AFRICAN UNION

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UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

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IN THE MATTER OF MOHAMED ABUBAKARI

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION 007/2013

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
ARUSHA
TANZANIA

JUDGMENT

F.O.

**The Court composed of:** Elsie N. THOMPSON, Vice-President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Sylvain ORÉ, Ben KIOKO, Rafâa BEN ACHOUR, Solomy B. BOSSA, and Angelo V. MATUSSE, Judges; and Robert ENO, Registrar,

Pursuant to 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"), Judge Augustino S. L. RAMADHANI, President of the Court and a national of Tanzania, did not hear the case.

In the Matter of:

Mohamed ABUBAKARI,

*represented by*

Advocate Donald DEYA, Pan African Lawyers Union (PALU)

v.

United Republic of Tanzania,

*represented by*

i) Ambassador Irene F.M. KASYANJU, Director of Legal Affairs, Ministry of Foreign Affairs and International Cooperation;

ii) Ms Sarah MWAIPOPO, *Principal State Attorney*, Acting Director – Constitutional Affairs and Human Rights;

iii) Mr. Zacharia ELISARIA, *Senior State Attorney;*

iv) Ms. Nkasori SARAKIKYA, *Principal State Attorney*;

v) Mr. Benedict T. MSUYA; Second Secretary; Legal Officer, Ministry of Foreign Affairs and International Cooperation;

vi) Mr. Michael LUENA, *Principal State Attorney*;

vii) Mr. Veritas MLAY, *State Attorney*

After deliberation,

*delivers the following Judgment:*

## I. THE PARTIES

1. The Applicant is Mr. Mohamed Abubakari, a national of the United Republic of Tanzania, who is currently serving a thirty-year term of imprisonment at the Karanga Main Prison at Moshi, Kilimanjaro, for the offence of armed robbery.

2. The Respondent is the United Republic of Tanzania which ratified the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 18 February 1984, the Protocol on 7 February 2006; and deposited the declaration accepting the jurisdiction of the Court to receive cases from individuals and non-governmental organisations on 29 March 2010. The Respondent also acceded to the 11 December 1966 International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant") on 11 July 1976.

## II. SUBJECT OF THE APPLICATION

3. The Court was seised of an Application dated 8 October 2013 to which written submissions were annexed. The Annex comprised a copy of the Judgment of the Court of Appeal of Tanzania in Criminal Appeal No. 48 of 2004, in the matter of Mohamed Abubakari v. The Republic[1] of 5 October 2004.

[1] Also attached to the Application is another Judgment of the High Court of Moshi dated 27 February 2013 in another Case, *Alfayo Michel Shemwilu and Ramadhani Shekiondo v. The Republic Criminal Revision* No. 2 of 2013. This Judgment is on the issue of the sentence applicable in case of a crime of armed robbery.

**A) Facts of the matter**

4. In his Application, the Applicant alleged that he was arrested by the Police on 10 April 1997 while he was in his home, and that he was kept in Police custody up to 14 April 1997. He averred that he was convicted of the offence of armed robbery and sentenced by the District Court of Moshi on 21 July 1998 to thirty (30) years imprisonment which he is currently serving at the Karanga Main Prison in the Moshi region. He further stated that he appealed against the conviction at the High Court at Moshi, but his Appeal was dismissed on 5 January 1999 (sic). He stated that he, thereafter, lodged an appeal before the Tanzania Court of Appeal at Arusha (Appeal No. 48 of 2000), and that Appeal was similarly dismissed

**B) Alleged violations**

5. In both his written submissions and oral pleadings, the Applicant outlined several complaints in relation to the manner in which he was detained, tried and convicted by the Tanzanian Police and Judicial authorities. He complained in particular of:

(i) having been detained upon his arrest, at a police post which had no basic facilities appropriate for receiving suspects;

(ii) having been sentenced on the basis of an indictment marred by irregularities;

(iii) having been prosecuted by a State Attorney who had a conflict of interest in relation to the armed robbery victim;

(iv) not having been afforded the right to defend himself and the assistance of a lawyer at the time of his arrest;

(v) not having been afforded the right to the free assistance of a lawyer during the judicial process;

(vi) having thus been discriminated against;

(vii) having not promptly received communication of the indictment and the statements of the prosecution witnesses to be able to defend himself;

(viii) having been convicted on the basis of the testimony of a single individual, fraught with contradictions, in the absence of any identification parade;

(ix) having been convicted without his alibi defence being seriously considered by the Judge;

(x) having been convicted despite the fact that the crime weapons and the items stolen were not found;

(xi) having been sentenced to thirty years in prison, a punishment which was not applicable at the time of the offence; and

(xii) the judgment by which he was convicted and sentenced was not delivered in open court.

## III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Application was received at the Court Registry on 8 October 2013.

7. On 5 November 2013, the Registry, pursuant to Rules 35(2) and (3) of the Rules of Court transmitted the Application to the Respondent, the Chairperson of the African Union Commission and, through her, to the Executive Council of the Union, as well as to all the other States Parties to the Protocol.

8. After having requested and obtained leave of Court for extension of time, the Respondent transmitted to the Registry its Response to the Application on 6 February 2014. That Response comprised in the Annex a series of Tanzanian legal texts as well as two decisions of the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission").

9. The Registry received the Applicant's Reply on 7 March 2014.

10. On the same date, the Registry received a letter dated 5 March 2014 from the Applicant, in which he was seeking legal assistance from the Court, considering that he is a layman in legal matters. Following the directives of the Court, the Registry, by letter dated 2 June 2014, inquired from the Pan African Lawyers Union (PALU) whether it could provide legal assistance to the Applicant. By letter dated 7 August 2014 received at the Registry on 11 August 2014, PALU responded positively to the Registry's request.

11. At its 34th Ordinary Session held in Arusha from 8 to 19 September 2014, the Court decided to hold a Public Hearing on the matter in March 2015. Following a request dated 22 January 2015 from the Applicant for the Public Hearing to be postponed, and after having taken notice of the Respondent's reaction in a letter dated 4 February 2015, the Court decided at its 36th Ordinary Session held from 9 to 27 March 2015 to postpone the Public Hearing to 22 May 2015.

12. The Public Hearing took place on the scheduled date in Arusha, and the Court heard the oral submissions of the Parties:

For the Applicant:
i) Advocate Donald DEYA, PALU,

For the Respondent State:
i) Ms. Nkasori SARAKIKYA, Acting Director, Human Rights Department in the Office of the Attorney General, and
ii) Mr. Mark MULWAMBO, Principal State Attorney in the Office of the Attorney General.

