismissed the appeal in its entirety. Section 227 of the Criminal Procedure Act provides as follows:

"Where in any case to which section 226 does not apply, an accused being tried by a subordinate court fails to appear on the date fixed for the continuation of the hearing after the close of the prosecution case or on the date fixed for the passing of sentence, the court may, if it is satisfied that the accused's attendance cannot be secured without undue delay or expense, proceed to dispose of the case in accordance with the provisions of section 231 as if the accused, being present, had failed to make any statement or adduce any evidence or, as the case may be, make any further statement or adduce further evidence in relation to any sentence which the court may pass:

Provided that - (a) where the accused so fails to appear but his advocate appears, the advocate, subject to the provisions of this Act, be entitled to call any defence witness and to address the court as if the accused had been or is convicted, and the advocate shall be entitled to call any witness and to address the court on matters relevant to any sentence which the court may pass; and

(b) where the accused appears on any subsequent date to which the proceedings may have been adjourned, the proceedings under this section on the day or days on which the accused was absent shall not be invalid by reason only of his absence."

28. Following the dismissal on 23 March 2000, of the Applicant's Appeal to the High Court of Tanzania at Moshi in Criminal Case Number 82 of 1998, the Applicant filed his Notice of Appeal at the Court of Appeal of Tanzania at Moshi on the same date. The Applicant subsequently filed his appeal on 17 April 2003, which was registered as Criminal Appeal Number 153 of 2003.

29. In order to prosecute this appeal, on 23 April 2003, the Applicant wrote to the High Court requesting for the court record of the proceedings at the High Court in Criminal Case Number 82 of 1998. On 27 January 2004, the Applicant wrote to the Court of Appeal requesting the same, and again on 5 August 2004,[1] to the Registrar of the High Court at Moshi. On 13 September 2004, he wrote a letter to the Registrar of the Court of Appeal requesting a copy of the court record of proceedings at the High Court. On 19 October 2004, the Applicant filed a complaint with the Commission for Human Rights and Good Governance of Tanzania for failure to be furnished with copies of the court record.[2] On 17 June 2005, he wrote a further letter to the Registrar of the Court of Appeal regarding

[1] This is the letter wherein the Applicant makes reference to the letters of 23 April 2003 and 27 January 2004.

[2] This is deduced from the Commission's letter of acknowledgment dated 23 November 2004, of the Applicant's letter of 19 October 2004.

the delay in having his appeal heard. On 21 September 2005, after the expiry of two (2) years and five (5) months, the Applicant's appeal to the Court of Appeal, Criminal Appeal Number 153 of 2003, was heard and dismissed. At the time of the hearing of this appeal, the Applicant had not been provided with a copy of the court record. The Appeal was dismissed for being filed out of time.

30. On 31 October 2005, the Applicant made an application to the High Court at Moshi, vide Miscellaneous Criminal Application Number 40 of 2005, for leave to file his Notice of Appeal out of time. The High Court of Tanzania at Moshi granted his Application, on 12 February 2007 and on the same date, the Applicant filed a Notice of Appeal to the Court of Appeal, being Criminal Appeal Number 217 of 2007. On 28 June 2007, and after the expiry of four (4) years and six (6) months, the Applicant received the record of proceedings in Criminal Appeal Number 82 of 1998 at the High Court of Tanzania at Moshi. On 15 October 2007, Criminal Appeal Number 217 of 2007 was struck out on the basis that the Notice of Appeal was unsigned and was filed out of time.

31. On 7 February 2008, the Applicant filed Miscellaneous Criminal Case Number 3 of 2007 at the High Court of Tanzania at Moshi seeking that his Notice of Appeal be heard out of time. In the course of the proceedings for this application, the Applicant requested to amend the application in order to cite the proper provisions applicable and the Court granted this application. The Court ordered that the Applicant file the amended application before 11 June 2008. In compliance with this order, on 6 June 2008, the Applicant applied to the High Court of Tanzania at Moshi vide

Amended Miscellaneous Application Number 3 of 2008, seeking leave to lodge a fresh appeal out of time. On 11 June 2008, the High Court, being satisfied that the Applicant had complied with the Order to file the amended Application, granted the Applicant leave to file the Notice of Appeal to the Court of Appeal within ten (10) days thereof. On 13 June 2008, the Applicant filed at the High Court of Tanzania at Moshi, a Notice of Appeal to the Court of Appeal. This new appeal to the Court of Appeal was filed as Criminal Appeal Number 230 of 2008.

32. On 10 July 2008, the Applicant wrote a letter to the Registrar of the Court of Appeal to inform him of the delay in the hearing of his appeal. On 2 February 2009 the Applicant wrote a letter to the District Registrar of the High Court of Tanzania at Moshi requesting the record of the proceedings at the High Court. On 17 March 2009, the Applicant received a copy of the court record.

33. On 29 May 2009, the Court of Appeal delivered its judgment in Criminal Appeal Number 230 of 2008, dismissing the appeal, and finding that the prosecution's case had merit, upheld the Applicant's conviction and sentence.

34. On 10 June 2009, the Applicant filed a Notice of Motion for review of the decision of the Court of Appeal in Criminal Appeal Number 230 of 2008. On 4 January 2010, the Applicant wrote to the Chief Justice of the United Republic of Tanzania reminding him of his request for *pro bono* legal counsel and requesting hearing of his Application for Review.

35. Though it is not clear from the record when the Applicant first requested for *pro bono* legal counsel, on 3 September 2010, the Applicant wrote a further letter reminding the Chief Justice of his request for *pro bono* legal counsel and requesting hearing of his Application for Review.

36. On 10 January 2011 and 20 September 2011, the Applicant wrote to the Chief Justice reminding him of his request to have his Application for Review heard. On 12 July 2013, he further wrote to the Registrar of the Court of Appeal requesting that his Application for Review be included and heard at the next Court of Appeal session. The Applicant alleges that, at the time of filing this Application at the African Court on 2 August 2013, he has received "no substantive response as to the status of his review".

The Preliminary Objections

37. The Respondent raises preliminary objections on issues of jurisdiction and admissibility.

Preliminary objections on jurisdiction

38. The Respondent contends that the Applicant's citation of Articles 5 and 34(6) of the Protocol and Rule 33 of the Rules of Court to invoke the jurisdiction of the Court is not proper as these articles only provide him standing before the Court. The Respondent argues that, therefore, the jurisdiction of the Court has not been invoked.

39. The Respondent contends further that, the Application does not refer to, or ask for, the interpretation or application of the Charter,

the Protocol or any other relevant human rights instrument ratified by the United Republic of Tanzania. The Applicant has merely listed his grievances against the application of the Criminal Procedure Act in relation to the originating criminal case against him, being Case Number 321 of 1996.

40. The Respondent asserts that, because the Applicant is not clear in the remedies he seeks, he therefore, has not invoked the jurisdiction of the Court and the Application should be dismissed.

41. The Applicant maintains that the Court has the jurisdiction *ratione materiae* to determine this case on the basis that there are allegations of violations of the human rights of the Applicant as guaranteed under the Charter.

42. In the Reply to the Respondent's Response, the Applicant alleges violation of the obligation of Member States to give effect to the rights, duties and freedoms enshrined therein, violation of the right to equality before the law and equal protection of the law and violation of the prohibition of torture, cruel, inhuman and degrading treatment which resulted from the inordinate delay in the hearing of the Applicant's cases. The Applicant also states that his right to personal liberty and protection from arbitrary arrest have been violated by his continued detention occasioned by the delay in the hearing of his cases. He asserts that his right to a fair trial was violated because he was not given the opportunity to present his defence, he was not provided *pro bono* legal aid despite being charged with a serious offence and that there were systematic and prolonged delays in his appeals and his application for review at the

Court of Appeal. The Applicant maintains that these delays were compounded by the dilatory conduct of the state in providing the record of proceedings of the trial courts which hampered his ability to file his appeal. The Applicant maintains that this also violated his right to receive information and his right to freedom of expression.

43. The Applicant also argues that, the Court has jurisdiction *ratione personae* and that he is entitled to file an Application before the Court on the basis that he is a citizen of the United Republic of Tanzania, and the Respondent State has ratified the Protocol and filed a declaration allowing direct access for individuals to file cases before this Court.

44. The Applicant further asserts that, the Court has held a similar view on its jurisdictional requirements in *Application Number 001/2012 Frank David Omary and Others v The United Republic of Tanzania* and *Application Number 003/2012 Peter Joseph Chacha v The United Republic of Tanzania*.