13. In the course of the Public Hearing, the Judges put questions to the Parties, to which the latter provided answers.

## IV. PRAYERS OF THE PARTIES

14. In the course of the written procedure, the following submissions were made by the Parties:

*On behalf of the Applicant,*

In the Application:

"10....I request the Court (ACHPR) to intervene due to unconstitutional acts against me by the subordinate Court, 1st and 2nd appellate Court of my country and the Police force in general.

11....I humbly beg that, this court [to] restore justice where it was overlooked, quash both conviction and sentence and set me at Liberty

12....this Court of Human and Peoples' Rights may grant any other order or relief that it may deem fit".

At the Public Hearing:

"....we make a few prayers on behalf of the Applicant:

One, for a declaration that the Respondent State violated the Applicant's rights to a fair trial and enjoin the latter to provide him assistance for his defence.

Two, for a declaration that the Respondent State violated the Applicant's right to legal aid and representation.

In view of the circumstances of the case, we pray for an Order of the Court that the Courts of the Respondent State re-examine the Applicant's trial and conviction in light of the multiple violations of his fair trial rights that we have averred and that it does so within a reasonable time as this Honourable Court may determine.

We also seek a further Order contingent to this previous Order that in so doing in seeking a re-examination of the Applicant's trial and conviction that the Respondent State provide aid and representation to the Applicant.

Lastly, we also pray for an Order that proceedings for reparation should follow the various declarations of violations of the rights of the Applicant that we have averred.

Finally, that this Court make any further declarations or orders as it deems necessary in the circumstances of the case to render substantive justice to the Applicant"

*On behalf of the Respondent State,*

In its Response:

"The Respondent prays the Court to order as follows in respect of admissibility of the Application:

"i) That the Applicant has not evoked **(sic)** the jurisdiction of the African Court;

ii) That the Application has not met the admissibility requirements stipulated under paragraphs 1 to 7 of Rule 40 of the Rules of Court and Articles 56 and 6.2 of its Protocol;

iii) That the Application be dismissed pursuant to Rule 38 of the Rules of Court;

iv) Order the Applicant to pay costs.

With regard to the merits, to rule:

i) that the Government of the United Republic of Tanzania did not illegally arrest the Applicant;
ii) that the Government of the United Republic of Tanzania did not illegally detain the Applicant:
iii) that the Government of the United Republic of Tanzania did not violate the right of the Applicant to be represented by a lawyer;
iv) that the Government of the United Republic of Tanzania did not violate the right of the Applicant to defend himself;
v) that the Government of the United Republic of Tanzania did not violate the Applicant's right to equality before the law;
vi) that the Government of the United Republic of Tanzania did not discriminate against the Applicant;
vii) that the Government of the United Republic of Tanzania did not infringe Section 311 of the Tanzanian Criminal Code;
viii) that Applicant's conviction based on the testimony of a single witness is in conformity with the law;
ix) that the prosecution witnesses in the initial criminal case No. 397/1997 did not make contradictory submissions ;
x) that the Applicant's conviction to thirty years term of imprisonment for armed robbery is in conformity with the law; and
xi) order the Applicant to pay costs".

At the Public Hearing:

"We pray to proceed with our prayers with regard to preliminary objections and jurisdiction of this Honourable Court. We pray the Court to admit the preliminary objections on the jurisdiction and admissibility of the Application itself and declare as follows.

That the Applicant in his Application has not evoked the jurisdiction of the Honourable Court.

Two, that the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court and Article 56 (6) of the Charter.

Three, that the Application has not met the admissibility requirement stipulated in 40(6) of the Rules of Court and Article 56 (6) of the African Charter on Human and Peoples' Rights.

Four, that the Application be dismissed.

With regard to the issue of merits, we request the African Court to declare as follows: that the Government of the United Republic of Tanzania did not violate the Applicant's rights to be represented and to a fair trial with regard to all the allegations he has brought before the Court.

Number two, we pray that no reparation be granted to the Applicant with regard to this Application, and, finally that the Application be duly dismissed".

## V. REQUEST FOR THE PRODUCTION OF FRESH EVIDENCE

15. In its Response, the Respondent referred to its letter dated 13 December 2013 indicating, according to it, that the collection of evidence would take some time, and therefore craved the indulgence and leave of the Court to adduce fresh evidence when the latter would be available.

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16. Furthermore, at the Public Hearing of 22 May 2015, each of the parties, pursuant to Rule 50 of the Rules of Court, sought leave of the Court to submit fresh documents essentially comprising the evidence on the case before the national courts. To justify the delay, the two parties invoked mainly the difficulties faced in seeking for and finding the said documents given the fact that the Registry of the District Court of Moshi had meanwhile been relocated elsewhere. Each of the parties also indicated that it had no objection to the other's request in this regard.

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17. Rule 50 of the Rules of Court provides that:

"No party may file additional evidence after the closure of pleadings except by leave of Court".

18. The Court decided at the Public Hearing, to grant the respective requests of the Parties and leave to produce the documents in question exercising its discretionary power on the issue of late production of evidence,

19. Consequently, the Parties submitted the aforesaid documents respectively on 5 June 2015 for the Applicant, and on 20 May 2015 for the Respondent State.

## VI. JURISDICTION OF THE COURT

20. In terms of Rule 39(1) of its Rules, the Court "shall conduct preliminary examination of its jurisdiction ...".

### A) Preliminary objection regarding material jurisdiction

21. As regards material jurisdiction, the Respondent State raised an objection, based on the fact that, in its view the Court was not supposed to act as an appellate jurisdiction; it also objected to the fact that the Applicant had allegedly not invoked the appropriate provisions of the Protocol and the Rules of Court.

#### *1) Objection regarding lack of jurisdiction on the grounds that the Court could not have considered the evidence on which the Applicant's conviction was based without acting as an appellate jurisdiction*

22. At the Public Hearing, the Respondent State, particularly in regard to the question of evidence on the basis of which the Applicant was tried by the national courts, argued that the Applicant was in effect requesting that the Court act as an appellate jurisdiction whereas it is not competent to do. The Respondent State in particular averred that "Article 3 (1) the Protocol does not give the Court jurisdiction to pronounce itself on issues of evidence or to sit as an appellate court". Invoking the Court's jurisdiction in the Matter of *Ernest Francis Mtingwi v. Republic of Malawi*, the Respondent State submitted that the Applicant had prayed this Court to "quash the decision of the Court of Appeal of Tanzania" whereas "Article

3(1) of the Protocol does not provide the Court the jurisdiction to act as an appellate court". The Respondent State further contended that analysis of evidence should be left solely to the national courts of the Respondent State.

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23. At the same Public Hearing, Counsel for the Applicant responded that in the Matter of *Ernest Francis Mtingwi v. Republic of Malawi*, the Applicant himself had indicated having filed an appeal against the decision of the Supreme Court of Malawi whereas, in the instant case, the Applicant alleges human rights violations by the Respondent through, *inter alia*, the acts of its judicial system. He points out in particular that "the Applicant did not deem to appeal the decisions of the Respondent State before his host State national courts"; that it "alleges violations of his rights notably by the organs and institutions of the Respondent State especially by, but not limited to, the Judiciary" and that, that was the reason for which he brought a case before this Court.

24. On the question as to whether the Court has jurisdiction to re-examine the evidence on the basis of which the Applicant was convicted by the national courts, his Counsel basing his argument on the jurisprudence of the European Court of Human Rights argues that even if the issue in the question of admissibility of evidence falls under the purview of national courts, this Court remains competent to ascertain whether the totality of the procedure followed before the said national courts is fair as required by Article 7 of the Charter.

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25. The Court reiterates its position that it is not an appellate court in terms of the decisions rendered by the national court[2]. However, as it pointed out in its Judgment of 20 November 2015 in the Matter of *Alex Thomas v. Republic of Tanzania*, this position does not preclude its jurisdiction to examine whether the procedures before the national

[2] See *Ernest Francis Mtingwi v. Republic of Malawi,* Judgment of 15 March 2013, para. 14.

courts are consistent with the international standards established by the Charter or other applicable human rights instruments.[3]

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

27. As the European Court of Human Rights noted especially in the Matter of *Sarp Kuray v. Turkey*:

"...the admissibility of evidence is primarily a matter for domestic law and rules ... in principle it is for national courts to assess the evidence before them. The mission entrusted to the Court by the Convention is not to rule on the question as to whether witnesses' statements were properly admitted as evidence, but to determine whether the proceedings as a whole, including the way of presentation of evidence has been fair"[4].

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[3] *Alex Thomas v. United Republic of Tanzania*, Judgment of 20 November 2015, para 130: "*Though this Court is not an appellate body with respect to decision of national courts, ... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with standards set out in the Charter or any other human rights instruments 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...*".

[4] Judgment of 24 July 2012, para 69. See also: ECHR: *Dombo Beheer B.V. v. The Netherlands,* Judgment of 27 October 1993, para 31: "*The Court cannot substitute its own assessment of the facts for that of national courts. Its task is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, was "fair" within the meaning of Article 6 para. 1 (art. 6-1)*"; Gafgenv. Germay, Judgment of 1 June 2010, para 164: To ascertain whether the proceedings as a whole was fair, there is need to ascertain that the rights of the Defence had been observed. There is need to inquire in particular if the Applicant was afforded the opportunity to challenge the veracity of the evidence and to object to their use. The value of the evidence should also be considered and if the circumstances in which they were obtained creates doubt as to their credibility and correctness; *Balta and Demir v. Turkey*, Judgment of 23 June 2015, para 36: "*The Court also recalls in this context that the admissibility of evidence belongs to the purview of domestic laws and national courts, and that its only task is to determine whether the procedure was fair*"; *Sarp Kuray v.. Turkey*, Judgment of 24 July 2012, para 69. *Matter of Bochan v. Ukraine, Judgment of 11 March 2015, paras 61 and 62.*

28. In general terms, this Court would be acting as an appellate jurisdiction only if, *inter alia*, it were to apply to the case the same law as the Tanzanian national courts, that is, Tanzanian law. However, this is clearly not the case in the Matter before it, because by definition, the Court applies exclusively "the provisions of the Charter and any other relevant human rights instrument ratified by the States concerned" in accordance with the provisions of Article 7 of the Protocol.

29. On the basis of the aforesaid considerations, the Court holds that it is competent to determine whether the treatment of the matter by Tanzanian national courts has complied with the requirements set forth by the Charter in particular and any other applicable human rights instrument. Consequently, the Court dismisses the objection raised in this regard by the Respondent State.

***2) Objection regarding lack of jurisdiction on the grounds that the Applicant did not invoke the appropriate provisions of the Protocol and the Rules of Court***

30. In its Response, the Respondent objects to the jurisdiction of the Court on the ground that the Applicant, rather than invoking Article 3(1) of the Protocol and Rule 26 of its Rules, cited, as grounds for the jurisdiction of the Court, Articles 5 and 34(6) of the Protocol and Rule 33 of the Rules of Court, which rather, govern the uncontested issue of access to the Court. It argues that since the Applicant has not appropriately invoked the jurisdiction of the Court by citing the applicable provisions, its Application should consequently be dismissed with costs. It concludes in this regard that the Applicant has not been compliant with Article 3(1) of the Protocol and Rule 26 of the Rules of Court.

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31. At the Public Hearing, Counsel for the Applicant, relying on the jurisprudence of the Court in the Matter of *Peter Joseph Chacha v. United Republic of Tanzania,* submitted in reply that the Court shall have jurisdiction as long as "the rights alleged to be violated are protected by the Charter or any other human rights instrument ratified by the Respondent State".

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32. The Court notes that its jurisdiction is an issue of law which it has to determine on its own regardless of whether or not the issue is raised by the Parties in a case. It therefore follows that the fact that a Party cited provisions that are not applicable is of no consequence, because at any rate, the Court shall rule according to the law and is in a position to ground its jurisdiction on the appropriate provisions.

33. Furthermore, in the instant case, invoking Articles 5(3) and 34(6) of the Protocol to ground the jurisdiction of the Court is not even incorrect. Article 5(3) of the Protocol provides that: "the Court may entitle relevant non-governmental organisations (NGOs) with observer status before the Commission to institute cases directly before it in accordance with Article 34(6) of this Protocol". Article 34(6) of the Protocol provides that "at any time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol" and that "the Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration". While these two articles, read together, show that they effectively relate to the seizure of the Court by individuals and NGOs, and hence to the question of access to the Court, it is also true that these provisions at the same time address the question of the personal jurisdiction of the Court as far as both the Applicant and the Respondent State are concerned. Indeed, the said Articles also, in the final analysis, determine whether or not the Court is competent in respect of the individuals or NGOs that have brought cases before it or whether or not in the instant case the Respondent State has accepted the jurisdiction of the Court. The wording of Article 34(6) of the Protocol is significant in this respect as it speaks of a "declaration accepting the competence of the Court".