Jurisdiction *ratione materiae*

45. The Court considers that the Respondent's objection that *"the Court lacks jurisdiction because the Applicant improperly cites Articles 5 and 34(6) of the Protocol and Rule 33 of the Rules of Court and that the Articles only provide him standing before the Court"* lacks merit. The Court finds that as long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter. The Court first elaborated on this in

Application Number 001/2012 Frank David Omary and Others v United Republic of Tanzania and thereafter, in *Application Number 003/2012 Peter Joseph Chacha v United Republic of Tanzania*. The Court, in the above cases held that, the substance of the complaint must relate to rights guaranteed by the Charter or any other human rights instrument ratified by the State concerned. It is not necessary that the rights alleged to have been violated are specified in the Application.

46. In any event, in the instant case, the Applicant's Reply to the Respondent's Response specifies the rights guaranteed by the Charter alleged to have been violated (supra paragraph 42).

47. The Court finds that the Applicant's Application states facts which relate to human and peoples' rights protected under the Charter, and therefore holds that it has jurisdiction *ratione materiae.*

Jurisdiction *ratione personae*

48. Although the parties raised an issue purportedly relating to the Court's jurisdiction *ratione personae,* the Court does not consider this to be an objection on its jurisdiction *ratione personae.* The Respondent is a State Party to the Protocol, which has also made the declaration in terms of Article 34(6) of the Protocol accepting the seizure of the Court by an individual. The Respondent deposited its instrument of ratification of the Protocol on 10 February 2006 and deposited the declaration required under 34(6) of the Protocol on 29 March 2010. Though the alleged violations occurred before the deposit of the instruments of ratification and declaration

aforementioned, the Court finds that it has jurisdiction *ratione personae.*

Preliminary objections on admissibility

49. The Respondent raises preliminary objections on admissibility based on different components of the requirements of Article 56 of the Charter. These are on incompatibility of the Application with the Charter and the Constitutive Act of the African Union, on non-exhaustion of local remedies and in the alternative thereto, that the Application has not been filed within a reasonable time from when local remedies were exhausted.

I. Incompatibility of the Application with the Charter and the Constitutive Act of the African Union

50. The Respondent contends that the Application does not comply with the Constitutive Act of the African Union and the Charter as it does not address issues compatible with the Charter or the principles enshrined in the Charter of the Organisation of African Unity and further, that no provisions of the African Charter have been referenced in the Application.

51. The Applicant avers that he has met the requirements of Article 56(2) of the Charter which stipulate that applications must be compatible thereto. This is because, the Court has decided, in Application *Number 003/2012 Peter Joseph Chacha v The United Republic of Tanzania* that, so long as the rights alleged to have been

violated are contained in the Charter, they need not be specifically cited in the application.

52. Regarding the Respondent's objection to the application on the grounds of its incompatibility with the Charter of the Organization of African Unity, now the Constitutive Act of the African Union, the Court notes that this argument lacks merit. The Constitutive Act of the African Union provides that one of the objectives of the African Union shall be to promote and protect human and peoples' rights in accordance with the Charter and other relevant human rights instruments. In addition, the Court finds that the Applicant's Application states facts which relate to human and peoples' rights protected under the Charter. Moreover, the Court has decided on this issue in *Application Number 001/2012 Frank David Omary and Others v United Republic of Tanzania* and *Application Number 003/2012 Peter Joseph Chacha v United Republic of Tanzania*. In the latter case, the Court found that "... the Applicant's Application states facts which revealed a *prima facie* violation of his rights; furthermore, the Court finds that the Application relates to human and peoples' rights protected under the Charter, therefore the requirements of Article 3(1) of the Protocol and Article 56(2) of the Charter have been met".

II. Non-exhaustion of local remedies

53. The Respondent states that the application has not been filed after exhausting local remedies. The Respondent states that the

Applicant should have waited for the 5 June 2009[3] Notice of Motion to Review the Court of Appeal's decision in Criminal Appeal Number 230 of 2008 to be heard. The Respondent further states that the Applicant could have also instituted a Constitutional Petition before the High Court of Tanzania vide the Basic Rights and Duties Enforcement Act, 1994, regarding the alleged violation of his rights, which form the basis of his application before this Court.

54. The Applicant avers that local remedies were fully exhausted when the Court of Appeal of Tanzania, the highest court of the land, finally and in its entirety, dismissed his appeal on 29 May 2009.

55. The Applicant avers that one need not file an application for review so as to exhaust local remedies. He also states that the assertion of the Respondent State that the Applicant should have filed a constitutional petition to challenge the delay in the hearing of the review is both unnecessary and redundant as it imposes a requirement to utilise a procedure that falls outside the scope of the rule requiring exhaustion of local remedies.

56. On the preliminary objection that the Applicant did not exhaust local remedies, the Court finds that the Applicant went through the required criminal trial process up to the highest Court in the land and finally applied for review to the Court of Appeal. In a case involving the Respondent State before the African Commission, the

[3] The Notice of Motion for Review in the matter of Criminal Appeal Number 230 of 2008 in the Court of Appeal of Tanzania. It was signed by the Applicant by way of thumbprint on 5 June 2009 and lodged in the Registry at Dar es Salaam on 10 June 2009.

Respondent State maintained that the Court of Appeal is the highest Court in the land.[4] Additionally, the procedures followed on local remedies were unduly prolonged.

57. The Court finds that there were systematic and prolonged delays in the determination of his appeal to the Court of Appeal. Following the dismissal, on 23 March 2000 of the Applicant's appeal to the High Court, being Criminal Appeal Number 82 of 1998, it was only on 17 April 2003 that his Appeal to the Court of Appeal was registered. There were also unreasonable delays in providing the Applicant with the record of proceedings of the appeal heard by the High Court, (Criminal Appeal Number 82 of 1998), which he required to prosecute his Appeal at the Court of Appeal. A period of two (2) years and five (5) months lapsed between 23 April 2003, when the Applicant first requested for this record of proceedings, and 21 September 2005, when the appeal at the Court of Appeal was heard and dismissed, for being filed out of time. The Court notes that by the time the Court of Appeal dismissed his appeal, the Applicant was yet to be provided with the record of the proceedings of Criminal Appeal Number 82 of 1998.

58. The Applicant then filed a Miscellaneous Application at the High Court, on 31 October 2005, seeking leave to file his Notice of Appeal to the Court of Appeal, out of time. Once this application was granted on 12 February 2007, his new appeal to the Court of Appeal was registered on the same date, as Criminal Appeal Number 217 of

[4] See Communication 333/06 *Southern Africa Human Rights NGO Network and Others v Tanzania* 28th Activity Report November 2009 – May 2010 paragraph 29.

2007. It was only after the filing of this second appeal to the Court of Appeal that, on 28 June 2007, four (4) years and six (6) months after first requesting for the record of proceedings of the appeal at the High Court (Criminal Appeal Number 82 of 1998), the Applicant received the record. However, on 15 October 2007, the Court of Appeal struck out Criminal Appeal Number 217 of 2007 on the basis that the Notice of Appeal was unsigned and was filed out of time.

59. On 7 February 2008, the Applicant filed a Miscellaneous Application at the High Court seeking leave to file his Appeal out of time. This application was subsequently granted and on 13 June 2008, the Applicant filed a new appeal to the Court of Appeal vide Criminal Appeal Number 230 of 2008. This appeal was dismissed on 29 May 2009 on the basis that the prosecution had proven the case against the Applicant in the original criminal case. The Applicant represented himself throughout these processes, despite the fact that the charges against him were serious offences and carried a heavy custodial sentence and his requests for *pro bono* legal counsel were not responded to.

60. Regarding the Respondent's contention that the Applicant should have applied for a constitutional petition to vindicate his rights under the Basic Rights and Duties Enforcement Act, the Court finds that the Applicant was not under an obligation to do so. The alleged non-conformity by the trial court, with the due process, with its bundle of rights and guarantees, formed the basis of his appeals to the High Court and the Court of Appeal. The Court of Appeal decided on the Applicant's appeal with finality therefore he accessed the highest Court in the Respondent State.

61. Furthermore, the Court notes that if in proceedings in a subordinate court, basic rights are alleged to have been contravened, an application is made under the Basic Rights and Duties Enforcement Act, to the High Court to be decided by a three – Judge Bench and an appeal therefrom lies to the Court of Appeal.[5]

62. In the instant case, once the Court of Appeal of Tanzania decided on the Applicant's appeal, it would have been unreasonable to require him to lodge a fresh application regarding his right to a fair trial, to the High Court, which is a court lower than the Court of Appeal of Tanzania.