34. It is important to point out that Article 3(1) of the Protocol[5] to which the Respondent State makes reference, addresses essentially the material jurisdiction of the Court, which

[5] This Article provides as follows: "*the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol, and any other human rights instrument ratifies by the States concerned*".

is only one aspect of jurisdiction. Jurisdiction also covers personal, temporal and territorial jurisdiction.

35. In view of the aforesaid considerations, the Court dismisses the objection to its jurisdiction raised by the Respondent State. It holds that it has jurisdiction *ratione materiae* to examine the instant case given the fact that all the alleged violations (*supra*, para 5) *prima facie* concern the right to fair trial[6], as guaranteed especially by Article 7 of the Charter.

**B) Other aspects of jurisdiction**

36. With regard to the other aspects of its jurisdiction, the Court notes:

(i) that it has jurisdiction *ratione personae* in respect of the two Parties given the fact that the United Republic of Tanzania made the requisite declaration under the aforementioned Article 34(6) on 29 March 2010;

(ii) that it has jurisdiction *ratione temporis* since the alleged violations are continuous in nature, the Applicant having remained convicted on grounds which he believes are flawed by irregularities [see the Court's jurisprudence in the Zongo case][7];

(iii) that it has jurisdiction *ratione loci* in as much as the facts of the case occurred on the territory of a State Party to the Protocol, i.e. the Respondent State.

37. It therefore follows from all the preceding considerations, that the Court is fully competent to hear the instant case.

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[6] See in this regard the Judgments of this Court in the Matter of *Franck David Omary and Others v. United Republic of Tanzania*, Judgment of 28 March 2014, paras 74 and 75 and in the *Matter of Joseph Peter Chacha*, 28 March 2014, para 115: "*The rights alleged to have been violated are protected under the Charter. The Court therefore finds that it has jurisdiction ratione materiae over the Application*".

[7] See African Court especially in the Matter of *Zongo and Others v. Burkina Faso* (Preliminary Objections) Judgment of 21 June 2013, paras 71 to 77.

## VII. ADMISSIBILITY OF THE APPLICATION

38. According to the aforesaid Rule 39 of its Rules, "the Court shall conduct preliminary examination ... of the admissibility of the Application in accordance with Articles 50 and 56 of the Charter, and Rule 40 of these Rules".

39. According to Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

40. Rule 40 of the Rules of Court which substantially restates the content of Article 56 of the Charter provides as follows:

"Pursuant to the provisions of article 56 of the Charter to which article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the African Union or the Charter;
3. do not contain any disparaging or insulting language;
4. are not based exclusively on news disseminated through the mass media;
5. are filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. are filed within a reasonable period from the time local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized of the matter; and
7. do not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instrument of the African Union".

41. Whereas some of the above requirements are not in contention between the Parties, the Respondent State raised objections on incompatibility of the Application with the Constitutive Act of the African Union and the Charter, exhaustion of local remedies and the time limit for seizure of the Court.

**A) Admissibility requirements that are not in contention between the Parties**

42. The requirements regarding the identity of Applicants, the language used in the Application, the nature of the evidence and the *non bis in idem* principle (Sub Rules 1, 3, 4 and 7 of Rule 40 of the Rules of Court) are not in contention between the Parties.

43. The Court also notes, for its part, that nothing in the records submitted to it by the Parties suggests that any of the above requirements has not been met in the instant case.

44. Consequently, the Court holds that the requirements under consideration in this regard have been fully met in the instant case.

**B) Objection based on incompatibility of the Application with the Constitutive Act of the African Union and the Charter**

45. In its Response, the Respondent State is of the view that, in order for the requirement of compatibility of the Application with the Constitutive Act of the African Union as set forth in Article 56(2) of the Charter and Rule 40(2) of the Rules of Court to be met, the Application must invoke the provisions of the Charter that have allegedly been violated as well as the principles enshrined in the OAU Charter [now the Constitutive Act of the African Union] The Respondent State reiterates that instead of invoking the Articles of the Protocol on which the jurisdiction of the Court is grounded, the Applicant invoked only the provisions of the Protocol that address access to the Court by individuals and NGOs. Moreover, according to the Respondent State, the Application does not cite any provision of the Charter of the Organization of African Unity and is content with invoking the Tanzanian Criminal Procedure Act, concentrating on the technicalities of the criminal matter which concerns it. The Respondent State in conclusion submits that the requirement of compatibility of the Application with the Constitutive Act of the African Union and the Charter has not been met and that the Application should be dismissed in its entirety.

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46. In his Response, the Applicant maintains that, in his Application, he has invoked those provisions of the Charter that have been violated as well as the principles enshrined in the OAU Charter as prescribed in Articles 5 and 34 (6) of the Protocol and Rule 33 of the Rules of Court.

47. At the Public Hearing and as indicated above (*supra,* para 31), Counsel for the Applicant argued that the Court was competent as long as the rights, violation of which is alleged, are guaranteed by the Charter and any other applicable human rights instrument.

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48. As regards what the Respondent considers as erroneous invocation of the Articles of the Protocol on which the jurisdiction of the Court is grounded, the Court recalls that it had already disposed of this issue (*supra*, para 33) and does not therefore need to revert to it.

49. On the argument that the Applicant allegedly did not cite the relevant Articles of the Constitutive Act of the African Union, and of the Charter, the Court reaffirms that that situation does not render it incompetent to examine the Application[8], nor does it make the said Application inadmissible.

50. The Court notes that what is important for an Application to be compatible with the Constitutive Act of the African Union and the Charter is that, in their substance, the violations alleged in the Application are susceptible to be examined by reference to provisions of the Constitutive Act and/or the Charter and are not manifestly outside the scope of Application of these two instruments.

[8] See *supra*, note 6.

51. However, it is quite apparent in the instant case that the violations alleged herein, as already indicated, are all related to the right to a fair trial and fall within the ambit of the Charter which guarantees such rights in its Article 7, and of the Constitutive Act in its Articles 3(h) and 4(m) which set forth the promotion and protection of human rights, as well as respect of human rights, as a fundamental principle and objective of the continental organisation.

52. For all the aforementioned reasons, the Court dismisses the objection regarding the Application's incompatibility with the Constitutive Act of the African Union and the Charter.

**C) Objection based on non-exhaustion of local remedies**

53. Firstly, in its Response, the Respondent State, after reaffirming the principle of exhaustion of local remedies in international law, argues that it was premature on the part of the Applicant to submit the instant case to this Court given the fact that it still had local remedies available to him. According to the Respondent State, after the 1999 decision of the High Court, the Applicant first had the possibility of lodging a petition regarding the alleged violations of his constitutional rights, based on the Basic Rights and Duties Enforcement Act No. 9, Chapter 3, Revised Edition of 2002.

54. At the Public Hearing, the representative of the Respondent State reiterated, in substance, that whereas the Applicant had the possibility of seising the High Court on the alleged violation of his basic rights as guaranteed by the Constitution, as he was allowed to under the Constitution and the law, he chose not to and had thus not exhausted this remedy afforded him by the Tanzanian legal system.

55. Then, in its Response, the Respondent State argued that after the High Court decision of 2000 (sic), the Applicant also had the possibility of filing an Application for review of the judgment of that Court pursuant to the Rules of Procedure of that Court. The Respondent State, in conclusion, stated that the Applicant having not availed himself of that remedy,

the Application did not meet the requirements set down in Article 40 (5) of the Rules of this Court and should therefore be dismissed with costs against the Applicant.

56. At the Public Hearing, the representative of the Respondent State however recognised that the Applicant finally filed an Application for review in 2013, raising issues of identification and the credibility of the witness who identified him, as well as issues which according to the Respondent State had never been examined by the lower courts because the Applicant seised both the Court of Appeal and this Court at one and the same time. The representative of the Respondent State further pointed out that the Application for review was, in his opinion, an ordinary remedy and that the Court of Appeal should have been able to dispose of it within 24 months.

57. Lastly, at the same Public Hearing, the representative of the Respondent State reiterated that the Applicant had not availed himself of the remedy on the constitutional issue before the High Court, and that the Application for review was still pending before the Court of Appeal. He further maintains that, of all the nine complaints submitted by the Applicant before the African Court, only the complaint relating to issues of identification had been raised at the national level. In conclusion, the Respondent State averred that since it never had the opportunity to examine the other complaints, the Applicant has not exhausted local remedies and his Application should be declared inadmissible.

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58. In his Reply, the Applicant indicated that his Application was filed, to the extent possible, after the exhaustion of local remedies given the fact that the only option available to him was being unduly prolonged as the Court of Appeal of Tanzania wasted too much time before accepting his Application for Review No. 11 of 2013.

59. At the Public Hearing, Counsel for the Applicant, relying on the case law of the Commission, argued that the remedies, exhaustion of which is required, are only ordinary judicial remedies, and not the extraordinary remedies available in the Respondent State.

60. At the same Public Hearing, Counsel for the Applicant stated once again that the latter had been convicted three times at all levels of the Tanzanian judicial hierarchy; that, to his knowledge, there had been no Application for review before the Court of Appeal; that even if there were to be an Application for a review, such an Application would still be extraordinary, and not ordinary; that in Case 333/2006 - *Southern Africa Human Rights NGO Network and Others v. Tanzania*, the Respondent State acknowledged that the Court of Appeal is the highest court in the country; that as regards the constitutional remedy, the relevant articles of the Constitution [Art. 30**(3)**and **(**5**)**;Art.12] show that this is left to the judge's discretion; that under international jurisprudence including the UN Committee on the Elimination of All Forms of Discrimination Against Women, victims are not required to exhaust the special or extraordinary remedies.

61. Regarding the Respondent State's allegation that almost all the complaints now before the African Court had never been submitted before the national courts, Counsel for the Applicant replied that all the complaints had been presented before the national courts; and relying on court records and the Judgments filed by the Parties before this Court, he mentioned by way of example, identification issues, errors committed in respect of the invocation of an alibi by the Applicant, the absence of cross-examination of the witness, and the conflict of interest on the part of the Prosecutor.

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62. As regards local remedies, the Court notes that the fact is undisputed that the Applicant appealed his conviction before the Court of Appeal of Tanzania, which is the highest court in the land, and that that Court had upheld the Judgments of the High Court and of the District Court in the instant case.

63. The key question that arises here is whether the other two remedies mentioned by the Respondent, i e. the constitutional remedy before the High Court, and the Application for review before the Court of Appeal, are remedies that the Applicant must exhaust within the meaning of Article 56(5) of the Charter which, in substance, is reproduced in Rule 40 (5) of the Rules.

64. It is recognised in international law that the remedies that must be exhausted by the Applicants are ordinary judicial remedies. That was the point also underscored by the Court particularly in the case of *Alex Thomas v. United Republic of Tanzania*[9].

65. It is therefore important, in the instant case, to determine if the constitution-related complaint and the application for review, as conceived in the legal system of the Respondent State, are ordinary or extraordinary remedies.

66. In the legal system of the Respondent State, it is generally accepted that the usual remedies are, in a case like the instant one, the appeal before the High Court and the appeal before the Court of Appeal, which is the country's highest judicial organ.

67. Other remedies, such as the constitutional remedy or application for review are apparently exceptional judicial remedies, which are not normally thought about, and are thus extraordinary remedies.

68. As regards the constitutional remedies in particular, as the Court observed in the case of *Alex Thomas v. United Republic of Tanzania,* having considered the nature of the said remedy, it emerged that that was an extraordinary remedy which the Applicant was not required to use[10].

69. In this respect, Section 8(2) of the Basic Rights and Duties Enforcement Act of the Laws of Tanzania provides that:

"The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexations".

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[9] Judgment of 20 November 2015, para 64. See also: Matter of *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania,* Judgment of 18 March 2016, para 95.
[10] Judgment of 20 November 2015, para 65. See also paras 60 – 64.

70. The above provisions show that the institution of Constitutional Petitions to redress human rights violations in Tanzania will only be entertained where other remedies are not available and that they are an extraordinary remedy.

71. With respect to review, Section 66 of the Rules of Procedure of the Court of Appeal of Tanzania provides that this remedy is brought before the Court of Appeal against a decision it has itself made; that the remedy must, as much as possible, be considered by the same judges who delivered the Judgment being appealed against; and that the remedy may be exercised only in exceptional circumstances. In this regard, paragraph 1 of the aforementioned Section provides as follows:

> "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 was 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".

72. It is clear from the above provision that review as a remedy is not common, that it is not granted as of right and that it can be exercised only exceptionally and under the restrictive conditions set forth by the same law. It can therefore be concluded with certainty that the remedy or review is available in the Tanzanian legal system as an extraordinary remedy that the Applicants are not obliged to exhaust before bringing a matter before this Court. As the Court noted in the case of *Alex Thomas v. United Republic of Tanzania* "an application for review is an extraordinary remedy because the granting of leave by the Court of Appeal to file an application for review of its decision is based on specific grounds and .... is granted at the discretion of the Court"[11].

[11] *Ibidem*, para 63.

73. It must be said, moreover, that in the instant case, the Applicant tried to exercise this remedy, but the Court of Appeal is yet to take any action.