63. Regarding the Respondent's contention that the Applicant should have pursued the application for review to its conclusion, the Court finds that this was neither necessary nor mandatory. The final appeal in criminal trials lies, as of right, to the Court of Appeal, which the Applicant has proved that he accessed. In addition, his appeal to the Court of Appeal was based on allegations of violations of his basic right to a fair trial, which the Court of Appeal also decided on[6], therefore, it was not necessary for him to file a separate constitutional petition to the High Court vide, the procedure set out in the Basic Rights and Duties Enforcement Act, based on the alleged violation of his basic right to a fair trial. The Court also finds that an application for review is an extraordinary remedy because

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[5] Basic Rights and Duties Enforcement Act, Act Number 33 of 1994, Sections 9 and 10.

[6] Court of Appeal of Tanzania at Arusha, Criminal Appeal Number 230 of 2008 *Alex Thomas v The Republic* Judgment of 29 May 2009.

the granting of leave by the Court of Appeal to file an application for review of its decision is based on specific grounds[7] and is granted at the discretion of the Court.[8]

64. The Court is persuaded by the reasoning of the African Commission in *Southern African Human Rights NGO Network v Tanzania*[9], where it stated that, the remedies that need to be exhausted are ordinary remedies.

65. In view of this, the Court finds that the Respondent's assertion that the Applicant should have filed a Constitutional Petition to challenge the delay in the hearing of the application for Review,

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[7] See Section 66 (1) of the Court of Appeal Rules of the Court of Appeal of Tanzania which provides:

"The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds -

(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or

(b) a party was wrongly deprived of an opportunity to be heard;

(c) the court's decision is a nullity; or

(d) the court had no jurisdiction to entertain the case; or

(e) the judgment was procured illegally, or by fraud or perjury."

[8] *Karim Karia v Republic] Criminal Application N[umber] 4 of 2007 Court of Appeal of Tanzania at Dodoma* quoting the case of *Tanzania Transcontinental Co. Ltd v Design Partnership Ltd (Civil) Application N[umber] 62 of 1996.*

[9] Communication 333/2006 28th Activity Report November 2009 – May 2010. paragraph 64. The Commission held that:

"Furthermore, the 'remedies' referred to in Article 56(5) include all judicial remedies that are easily accessible for justice. The Commission in *INTERIGHTS and Others v Mauritania*, declared: 'The fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice."

would have been impractical and an extra-ordinary measure that was not required of the Applicant. Since the Applicant's appeal was dismissed by the Court of Appeal of Tanzania, the Applicant therefore exhausted local remedies.

III. The Application has not been filed within a reasonable time after exhaustion of local remedies.

66. In the alternative, and without prejudice to the Respondent's argument that the application is inadmissible for non-exhaustion of local remedies, the Respondent argues that the Application has not been filed within a reasonable time vis-à-vis his Notice of Motion of 5 June 2009, to Review the Court of Appeal's decision in Criminal Appeal Number 230 of 2008. This is because three (3) years and almost three (3) months have lapsed since this Notice of Motion was filed. The Respondent submits that the *"reasonable period; specified in the Charter for filing applications after exhaustion of local remedies should be set at six months in line with developments in international human rights jurisprudence and considering this, the Applicant has filed his application out of time".* The Respondent maintains that, by these standards, the Applicant would still be out of time for filing the Application, if time was reckoned from 20 September 2011, being the date of the Applicant's correspondence to the Chief Justice, reminding the Chief Justice of the Application for Review of the judgment of the Court of Appeal.

67. The Respondent concludes that on this basis, since the Application has failed to meet some of the conditions of admissibility, it should be declared inadmissible and be dismissed with costs.

68. The Applicant contends that this Application was filed within a reasonable period following the exhaustion of local remedies, given the circumstances and position of the Applicant, being a lay, indigent and incarcerated person.

69. The Applicant contends that, without prejudice to the above, should the Court consider that the period from the exhaustion of local remedies to the filing of the Application before this Court was unreasonably prolonged, there are sufficient reasons to explain the delay.

70. The Applicant contends that he embarked on a reasonable pursuit to have his complaints disposed of within his national jurisdiction by filing an Application for Review of the decision of the Court of Appeal.

71. In addition, the Applicant contends that he repeatedly wrote several letters to the Chief Justice and Registrar of the Court of Appeal requesting to have his Application for Review heard. The last letter was sent to the Registrar of the Court of Appeal on 12 July 2013 and the Applicant seized this Court on 2 August 2013. The multiple requests to agents of the Respondent State went unanswered. It is the Applicant's strong contention that he gave reasonable time to the Respondent State to finally remedy the violation of his rights.

72. The Applicant, in support of the above facts, relies on the jurisprudence of the African Commission which has held, in *Southern*

Africa Human Rights NGO Network and Others v Tanzania, that awaiting responses on applications or judicial reviews are sufficient grounds to explain a delay in seizing an international body. It is the contention of the Applicant that the jurisprudence of the African Commission on the matter forms a highly persuasive source of law and that this Court be inclined to reach the same decision.

73. On the preliminary objection that the Applicant did not file the application within a reasonable time from the time local remedies were exhausted, the Court finds that in considering whether the application was filed within a reasonable time, time should have started running from 29 May 2009 when the Court of Appeal dismissed the Applicant's appeal. However, the Respondent deposited its declaration under Article 34(6) of the Protocol on 29 March 2010, therefore the time should be reckoned from that date. This Court has, in *Application 013/2011 Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Movement on Human and Peoples' Rights v Burkina Faso (Ruling on Preliminary Objections of 21 June 2013)* set out the principle that, "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case by case basis".

74. Considering the Applicant's situation, that he is a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records, and his attempt to use extraordinary measures, that is, the application for review of the Court of Appeal's decision, we find that these constitute sufficient grounds to explain why he filed the Application before this Court on 2 August 2013, being three (3)

years and five (5) months after the Respondent made the declaration under Article 34(6) of the Protocol. For these reasons, the Court finds that the application has been filed within a reasonable time after the exhaustion of local remedies as envisaged by Article 56(5) of the Charter. The Court therefore overrules this preliminary objection and dismisses the same.

Respondent's objection to the alleged introduction of new issues by the Applicant

75. Following the Respondent's Response dated 5 February 2014, to the Application, the Applicant filed, in conformity with the deadline provided by the Court, a Reply dated 8 April 2014 responding to the Respondent's Response. The Applicant sought the reliefs listed in paragraphs 17, 19 and 20 above.

76. During the public hearing, the Respondent raised an objection to the Applicant's Reply to the Respondent's Response. The Respondent contended that "... the Rejoinder has raised new issues, which were not part of the Application, being issues related to both jurisdiction and admissibility of the case." The Respondent maintained that, "a Rejoinder is only meant to address and answer issues raised in the Reply and not to raise new issues. However, the so-called Rejoinder by the Applicant is a fresh Application, which raises new allegations." The Respondent further stated that, this results in an unfair situation and is contrary to the principle of equality of arms. The Respondent also stated that the "Court should only address itself on the issues raised in the Application and not the issues raised in the purported Rejoinder. This is especially as there is no provision for a Sur-Rejoinder in the Rules of Court."

77. The position of the Applicant as stated during the public hearing is that "there is no allegation that the Applicant makes pursuant to having Counsel assigned to him that the Applicant did not himself make, albeit without the sophistication that comes with having Counsel." In other words, the Applicant's rejoinder merely refined the Applicant's application which followed from his being represented by Counsel. The Applicant stated that " ... in total, the fourteen pages that the Applicant, on his own, without the benefit of Counsel filed, contains all the allegations and all the complaints that he has made that are merely reiterated in the Rejoinder. In fact, apart from perhaps a change of language, the only thing the Rejoinder articulates that was not there in the earlier fourteen pages, are the specific Articles of the African Charter alleged to have been violated".

78. The Court notes that the Applicant's Reply to the Respondent's Response largely restated the Applicant's position as enunciated in the Application. Counsel for the Applicant merely links the alleged violations with the relevant articles of the Charter. The Application alluded to alleged violations of the right to fair trial as set out in Article 7 of the Charter and Counsel merely expressly stated the same in the Reply. The Reply to the Respondent's Response alleges violations of Articles 1, 3, 5, 6, 7(1) and 9(1) of the Charter. The Court finds that the Applicant's Reply to the Respondent's Response linked more precisely with the Charter, the rights that the Applicant alleged were violated, and that it did not introduce new issues.