74. Regarding the Respondent State's argument, contested by the Applicant, to the effect that the latter brought before the national courts only one complaint out of the nine he filed before this Court, it is clear from the judicial records filed with the Court by the Parties that:

i) Of the nine issues the Respondent raised in response to the Applicant's pleadings, only a particular issue, relating to the fact that the charge was allegedly defective was consistently raised as a legal issue/substantive ground of appeal.

ii) Five other issues were raised in passing or may be imputed from or form the basis of the factual narrative of the Applicant. These are, namely that he was detained at the police post which had no basic facilities; that Section 32(1) and (2) and Section 33 of the Criminal Procedure Act were not complied with, that at the Police Station he had no legal representation and was not availed his right to call a lawyer or have his statement taken, and that he was not accorded the right to be represented and defended and that he was discriminated against.

iii) Three issues were not addressed at the national level, namely the Judgment of the Trial Court was delivered contrary to Section 311 of the Criminal Procedure Act; that the sentence was improper; and that the 30 year prison sentence meted out to him was excessive.

75. It is therefore clear that most of the complaints brought before this Court had been raised before Tanzanian national courts, in one way or the other.

76. In any event, the Court notes that all of these complaints essentially relate to one and the same right, i.e. the right to a fair trial, which the Applicant has repeatedly demanded before the national courts. It therefore follows that even if the complaints in question had not been submitted in detail to the national courts, the Respondent State would not be

justified to argue that all the remedies or some of them have not been exhausted, whereas the Applicant submitted the issue of his right to a fair trial before the said national courts – a right that these courts are supposed to guarantee *proprio motu* in all its aspects, without the Applicant having to specify the particular aspects.

77. It is therefore clear that the Applicant has exhausted all the ordinary remedies which he was supposed to exhaust. For this reason, the Court dismisses the objection of inadmissibility of the application on grounds of failure to exhaust local remedies.

**D) Objection based on non-compliance with a reasonable time in filing the application before the Court**

78. In its Response, the Respondent submits that, if the Court finds that the Applicant has exhausted local remedies, the latter has however failed to submit his Application before this Court within a reasonable time from when the local remedies were exhausted.

79. It further argued that even if Rule 40 (6) of the Rules of Court is not specific on the question of reasonable time, international human rights jurisprudence has established that six months is considered a reasonable time.

80. The Respondent points out that the decision of the Court of Appeal of Tanzania dates back to 5 October 2004, but concedes that Tanzania deposited its instrument of ratification only on 10 February 2006; it therefore maintains that the time elapsing since that date up to the referral of the matter to the Court on 8 October 2013 is seven years and nine months, and that this period is far higher than the six months considered to be reasonable.

81. The Respondent State further submitted that the fact that the Applicant was in prison did not and still does not prevent him from accessing the African Court, as he has done elsewhere in this procedure.

82. At the Public Hearing, the Respondent State reiterated that the Application had not been submitted to this Court within a reasonable time, pointing out that even if the time line was calculated from 2010 (the year in which it made the declaration accepting the competence of the Court to hear complaints from individuals and Non-Governmental Organisations), the period would still be around three years, well beyond the six months reference period.

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83. In his Reply, the Applicant argued that it took time before bringing the matter before the Court because he has been in prison for sixteen years, and he was still unaware of the procedure to be followed before the Court.

84. At the Public Hearing, Counsel for the Applicant argued that the timeline within which it seised the Court is three years given that the Respondent State made the declaration accepting the jurisdiction of the Court only on 9 March 2010. He argued that this time line was reasonable, given the particular circumstances of the Applicant's situation - a prisoner, uneducated, indigent, layman plus the fact that he did not have the benefit of a lawyer's assistance.

85. Referring in particular to the case law of the Court in the matter of *Tanganyika Law Society and Human Rights Centre & Rev. Christopher Mtikila v. United Republic of Tanzania* and *Peter Chacha v. United Republic of Tanzania*, Counsel for the Applicant explained that there was no fixed deadline to seise the Court, and that the issue should be decided on a case-by-case basis.

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86. The Court wishes to point out, from the outset that Article 56 (6) of the Charter does not indeed specify any period within which recourse to the Court should intervene. Rule 40 (6) of its Rules which essentially reproduces the above Article, simply speaks of a

"reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized of the matter".

87. The question that arises here is whether the period within which the Applicant seised the Court is a reasonable time within the meaning of Article 56 (6) of the Charter. To adequately address this issue, it is necessary to first determine the date from which that time must be calculated and assessed.

88. Whereas the Respondent State submits that the period should start to run from the date of deposit of the instrument of ratification of the Protocol establishing this Court, that is, 10 February 2006 (supra, para 80), the Applicant believes that the time starts to run from 9 March 2010, the date on which the Respondent State signed the declaration accepting the jurisdiction of the Court to receive cases from individuals.

89. In the opinion of the Court, it is appropriate to take into account not only the date on which the Respondent State became a Party to the Protocol, but also and above all, with regard to an Application from an individual, the date on which that State filed the declaration accepting the competence of the Court to receive cases from individuals within the meaning of Article 34(6) of the Protocol. The records however show that the United Republic of Tanzania deposited the said declaration on 29 March 2010. In the view of the Court, it is from that date that the date of seisure has to be calculated[12].

90. The Applicant having filed his Application at the Registry of the Court on 8 October 2013, the time line for seisure should run from 29 March 2010, to that date, that is, 3 years, 3 months and 10 days. The question that now arises is whether such a timeline is reasonable.

[12] See African Court: *Norbert Zongo and Others v. Burkina Faso,* (Preliminary Objections) Judgment of 21 June 2013, para; *Alex Thomas v. United Republic of Tanzania,* Judgment of 20 November 2015, para 73.

91. As the Court noted in a previous case, "... the reasonableness of the timeline for referrals to it depends on the circumstances of each case and must be assessed on case-by-case basis."[13]

92. In the instant case, the fact that the Applicant is in prison; the fact that he is indigent; that he is not able to pay a lawyer; the fact that he did not have the free assistance of a lawyer since 14 July 1997; that he is illiterate; the fact that he could not be aware of the existence of this Court because of its relatively recent establishment; all these circumstances justify some flexibility in assessing the reasonableness of the timeline for seisure of the Court[14].

93. The Court therefore holds that the timeline between the date it was seised of the instant case, that is, 8 October 2013, and the date on which the Respondent deposited the declaration accepting the jurisdiction of the Court to receive individual applications, that is 29 March 2010, is reasonable within the meaning of Article 56 (6) of the Charter. The Court therefore dismisses the objection on admissibility grounded on failure to file the Application before the Court within a reasonable time.