Applicant's objection to the Respondent's explanations relating to the Record of Proceedings in Criminal Appeal Number 230 of 2008

79. On 22 January 2015, PALU submitted the documents requested by the Court during the public hearing. On 5 February 2015, the Respondent submitted to the Registrar, a certified copy of the record of proceedings at the Court of Appeal in Criminal Appeal Number 230 of 2008 and its observations on the authenticity of the copy of the Applicant's Notice of Motion for Review of the decision of the Court of Appeal in Criminal Appeal Number 230 of 2008 submitted to the Registrar by PALU. On 24 February 2015, PALU objected to the Respondent's purported explanation of some of the issues arising from the record of proceedings in Criminal Appeal Number 230 of 2008. This was on the basis that by doing so, the Respondent was analysing freshly, both its own and the Applicant's arguments and that the Respondent is providing information and arguments to strengthen its defence. PALU urged that these explanations be disregarded as they were not included in the prior written and oral submissions. The Respondent did not respond to PALU's contention.

80. The Court did not direct that the parties provide explanations regarding the documents to be submitted after the public hearing. In this regard therefore, the Respondent was merely required to submit the documents as directed. An examination of the purported explanation by the Respondent of the record of proceedings in Criminal Appeal Number 230 of 2008 shows that this indeed amounts to fresh arguments by the Respondent, on its case and on

the Applicant's submissions. The pleadings having been closed, the Parties could not make fresh arguments. Therefore, the said explanation, provided by the Respondent regarding the record of proceedings in the Appeal at the Court of Appeal will be disregarded and will not affect the decision of the Court on the merits of the Application.

The Merits

I. The alleged Denial of the Right to be Heard and to Defend Oneself

81. The Applicant alleges that he was denied the right to be heard and to defend himself because the trial court proceeded to hear the case in his absence. During the trial, the Applicant alleges that he was admitted in hospital for eight (8) months, suffering from *pulmonary tuberculosis* and *asthmatic statae*. He also alleges that even after he was convicted *in absentia*, he was also not allowed to provide the trial court with reasons for his absence, pursuant to section 226(2) of the Criminal Procedure Act which reads:

"If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit."

82. The Respondent contends that section 226(1) of the Criminal Procedure Act provides for circumstances in which a court can proceed with a hearing and convict and sentence an accused person *in absentia*. The Respondent puts the Applicant to strict proof

regarding this allegation. Section 226(1) of the Criminal Procedure Act provides that:

"If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and acquit the accused with or without costs as the court thinks fit."

83. In the Respondent's written submissions to the High Court at Moshi, in respect of Criminal Appeal Number 82 of 1998, the Respondent conceded that, if the record does not show compliance with Section 226(2) of the Criminal Procedure Act, which requires that even after being tried *in absentia*, the Applicant (who was the Appellant in that Appeal) should have been allowed an opportunity to provide the Court with reasons for his absence, then the Applicant should be granted this opportunity.

84. The Respondent's submission before this Court on this issue is to maintain that the Applicant was absent during the defence case at the trial court and that Section 226(1) of the Criminal Procedure Act was properly applied in proceeding with the trial.

85. It is also the Applicant's allegation that the court did not admit his rejoinder in the appeal before the High Court. The Respondent's position is that it denies these allegations and the Applicant is put to strict proof thereof.

86. The Court observes that Article 7(1)(c) of the Charter is relevant in this regard. It provides that:

"Every individual shall have the right to have his cause heard. This comprises:
(a) ...
(b) ...
(c) the right to defense, including the right to be defended by counsel of his choice;"

87. Article 7 of the Protocol provides that:

"The Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the State concerned."

88. In view of the fact that the Respondent acceded to the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976 and deposited its instrument of accession on the same date, in accordance with Article 7 of the Protocol, the Court can interpret Article 7(1)(c) of the Charter in light of the provisions of Article 14(3)(d) of the ICCPR.

89. Article 14(3)(d) of the ICCPR is more elaborate than Article 7(1)(c) of the Charter and it reads:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) ...
(b) ...
(c) ...
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any

case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

90. The above mentioned provision of the ICCPR, Article 14(3)(d) contains three distinct guarantees. First, the provision stipulates that accused persons are entitled to be present during their trial. Second, the provision refers to the right of the accused to defend himself or herself, whether in person or through legal assistance of their own choosing. Third, the provision guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case, if they do not have sufficient means to pay for it.

91. Article 7(1)(c) of the Charter and Article 14(3)(d) of the ICCPR required that the Applicant be present to defend himself. The Applicant was not physically able to defend himself during the hearing of Criminal Case Number 321 of 1996 as he had been granted bail by the trial magistrate on grounds of ill health and, according to the trial record, had been admitted to hospital at the time the defence was making its case on 24 and 25 June 1997.

92. It is worthy to note that, prior to the defence case, the Applicant was not present in Court during the mention of the case on two occasions, that is, on 20 and 26 March 1997. With regard to both occasions, when the Applicant later presented himself to Court, the magistrate was satisfied with his explanation that he failed to attend court because of his ill health. During the trial of the case, in the Applicant's absence, despite the magistrate being aware of the

Applicant's sureties, he did not enquire from them as to the Applicant's whereabouts.

93. Given the serious nature of the offence that the Applicant had been charged with, the fact that the magistrate had granted the Applicant bail on the basis of his serious ill health and that he was unrepresented, warranted the Court to have more consideration for the Applicant and adjourn the proceedings to give him the opportunity to defend himself.

94. It is also important to note that, from the record, the Applicant was never prosecuted for jumping bail. This would suggest that the court was aware of the reasons for his absence during the trial at the time of his defence. It would, in the circumstances have been prudent for the trial magistrate to make an enquiry on the whereabouts of the Applicant, especially because, from the trial record, the Court had knowledge of the Applicant's ill health.

95. The Court is fortified in its reasoning by the decisions of the African Commission and the European Court of Human Rights and the Inter-American Court of Human Rights, which are courts of similar jurisdiction.

96. The African Commission considered the right to defend oneself, in *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi* and held that the right implies an accused's presence at each stage of the proceedings.[10]

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[10] *Communication 231/99* 14th Activity Report 2000 – 2001 paragraph 28.

97. In the case of *Colozza v Italy*,[11] the European Court of Human Rights held that the right to a hearing in one's presence is part of the right to a 'fair hearing' in Article 6(1) of the European Convention on Fundamental Rights and Freedoms (the European Convention).[12] The Court notes that Article 6 of the European Convention is similar to Article 7 of the Charter.[13]

98. In a similar vein, the Inter-American Court of Human Rights has found violations of Article 8 of the American Convention on Human Rights which provides for the right to a fair trial, similar to the provisions of Article 7 of the Charter. Of note is the *Case of Suárez-Rosero v Ecuador* where the Inter-American Court of Human Rights affirmed the minimum guarantees to which every person is entitled under Article 8(2)(c), (d) and (e) of the American Convention on Human Rights, with full equality.[14]

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[11] Application No. 9024/80 A 89 (1985) 7 European Human Rights Reports 516.

[12] In that case, the European Court of Human Rights stated that "Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present."

[13] Application No. 9024/80 *Colozza v Italy* A 89 (1985) 7 *European Human Rights Reports* 516 paragraph 27.

[14] Judgment of 12 November, 1997 (Merits) paragraph 82. These guarantees include "[a]dequate time and means for the preparation of his defense [t]he right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; [and] the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not

99. In the circumstances, the Court finds that the Applicant was denied the right to be heard and to defend himself in respect of Criminal Case Number 321 of 1996.

II. The alleged Inordinate Delay in the Appellate and Review Proceedings

100. The Applicant alleges that there has been an inordinate delay in the hearing or determination of his Notice for Review of the judgment of the Court of Appeal.

101. The Respondent states that the alleged delays in the Applicant's Appeals have been caused by the Applicant and that he has been afforded ample opportunity to keep pursuing his appeal. The Respondent avers that the Applicant even received guidance from the Court on how to seek extension of time to file his Notice of Appeal out of time. The Respondent maintains that their records do not show that the Applicant filed any application for review.

102. The applicable law in this regard is Article 7(1)(d) of the Charter which provides for *"The right to be tried within a reasonable time by an impartial court or tribunal."* In determining whether this right has been violated, the Court has to assess whether the trial was concluded within a reasonable time. The standards to be applied in this regard have been set out in jurisprudence.

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defend himself personally or engage his own counsel within the time period established by law [.]"

103. The African Commission has found that the right to be tried by an impartial tribunal within a reasonable time is one of the cardinal principles of the right to a fair trial[15] and that the undue prolongation of the case at the appellate level is contrary to the letter and spirit of Article 7(1)(d) of the African Charter.[16]

104. Similarly, the Inter-American Court of Human Rights has elaborated on the principle of reasonable time, as set forth in Article 8(1) of the American Convention on Human Rights, which is similar to Article 7(1)(d) of the Charter.[17] In doing so, the Inter-American Court has adopted the approach of the European Court of Human Rights in this regard, in respect of which the latter Court has laid out three elements which should be taken into account to establish the fairness of the time incurred in judicial proceedings. These are: a) the complexity of the matter, b) the procedural activities carried out by the interested party, and c) the conduct of judicial authorities.[18]

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[15] Communication 301/05 *Haregewoin Gebre-Sellaise & Institute for Human Rights and Development in Africa (on behalf of former Dergue officials) v Ethiopia* decision of 7 *November 2011* paragraph 215.

[16] Communication 199/97 *Odjouoriby Cossi Paul v Benin* (17th Activity Report 2003 – 2004) paragraph 28.

[17] *Case of Suárez-Rosero v Ecuador* Judgment of 12 November 1997 (Merits) paragraph 72. See also Case of *Ximenes-Lopes v. Brazil*, 4 July 2006, IACHR Series C No. 149, paragraph 196; and *Case of the Ituango Massacres v. Colombia*, 1 July 2006, IACHR Series C No. 148 paragraph *289*, Case of *Yllaconza Ramirez de Baldeón and Others (on behalf of Baldeón García) v Peru*, IACHR Judgment of 6 April 2006, paragraph 15.

[18] See ECHR *Ruiz Mateos v. Spain* Judgment of 23 June 1993, Series A No. 262, paragraph 30.

105. In the instant Application, the Court finds that there was no inordinate delay in the hearing of the appeal to the High Court as it was filed on 8 September 1998 and dismissed on 24 March 2000, one (1) year and seven (7) months after the appeal was filed.

106. The Court also finds that there was inordinate delay with regard to the hearing of the appeal at the Court of Appeal. Following the dismissal of the Applicant's appeal to the High Court at Moshi in Criminal Case Number 82 of 1998 on 23 March 2000, the Applicant commenced what would turn out to be a lengthy process of filing an appeal at the Court of Appeal of Tanzania.

107. The chronology of the Applicant's actions in this regard has already been set out in paragraphs 28 to 33 of this judgment. It was only on 6 June 2008, when the Applicant's appeal, was finally deemed properly filed before the Court of Appeal. This amounted to a period of eight (8) years and three (3) months of attempting to file an appeal at the Court of Appeal.

108. The Applicant's previous attempts to file the appeal failed due to the lack of court records, which the Applicant consistently requested for, but was not provided with. Furthermore, being a lay, indigent and incarcerated person, the Applicant filed Notices of Appeal which were dismissed on the ground that they were procedurally defective for being unsigned or filed out of time. The Applicant could not have proceeded with his appeal without the Court record, therefore the Respondent's contention that the delays in the appeals were caused by the Applicant lacks substance.

109. It was the responsibility of the Courts of the Respondent to provide the Applicant with the Court record he required to pursue his appeal. Failure to do so and then maintain that the delay in the hearing of the Applicant's appeal was the Applicant's fault is unacceptable. The Applicant's case was not a complex one, the Applicant made several attempts to obtain the relevant records of proceedings but the judicial authorities unduly delayed in providing him with these records.

110. Regarding the Applicant's application for review and whether it contributed to the inordinate delay of hearing the Applicant's matters, the Court considers this to be moot. This is because the Court has found that there was an inordinate delay in the hearing of the Applicant's appeal by the Court of Appeal emanating from the original Criminal Case Number 321 of 1996.

III. The alleged Denial of Legal Aid

111. The Applicant alleges that his right to free legal assistance was violated when he was denied legal aid despite being a lay, indigent and incarcerated person, having been charged with a serious offence.

112. The Applicant states that Section 3 of the Legal Aid (Criminal Proceedings) Act places a positive obligation on the certifying authority to make a determination to grant legal aid where it is desirable, in the interests of justice, or where the accused does not have the means to retain legal aid. The Applicant further states that there is no requirement under the Act stipulating that the accused

must request legal aid in order for it to be granted to him or her. He states that his right to *pro bono* legal assistance was and continues to be violated to date, as he has still not been provided with legal aid regarding his Notice for Review, despite repeated requests.

113. The Respondent contends that the Applicant is put to strict proof regarding his allegation that he was not given free legal counsel by the State in any of his cases, which contributed to his various convictions by the Court and that he should prove that he requested for such assistance and that he is indeed an indigent person.

114. The relevant provision of the Charter in this regard is Article 7(1) (c) which has been previously set out. As stated earlier, even though Article 7(1) (c) of the African Charter does not specifically provide for legal aid, the Court can, in accordance with, Article 7 of the Protocol, apply this provision in light of Article 14(3)(d) of the ICCPR. Article 14(3)(d) of the ICCPR provides for one to be provided legal assistance where the interests of justice so require and for such assistance to be provided free of charge where one is unable to pay for the same.

115. In view of the Respondent having acceded to the ICCPR, it was enjoined to provide the Applicant with legal aid, given the serious nature of the charges against him and the potential sentence he faced if convicted.

116. The Court is fortified in this position by jurisprudence of the African Commission, which also applies and interprets the Charter, the European Court of Human Rights, which is a Court of similar jurisdiction and applies provisions similar to those in the Charter, being Article 6(3)(c) of the European Convention and the Human Rights Committee which applies Article 14(3)(d) of the ICCPR.

117. The African Commission has, in Communication *231/99 Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi* elaborated on this provision in relation to the right to legal assistance.[19]

118. The European Court has identified four factors that should be taken into account, either severally or jointly, when determining if the "interests of justice" necessitates free legal aid, namely:

(i) The seriousness of the offence;

(ii) The severity of the potential sentence;

(iii) The complexity of the case and;

(iv) The social and personal situation of the defendant.[20]

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[19] Communication *231/99,* Paragraph 30, 14th Activity Report 2000 – 2001. "The Commission emphatically recalls that the right to legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case."

[20] *Benham v United Kingdom*, ECtHR, Judgment of 10 June 1996, at paragraph 59; *Quaranta v Switzerland*, ECtHR. Judgment of 24 May 1991, at paragraph 33; *Zdravka Stanev v Bulgaria*, ECtHR, Judgment of 6 November 2012, at paragraph 38; *Talat Tunç v Turkey*, ECtHR, Judgment of 27 March 2007, at paragraph 56; *Prezec v Croatia*, ECtHR, Judgment of 15 October 2009, at paragraph 29. *Biba v Greece*, ECtHR, Judgment of 26 September 2000, at paragraph 29.

119. In *Benham v The United Kingdom*[21], the applicant had been charged with non-payment of a debt and faced a maximum penalty of three (3) months in prison. The European Court held that this potential sentence was severe enough that the interests of justice demanded that the applicant ought to have benefited from legal aid. In *Salduz v Turkey*, the Court held that legal aid should be available for people accused or suspected of a crime, irrespective of the nature of the particular crime and that legal assistance is particularly crucial for people suspected of serious crimes.[22]

120. The Court draws inspiration from the jurisprudence of the Human Rights Committee on the interpretation and application of Article 14(3)(d) of the ICCPR. This is with respect to *Anthony Currie v Jamaica,* whose circumstances are similar to those of the Applicant in the case before this Court, as they both raised issues of compliance with constitutional guarantees of their rights to fair trial in their criminal trials and appeals. In this communication, the Human Rights Committee held that Article 14(3)(d) of the ICCPR requires the provision of legal aid in the course of criminal proceedings, where the interests of justice so require."[23]

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[21] Application No 19380/92, Judgment of 10 June 1996 (Grand Chamber).

[22] Application No. *36391/02*, *Salduz v Turkey*, Judgment of 27 November 2008 (Grand Chamber) paragraph 54.

[23] Communication Number 377/89 paragraph 13.2.

"The author has claimed that the absence of legal aid for the purpose of filing a constitutional motion itself constitutes a violation of the Covenant. The Committee notes that the Covenant does not contain an express obligation as such for a State to provide legal aid for individuals in all cases but only, in accordance with article 14 (3) (d), in the determination of a criminal charge where the interests of justice so require".