94. Having thus examined herein-above all the requirements of admissibility under Article 56 of the Charter, the Court holds that the Application is admissible.

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[13] In the Matter of *Zongo and Others v. Burkina Faso* (Preliminary Objections) Judgment of 21 June 2013, para. 121. See also, African Commission: *Darfur Relief and Documentation Centre v. The Sudan*, Communication 310/05, para 75, "*The African Commission notes that the Charter does not provide for what constitutes 'a reasonable period of time,' and neither has it defined reasonable time. For this reason, the African Commission would therefore treat each case on its own merits*".

[14] In this regard, In the Matter of *Zongo and Others v. Burkina Faso* (Preliminary Objections) Judgment of 21 June 2013, para 122.

## VIII. THE MERITS OF THE CASE

### A) The allegation that, on his arrest, the Applicant was detained at a police post which lacked basic facilities

95. In his Application, the Applicant first complained that, since his arrest on 10 April 1997 he was detained until 14 April 1997 at a police post that had no basic facilities to accommodate detainees.

96. In his Reply, the Applicant reiterated that the police detention venue was not up to standard, and that even today, the conditions in police posts are not conducive for human living.

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97. In its Response, the Respondent State maintained that the allegation is unfounded; that detention facilities at police posts conform to the required regulatory standards; that the Applicant must provide concrete proof of his allegation; and that the arrest and detention of the Applicant has been done in accordance with the law.

98. At the Public Hearing, the Respondent State reiterated this position, explaining in particular that all police stations have the infrastructure required to comply with the regulations particularly in terms of the number of prisoners in a cell, latrines, toilets, cleanliness, and food for prisoners; the regulations prohibit the mistreatment of prisoners and allow them to complain to the person in charge of the police post who will then carry out investigation and take appropriate action; and, besides, that it is the first time the Applicant ever spoke of this complaint which he never raised either before the police post commandant or before the national courts

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99. The Court notes that in view of the challenge to the allegation under consideration by the Respondent State, the Applicant, who bears the burden of proof, has not provided any such proof. The Court therefore dismisses this allegation.

**B) The allegation that the charge against the Applicant was defective**

100. In his Application, the Applicant alleges that the charge sheet was marred by defects.

101. In his written submissions attached to the Application, the Applicant argued that on the charge sheet by which he was arraigned before the trial, it was indicated that he was the only one to have committed the armed robbery, whereas the evidence indicates that they were many. He argues that according to law, the charge sheet should have been amended accordingly, which was not done.

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102. In its Response, the Respondent contests that allegation and asked that the Applicant provide strict proof thereof. Regarding the difference between the content of the charge sheet, which mentions only one accused person, and the evidence before the judge indicating that there were several thieves, the Respondent State indicated that the law provides for the possibility of modifying the charge sheet only if there has been a defect in the substance and on the form; that in the instant case, the fact that the other thieves were not mentioned in the charge sheet did not distort the substance or form of the charge; and that had the other thieves been arrested, the charge sheet would have been duly amended to include them. The Respondent State further argued that if other people involved in the armed robbery were to be arrested even today, they could still be charged with the crime since there is no time limitation in criminal matters; and that in fact their inclusion in the charge sheet would have been a huge irregularity, and would have rendered the charge sheet defective.

103. The Respondent State concludes that the allegation is frivolous and misconceived and should be dismissed.

104. At the Public Hearing of 22 May 2015, the Respondent State argued that the Applicant has never brought the grievance to the attention of the national courts; and that in any case, an accused person can be tried alone, and not necessarily with co-defendants. He further explained that one person had been tried while there were more others on the charge sheet because trial can proceed only when someone has been arrested and arraigned before the judge; and when the procedure concerning that person has reached an advanced stage, others would eventually be tried separately.

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105. The Court holds the view that the mere fact that the Applicant was charged alone while the testimonies showed that there were several thieves, does not necessarily infringe on his right to a fair trial under Article 7 of the Charter. Indeed, in criminal matters, liability is personal, and the fact that the other persons possibly involved in the robbery were not found and charged, changes nothing in terms of his own possible liability. As underscored in Article 7(2) of the Charter, "... punishment is personal and can be imposed only on the offender." In reality, the fact that mention was not made of the involvement of these other persons, even if not identified, should not impact on the key question of the possible liability of the Applicant and the punishment incurred.

106. For these reasons, the Court holds that there has, in this respect, been no violation of the right to a fair trial as guaranteed by Article 7 of the Charter.

**C) The allegation that the Prosecutor was in a situation of conflict of interest**

107. At the Public Hearing, Counsel for the Applicant pleaded that the Applicant was convicted "in a trial through a Prosecutor who had a conflict of interest in the matter." ;that the Applicant has consistently indicated to the national courts that it had come to his knowledge that the Prosecutor in the primary court was related to the complainant, but that this allegation of conflict of interest has never been investigated, whereas that would

have required the appointment of a different prosecutor to handle the case; and that the Applicant raised the issue of the relationship between the Prosecutor and the complainant in court as far back as 12 August 1997.

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108. At that same hearing, the Respondent State's representative, referring to the record of the proceedings before the national courts, explained that the Applicant's complaint in this regard was based on hearsay as he indicated that he was told that the Prosecutor had a relationship with the complainant; that the court sought to know more; that the Prosecutor averred that the allegations were not true and were baseless; that on the basis of this rebuttal, the court was satisfied with the matter and saw it fit to proceed with consideration of the case; and that in any case, the Applicant had the possibility of bringing the complaint to the Director of Public Prosecutions who could have changed the Prosecutor in the interest of justice, which the Applicant did not do.

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109. The Court notes that the record of domestic judicial procedures shows that the Applicant had, indeed, requested a change of the Prosecutor for reasons of alleged conflict of interest; that the Prosecutor contested this allegation; but that the court ultimately took no explicit decision on this, and simply proceeded with consideration of the case.

110. The Court notes that a possible conflict of interest on the part of a Prosecutor for reasons of his alleged relationship with the complainant is a matter of crucial importance in any trial, especially in criminal cases, as it touches on the very principle of impartiality of judicial institutions, including prosecuting institutions, as impartiality is one of the pillars of a fair trial.

111. Consequently, the Court holds that, in the instant case, the national judge, before further consideration of the case, should have pushed for further investigations on the

issue of conflict of interest, asking the Applicant to substantiate and prove his allegations; and then make a formal decision on the issue. As the judge did not take any of these actions, but merely chose to proceed with the trial, the Court holds that the Respondent State has violated the right of the Applicant to a fair trial under Article 7 of the Charter. As the dictum goes, "justice must not only be done but must be seen to be done[15]".