121. The African Commission has elaborated on the question of legal assistance in the '*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*' which it adopted in 2003. The guidelines state that an accused person or a party to a civil case has a right to have free legal assistance, where the interest of justice so require or if he is indigent. The guidelines state that, in criminal matters, whether an accused should be provided free legal assistance in the interests of justice is to be determined by the seriousness of the offence and the severity of the sentence. The *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* goes further to require that legal aid programmes should include all stages of the criminal process from investigation to appeals and all proceedings brought to ensure the protection of human rights.[24] The Court notes that the Guidelines and Declaration are in line with the jurisprudence elaborated.

122. In addition, the situation in the United Republic of Tanzania is that the law governing the provision of legal aid is the Legal Aid (Criminal Proceedings) Act, 1969. Section 3 thereof requires an officer presiding over judicial proceedings to determine if an accused person should, in the interests of justice, get legal aid in the

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[24] This Declaration was adopted by the Conference on Legal Aid in Criminal Justice: the Role of Lawyers and Other Service providers in Africa held in Lilongwe from 22 to 24 November 2004. The declaration has been endorsed by the African Commission on Human and People's Rights vide its *Declaration on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System* adopted during the Commission's 40th Ordinary Session, held in Banjul, The Gambia, from 15 - 29 November 2006.

preparation and conduct of his defence or appeal and if such a person has insufficient means to obtain such aid, the officer should certify that the person ought to have such legal aid. Once it is so certified, the Registrar shall, as far as practicable assign to the accused person, an advocate for that purpose. The Court observes that the Court of Appeal of Tanzania has held that this provision, read together with Section 310 of the Criminal Procedure Act provides for the right of accused persons to get legal aid, the right to be informed of that right and that failure to so inform an accused person will render a trial a nullity.[25]

123. In conclusion, the Court finds that, the Applicant was entitled to legal aid and he need not have requested for it. The Court notes that even after requesting for it, his request was not granted. The Applicant was charged with the offence of armed robbery, which is a serious offence and which carries a minimum sentence of thirty (30) years imprisonment. He was unrepresented and of ill health, which occasioned him to be absent during the presentation of his defence. Under these circumstances, it was desirable and in the interests of justice for the courts of the Respondent State to have provided the Applicant with legal aid.

124. In the instant case, the relevant factors that the Court finds should have been borne in mind in the determination of the provision of legal aid to the Applicant, are, the gravity of the offences that the Applicant was facing, the minimum sentence the offence carries as

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[25] *Moses Muhagama Laurance v Government of Zanzibar* Criminal Appeal N[umber] 17 of 2002 citing *Thomas Miengi v R[epublic] [1992] JTLR 157* Pages 11 – 14 of the Judgment 8 October 2001.

specified under the Minimum Sentences Act and his being unrepresented. Having considered all the above circumstances, the Court finds that it was incumbent upon the trial magistrate and Appellate Judges to ensure that, the Applicant was provided with legal aid. Therefore the Respondent failed to comply with its obligations under the Charter and the ICCPR to provide the Applicant with legal representation in respect of the trial and subsequent appeals.

IV. The alleged Manifest Errors at Trial with Regard to Criminal Case Number 321 of 1996 and their subsequent consideration by the High Court and Court of Appeal

125. The Applicant contends that there were grave inconsistencies between the Charge Sheet and the evidence of the Prosecution Witnesses which adversely affected his right to a fair hearing at the trial and Appellate Courts. These inconsistencies related to:

i. Attribution of ownership of stolen items: The Charge Sheet stated that the stolen goods belonged to Mr. Elimani Maleko while in evidence, Prosecution Witness 1, Mr. William Mika, stated that the stolen goods belonged to him.

ii. Description of items stolen: The Charge Sheet describes the stolen items as "clutch covers" while Prosecution Witness 1, Mr Mika describes them as "clutch plates" andProsecution Witness 2, Mr. Fredrick Martin Minja, describes them as "clutch facings."

iii. Number of items stolen: The Charge Sheet states that the number of stolen items were one hundred (100) sets of clutch covers while Prosecution Witness 1, Mr Mika said they were two hundred and fifty (250) sets of clutch covers.

iv. Value of items stolen: The Charge Sheet states that the items were valued at Eight HundredThousand Tanzania Shillings (Tshs. 800,000/=) while Prosecution Witness 1, Mr Mika testified to their value being Two Million Two Hundred Thousand Tanzania Shillings (Tshs. 2,200,000/=).

v. Proof that the offence of armed robbery occurred. The Applicant states that Prosecution Witness 4, Mr. Ally Saidi who was one of the two persons alleged to have been attacked and injured during the robbery did not testify to seeing the Applicant at the scene of the robbery incident. The Applicant maintains therefore, that it was wrong to charge him with the offence of armed robbery and that, instead he should have at most, been charged with the offence of being in possession of stolen property.

vi. The authenticity of the Police Form 3 issued to the alleged victim of the armed robbery: Prosecution Witness 4, Mr. Ally Saidi. The Police Form 3 is issued by a Police Officer who holds the rank of Police Constable and above, to a person claiming to have been injured as a result of a criminal act. The form allows him or her to obtain medical attention from a health facility. The Applicant contends that there was no prosecution testimony to authenticate the Police Form 3 issued to Mr. Ally Saidi.

vii. The causal connection between the Applicant and the alleged recently stolen goods, thus the invocation of the doctrine of recent possession[26] to link him to the crime. In his memorandum of appeal to the High Court at Moshi, vide Criminal Appeal Number 82 of 1998, the Applicant contends that there is no traceability to him, of the items alleged to have been stolen from Mr. William Mika, as these could have been obtained from any motor spares shop. He states that he was at the shop of Prosecution Witness 2, Mr. Fredrick Martin Minja, to collect money that one Mr. Kipisi owed him and not that he was there to sell the alleged stolen items. He alleges that Mr. Kipisi was selling some items to Mr. Minja then Mr. Kipisi would pay him back from the money he received from Mr. Minja.

126. The Respondent contends that the Applicant is put to strict proof regarding the above allegations. The Respondent also contends that the Applicant was lawfully charged with the offence of armed robbery and that the trial courts had jurisdiction to try the matter. The Respondent further states that these are matters that are not within the purview of this Court because the Court of Appeal of Tanzania, being the final court of appeal has already adjudicated upon them.

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[26] This doctrine relates to a common law principle applied where an accused person is in possession of property which has been recently stolen and the accused either gives no explanation as to how he came to have it, or gives an explanation which could not reasonably be true thus the conclusion that he stole it or that he received it knowing it to be stolen.

127. In the Respondent's written submissions to the High Court at Moshi, in respect of Criminal Appeal Number 82 of 1998, the Respondent maintains that though the Applicant was not identified at the scene of the crime, he was found selling the stolen items, a few hours after the robbery.

128. The record of proceedings for the Applicant's appeal to the High Court at Moshi shows that, in its judgment, the High Court did not consider the issues of inconsistencies between the charge sheet and one of the prosecution witness's statements regarding the ownership of the property alleged to have been stolen, the description, number and value of the items stolen, proof that the offence occurred and the application of the doctrine of recent possession to link the Applicant to the crime. These issues were raised by the Applicant in his Appeal. Instead, the High Court upheld the Applicant's conviction on the basis that he did not use the opportunity to defend himself in the trial court and that the trial magistrate must have therefore been convinced of the strength of the prosecution's case. The High Court upheld the Applicant's conviction and sentence, the latter being the statutory minimum under the Minimum Sentences Act.

129. The Court of Appeal of Tanzania, considered these points of appeal raised by the Applicant but it did not determine the issue of the ownership of the property alleged to have been stolen.

130. This Court does not accept the Respondent's contention that, the issue of manifest errors at trial are not within the purview of this

Court because the Court of Appeal of Tanzania has determined them with finality. Though this Court is not an appellate body with respect to decisions of national courts[27], this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instrument ratified by the State concerned. With regard to manifest errors in proceedings at national courts, this Court will examine whether the national courts applied appropriate principles and international standards in resolving the errors. This is the approach that has been adopted by similar international courts.[28]

131. The Court finds that the alleged manifest errors relating to the value of the property, proof that the offence of armed robbery occurred, the authenticity of the Police Form 3 issued to the alleged victim of the armed robbery and the causal connection between the Applicant and the allegedly recently stolen goods were not of such a nature as to deny the Applicant his right to a fair trial. However, the

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[27] See Application 001/2013 *Ernest Francis Mtingwi v Republic of Malawi.*

[28] See *Application No. 76809/01 Baumann v Austria ECHR Judgment of 7 October 2004 paragraph 49;* Communication 375/09 *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v Kenya* ACHPR 5 November 2011 paragraph 36; Case of *Santiago Marzioni v Argentina* 11.673, *Report No. 39/96, Inter-American Commission on Human Rights, OEA/Ser. L/V/II.95 Doc. 7 rev.* at 76 (1997) paragraph 51. Also see Application No. 30544/96 *García Ruiz v Spain*, Judgment of 21 January 1999 (Grand Chamber) paragraph 28, Application No. 47287/99 *Perez v France* Judgment of 12 February 2004 (Grand Chamber) paragraph 81, Application No 34553/97, *Dulaurans v France* Judgment of 21 March 2000, paragraph 39.

Court finds that the failure to determine the issue of the ownership of the property alleged to have been stolen and the discrepancies in the description of this property, were violations of a fundamental nature and adversely affected his right to a fair hearing at the trial and Appellate Courts.

V. The alleged Violation by the Respondent of its Obligation to Recognise the Rights, Duties and Freedoms Enshrined in the Charter and to Adopt Measures to Give Them Effect.

132. The Applicant contends generally, that the Respondent has violated Article 1 of the Charter on the obligation to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt measures to give effect to them.

133. In response, the Respondent denies violating article 1 of the Charter. The Respondent states that it has domesticated the Charter through the Bill of Rights of its Constitution, the Basic Rights and Duties Enforcement Act and the Criminal Procedure Act. The Respondent has also made the declaration under Article 34(6) of the Court's Protocol.

134. The Court notes that the Respondent State has ratified the Charter and adopted constitutional and statutory measures to domesticate it and made the declaration under Article 34(6) of the Protocol.

135. However, it should be noted that, in assessing whether the obligation set out under Article 1 of the Charter has been fulfilled, the Court does not merely examine whether the Respondent has enacted legislation or adopted other measures to domesticate the Charter. The Court will also assess whether the application of those legislative or other measures is in line with the achievement of the rights, duties and freedoms enshrined in the Charter, that is, the attainment of the objects and purposes of the Charter. This means that when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated.

136. The Court reiterates its finding in Application No. 13/2011 *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Human and Peoples' Rights Movement v Burkina Faso*. In that case, the Court found that, by not seeking out, investigating, prosecuting and putting to trial the killers of Norbert Zongo and his companions, Burkina Faso violated Article 7 of the Charter and that by so doing, it simultaneously violated Article 1 of the Charter. The Court is also persuaded by the reasoning of the African Commission with regard to the overarching applicability of Article 1 of the Charter.[29]

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[29] Communication 147/95 – 149/96 *Sir Dawda K. Jawara v The Gambia* 13th Activity Report 1999-2000 paragraph 46 "The Commission held that *"Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article. Its violation, therefore, goes to the root of the Charter."*

137. Having found that the Applicant was denied a right, to be heard, to defend himself and to legal assistance, the Court therefore finds that the Respondent has violated its obligation under Article 1 of the Charter.

VI. The alleged Denial of the Right to Equality Before the Law and Equal Treatment of the Law

138. The Applicant makes general allegations regarding the violation of his right to equality before the law and equal treatment of the law as provided for in Article 3(1) and (2) of the Charter.

139. On its part, the Respondent maintained that Articles 12 and 13 of the Constitution of the United Republic of Tanzania enshrine these rights and that the Applicant has failed to demonstrate how these guarantees of equality were not applied to him therefore resulting in the alleged violations.

140. The Court finds that the Applicant has failed to substantiate how the guarantees of equality before the law and equal treatment of the law have resulted in a violation of Article 3 of the Charter. The Applicant has failed to show whether and how he was treated in a manner different to that meted out to others who were in the same position as he was. General statements to the effect that this right has been violated are not enough. More substantiation is required. The Court therefore finds no violation of the said article.

VII. The alleged Denial of the Right to the Respect of the Dignity inherent in a Human Being and to the Recognition of his Legal Status and the Prohibition from all Forms of Exploitation and Degradation of Man, Particularly Torture, Cruel, Inhuman or Degrading Punishment and Treatment

141. The Applicant alleges that the undue delay in the hearing of his appeal and review amounts to torture, cruel, inhuman and degrading punishment and treatment contrary to Article 5 of the Charter.

142. The Respondent maintains that torture, cruel, inhuman and degrading punishment and treatment are prohibited under Section 13(c) and (e) of the Constitution of the United Republic of Tanzania and that the Applicant should show proof of the same. The Respondent asserts that there has been no delay in hearing the Applicant's appeal and review and that his imprisonment is lawful.

143. The Court has found that there has been an undue delay in the hearing of the Applicant's Appeal at the Court of Appeal. The Applicant started pursuing his appeal from 23 March 2000 to 29 May 2009, when the Court of Appeal dismissed the appeal. This was a period of nine (9) years and two (2) months. The issue for determination is whether this nine (9) years and two (2) months' delay in the Applicant's appeal amounts to torture, cruel or inhuman or degrading punishment and treatment.

144. The Court, like the African Commission, applies and interprets the Charter. In this regard, the Court takes into consideration, the

African Commission's *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.*[30] These Guidelines refer to the definition of torture as set out in Article 1 of the United Nations Convention Against Torture which reads:

"1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

145. In view of the above, the Court finds that the Applicant has not proved that the delay in the hearing of his appeal is tantamount to torture. This is because he has not proved that the delay caused him severe mental or physical pain which was intentionally inflicted for a particular purpose. In addition, he is serving a prison sentence pursuant to lawful sanctions imposed on him. For this reason therefore, the Court finds that there has been no violation of Article 5 of the Charter.

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[30] The African Commission adopted these guidelines in 2008; the Guidelines are commonly known as the *Robben Island Guidelines*. See also Application 288/04 *Gabriel Shumba v Zimbabwe* Decision of 2 May 2012, paragraphs 142 to 166.

146. The Court also finds that the delay in the Applicant's appeal proceedings does not amount to cruel, inhuman and degrading punishment and treatment, as it does not meet the threshold of severity, intention, and severe humiliation required by the definitions established in jurisprudence.[31] Moreover, the Court is of the view that the delay does not *per se*, constitute cruel, inhuman or degrading punishment and treatment, even if it may have caused the Applicant mental anguish. The Court is fortified in its decision in this regard by the jurisprudence of the Human Rights Committee.[32]

VIII. The alleged Violation of the Right to Liberty and Security of the Person.

147. The relevant provision in this regard is Article 6 of the Charter which provides that everyone shall have the right to liberty and security of his person and that no one shall be deprived of his freedom except for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained.

148. The Applicant has contended that his arbitrary and continued detention caused by the delay in the hearing of his cases amounts to a violation of his right to liberty as provided by Article 6 of the Charter.

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[31] *Price v United Kingdom*, Judgment of 10 July 2001, paragraphs 24-30; *Valašinas v. Lithuania*, Judgment of 24 July 2001, paragraph 117; and *Pretty v United Kingdom*, Judgment of 29 April 2002, paragraph 52.

[32] Communications 210/1986 & 225/1987, Earl Pratt & Ivan Morgan v Jamaica CCPR/C/35/D/210/1986; CCPR/C/35/D/225/1987, 7 April 1989.

149. The Respondent on its part, maintains that it has not violated the Applicant's right to liberty. The Respondent states that the right to liberty is not absolute and can be curtailed under conditions laid down by the law, which in the Respondent's case, the law in this regard is the Criminal Procedure Act. The Respondent asserts that, the Applicant was arrested, arraigned in Court, prosecuted and convicted in accordance with the Criminal Procedure Act and the Penal Code. The Respondent maintains that the Applicant cannot therefore contend that his arrest and detention were arbitrary and unlawful and that his allegations on the violations of Article 6 are unfounded, baseless and without merit.

150. The Court's finding that there is an undue delay in the hearing of the Applicant's appeal at the Court of Appeal does not necessarily mean that there has been a violation of the right to liberty and security of the person. This may be so where the Court finds that there has been such a flagrant denial of justice that the resulting imprisonment of an Applicant would be incompatible with the provisions of Article 6 of the Charter. In the instant Application, the Applicant was tried and convicted by a legally constituted Court, which passed a sentence against the Applicant based on domestic law, therefore his imprisonment was being carried out pursuant to the court's order. This Court therefore finds that the undue delay in the hearing of the Applicant's appeal did not result in a violation of the right to liberty and security of his person.

IX. The alleged Violation of the Right to Receive Information

151. The Applicant has stated that the delay in providing him with the record of proceedings of the trial court in respect of Criminal Case Number 321 of 1996 and of the High Court in respect of Criminal Appeal Number 82 of 1998 and the lack of information regarding his application for review, violated his right to receive information as provided for in Article 9(1) of the Charter.

152. The Respondent denies that there was a prolonged and unreasonable delay in providing the Applicant with the information that would enable the Applicant prepare his Appeal.

153. The Respondent maintains that the delays in the hearing of the Applicant's cases from the District Court to the Court of Appeal were caused by the Applicant himself and the fact that he had jumped bail. The Respondent asserts that this inadvertently led to him being late to request for copies of proceedings and documents which would have assisted him in the hearing of his appeals. The Respondent further asserts that it does not have a record of the Applicant's Notice for Review therefore, the Applicant's contention that the hearing of his application for Review of the Court of Appeal's judgment cannot be maintained.

154. The Court notes that the record indicates that the Applicant filed a Notice of Review seeking leave to have the decision of the Court of Appeal reviewed. The Court has found that there was an undue delay in the Applicant receiving the record of proceedings in

respect of Criminal Case Number 321 of 1996 and the record of proceedings at the High Court in respect of Criminal Appeal Number 82 of 1998 and the lack of information regarding his application for review. Article 9(1) relates to the right to receive information in connection with the right to express and disseminate one's opinions within the law. The Court finds that since the requests for the record of proceedings of the High Court were made in the context of the Applicant's appeals to the Court of Appeal, this issue has been addressed by the Court when resolving the contention regarding the violation of the right to a fair trial as guaranteed by Article 7(1) of the Charter. The Court consequently finds that there was no breach of the right to information as set out in Article 9(1) of the Charter.

X. The Applicant's Request to be Released from Prison

155. In his application, the Applicant requested the Court to order his release from prison. He reiterated this prayer in his Reply to the Respondent's Response.

156. The Respondent did not specifically respond to the Applicant's request to be released from prison.

157. The Court observes that an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances.[33] In the instant case, the Applicant has not set out

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[33] See Inter-American Court of Human Rights *Case of Loayza-Tamayo v. Peru* Merits. Judgment of 17 September 1997. Series C No. 33, Resolutory paragraphs 5 and 84; In this case, the Court ordered the Applicant's release since not doing so would have

specific or compelling circumstances that would warrant the Court to grant such an order.

158. The Court recalls that it has already found violations of various aspects of the Applicant's right to a fair trial contrary to Article 7(1)(a),(c) and (d) of the Charter and Article 14(3)(d) of the ICCPR. The appropriate recourse in the circumstances would have been to avail the Applicant an opportunity for reopening of the defence case or a retrial. [34] However, considering the length of the sentence he has served so far, being about twenty (20) years out of thirty (30) years, both remedies would result in prejudice and occasion a miscarriage of justice.

159. The Court therefore orders the Respondent State to take appropriate measures to remedy the violations taking into account the above factors.

XI. Costs

160. The Respondent prayed that the Court orders the Applicant to bear the costs of the Application. The Court notes that Rule 30 of the Rules of Court states that "[U]nless otherwise decided by the Court, each party shall bear its own costs." The Court will decide on the issue of costs when it considers the issue of reparations.

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resulted in a double jeopardy situation which is prohibited by the American Convention on Human Rights.

[34] See ECtHR *Stoyanov v. Bulgaria*, Application No. 39206/07, 31 January 2012.

For these reasons:

161. The Court holds:

On the Respondent's Preliminary Objection on Jurisdiction

i. Unanimously, that the Respondent's preliminary objection on the lack of jurisdiction *ratione materiae* of the Court as required by Article 3(1) of the Protocol is dismissed and *declares* that the Court has jurisdiction.

On the Respondent's Preliminary Objections on Admissibility

ii. Unanimously, that the Respondent's preliminary objection on the admissibility of the Application for incompatibility with the African Charter and the Constitutive Act of the African Union as required by Article 6(2) of the Protocol read together with Article 56(2) of the Charter and Rule 40(2) of the Rules is dismissed.

iii. Unanimously, that the Respondent's preliminary objection on the admissibility of the Application for non-exhaustion of local remedies as required by Article 6(2) of the Protocol read together with Article 56(5) of the Charter and Rule 40(5) of the Rules is dismissed . The Court finds that the Applicant exhausted local remedies.

iv. Unanimously, that the Respondent's preliminary objection on the admissibility of the Application for not being filed within a reasonable time after exhaustion of local remedies

as required by Article 6(2) of the Protocol read together with Article 56(6) of the Charter and Rule 40(6) of the Rules is dismissed.

v. Unanimously, that the Application is admissible.

On the Merits

vi. Unanimously, that there has been no violation of Articles 3, 5, 6, 7(1) (b) and 9(1) of the Charter.

vii. Unanimously, that there has been a violation of Articles 1 and 7(1) (a), (c) and (d) of the Charter and Article 14(3)(d) of the ICCPR.

viii. By a vote of six (6) to two (2), Judge Elsie N. THOMPSON, Vice-President and Judge Rafâa BEN ACHOUR dissenting, that the Applicant's prayer for release from prison is denied.

ix. Unanimously, that the Respondent is directed to take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the Applicant, and to inform the Court, within six (6) months, from the date of this judgment of the measures taken.

x. Unanimously, that in accordance with Rule 63 of the Rules of Court, the Court directs the Applicant to file submissions on the request for reparations within thirty (30) days hereof

and the Respondent to reply thereto within thirty (30) days of the receipt of the Applicant's submissions.

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the joint Dissenting Opinion of Judge Elsie N. THOMPSON; Vice-President and Judge Rafâa BEN ACHOUR, on the Applicant's prayer for release from prison is appended to this Judgment.

Done, at Arusha this twentieth day of November 2015, in the English and French languages, the English text being authoritative.

Elsie N. THOMPSON, Vice President;

Gérard NIYUNGEKO, Judge

Duncan TAMBALA, Judge

Sylvain ORÉ, Judge

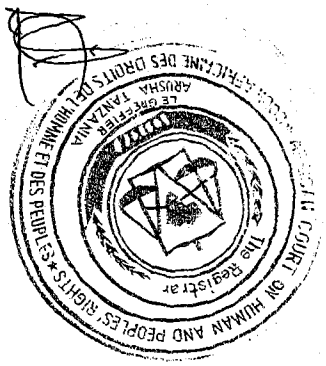
El Hadji GUISSE, Judge

Ben KIOKO, Judge

Rafâa Ben ACHOUR, Judge

Solomy B. BOSSA Judge

and Robert ENO, Registrar.



ALEX THOMAS

VS

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 005/2013

DISSENTING OPINION

JUDGE ELSIE N. THOMPSON, VICE PRESIDENT

JUDGE RAFÂA BEN ACHOUR

1. We agree substantially with the merits of the judgment of the Court but there is one particular issue on the Order at paragraph 159 which we would approach in a different manner and make a specific order.

2. The Applicant alleges violation of several articles of the African Charter on Human and Peoples' Rights which have been set out in the judgment and he seeks amongst other reliefs, that he be released from prison.

3. The Court in its wisdom finds infractions of Articles 1, and 7(1) (a), (c) and (d) of the Charter and Article 14(3)(d) of the ICCPR based largely on lack of fair hearing and then orders the State to:

   "...take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the Applicant, and to inform the Court, within six (6) months, from the date of this judgment of the measures taken".

4. On the specific issue as to the Order of his release the Court opines and we entirely agree that an Order of release of a convict

can only be done in "very specific/and or compelling circumstances". The Court, however goes further to say that the Applicant has not shown exceptional circumstances and this is where we depart.

5. In spite of the fact that the Application does not state that particular facts exhibit exceptional circumstances, we are of the firm view that the Court found such specific/and or compelling circumstances when it noted that the Applicant has been in prison for 20 years out of the 30 year term of imprisonment and that the reopening of the defence case or a retrial "would result in prejudice and occasion a miscarriage of justice."

6. We cannot find a more "specific and/or compelling" than that the Applicant has been in prison for about 20 years out of a 30 year prison term following a trial which the Court has declared to be an unfair trial, in violation of the Charter.

7. Furthermore, there is the recognition that the reopening of the defence or a retrial "would result in prejudice and occasion a miscarriage of justice."

8. The Court fell shy of making the Order of releasing the Applicant. Our view is therefore that, there is no other remedy in the circumstance other than, that the Applicant be released.

9. In the circumstance of the case, rather than leaving the issue to the imagination of the Respondent, we would have granted the relief and ordered that the Applicant be released.

Done at Arusha this twentieth Day of November 2015

Judge Elsie N. Thompson – Vice President

Judge Rafâa Ben Achour