**D) The allegation that at the time of his arrest and detention at the police station, the Applicant was not afforded the right to defend himself and to be assisted by a lawyer**

112. In his Application, the Applicant complains that, upon his arrest, he was not afforded the right to express himself; to make a written statement to the police; to call a lawyer and to be assisted by him; and that the absence of a lawyer led to injustice, thus denying him his constitutional rights.

113. In his Reply, the Applicant argued, in that regard, that during his detention at the police post, his fundamental rights were neither read to him nor brought to his attention and this was in violation of the law.

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114. In its Response, the Respondent State disputed the allegation that the Applicant was not informed of his rights. It asserted that he was, in particular, informed of his right to remain silent and his right to consult a lawyer, a relative or friend, in accordance with Section 53 of the Criminal Procedure Code [para 44]. The Respondent State further maintained that the Applicant must provide full proof in support of his allegations.

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[15] R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep; The Bangalore Principles of Judicial Conduct 2002, Value 3.2; United Nations Office of the High Commissioner on Human Rights *Guidelines on the Role of Prosecutors* 1990 Guideline 12; International Association of Prosecutors *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, 1999 Standards 1 and 4.3

115. At the Public Hearing, the Respondent State further explained that the Applicant was not convicted on the basis of any statement made at the police post, but rather on the testimony of a witness, and therefore that his Application should be dismissed as unfounded.

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116. The Court recalls that according to Article 7 of the Charter:

"Every individual shall have the right to have his cause heard. This comprises...

c) the right to defense, including the right to be defended by counsel of his choice".

117. The Court notes in the instant case that the Respondent State refutes the allegation that the Applicant was not informed of his constitutional rights, but was unclear as to whether he was afforded the right to express himself and to make a written statement to the police.

118. As regards the issue of a possible deposition by the Applicant before the Police at the time of this arrest, the records before the national courts, as submitted to the Court by the Parties, show that during the pleadings before the trial magistrate, the Applicant complained, among other things, that the Police did not inform him of the reasons for which he was detained, the offence of which he has been accused and that there was no trace of his statement to the police in his records. In the circumstances, the Court cannot but presume that the Applicant's right to defend himself by submitting a written statement to the police has not been respected by the Respondent State.

119. Regarding the allegation that the Applicant at the time of his arrest, was not informed of his constitutional rights, the records before the national courts show no trace of a police report detailing such information. Consequently, the Court finds that the Applicant's right to be informed of his constitutional rights was not respected by the Respondent State.

120. On the allegation that the Applicant was, upon arrest, not afforded the assistance of a lawyer, the records show that the Applicant represented himself in court on 14 April, 24

April, 13 May and 26 May 1997, respectively, and that Advocate Njau intervened for the first time on 9 June 1997, that is, about two months after his arrest.

121. In principle, as the Commission noted in the Matter of *Abdel Hadi, Ali Radi and Others v. Republic of The Sudan*, the fact of not having access to a lawyer for a long period after arrest affects the victims' ability to effectively defend themselves, and constitutes a violation of Article 7(1)(c) of the Charter.[16]

122. In the circumstances of the present case, where the Court records at the national level make no mention of the Applicant being informed of his right to be assisted by Counsel at the time of his arrest, the Court is of the opinion that the Applicant's right to have access to Counsel upon his arrest was violated by the Respondent State.

**E) The allegation that the Applicant was not afforded free legal assistance during the proceedings**

123. In his Application, the Applicant further alleges that during the trial at the first instance and appellate courts, he was not assisted by Counsel; that he did his best to prove his innocence all by himself but without success; and that all that caused him prejudice, especially as it was in breach of Article 13 of the Tanzanian Constitution on the right to equal treatment for all.

124. In his written submissions attached to the Application, the Applicant invokes the Criminal Procedure Act of Tanzania on the right to be defended by a lawyer in criminal proceedings and the right to legal assistance, and argues that had he been duly represented, his current predicament should not have been there to haunt his life.

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[16] Communication 368/09, Decision of November 2013, para 90. See in this regard: - ECHR: *Matter of A.T v. Luxemburg,* Judgment of 9 April 2015, paras 63- 65.

125. He reiterates that he was not afforded the right to be represented and defended as provided by Section 310 of the Criminal Procedure Act. He further argued that the fact that he was initially defended by lawyer, Mr. Njau does not mean that he was not at a disadvantage; the latter having represented him as a relation, but when he had more clients, he decided to abandon him since his services were free of charge .

126. At the Public Hearing, Counsel for the Applicant maintained that as at 12 October 1997, the latter no longer had an Advocate; and that despite the existence of a law on legal aid, he had to defend himself all alone both in the lower courts and at the Court of Appeal. He added that no attempt was made by the judicial authorities to afford him legal assistance or representation, whereas they had the power to do so; whereas under the *African Commission on Human and Peoples' Rights' Principles and Guidelines on the Right to Fair Trial and Legal Assistance*[17] in Africa, the State is under the obligation to extend legal aid to the accused if he/she cannot afford to hire an attorney, or where the interests of justice so require, which situation has to be assessed according to the seriousness of the offence and the severity of the penalty. He also invoked the *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* on accessing legal aid in the criminal justice system in Africa and argued that for the purpose of adopting measures in compliance with the right to a fair trial under Article 1 of the Charter, the State had to take on board the principles set forth in the Lilongwe Declaration.

127. At the same hearing, Counsel for the Applicant stated that the latter had requested for legal aid, but was told that legal aid was available only in cases of homicide; that in the circumstances, the Respondent State in particular violated Article 7 of the Charter and Article 14 of the Covenant on the right to a fair trial, including the right to legal assistance.

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[17] See infra, note 17.

128. In its Response, the Respondent State asserts that it grants free legal representation to all accused persons liable to capital punishment; that beyond this hypothesis, the grant of legal aid is not compulsory, but is subject to the indigence status of the accused, or is required in the interest of justice.

129. Reverting to the issue of the special circumstances of the matter, the Respondent State indicates that according to the records of the Moshi District Court, the Applicant was represented by a lawyer by the name of Mr. Njau; and that if, subsequently, this lawyer no longer handled the case, it was not for financial reasons, but rather because the Applicant believed that his lawyer wanted "to settle the matter" (sic).

130. The Respondent State further argued that the fact that the Applicant was not represented by an Advocate does not at all mean that he was disadvantaged, since the Criminal Procedure Act allows him to appear in person during administration of evidence, and recognises his right to be informed of his rights as an accused so that he can defend himself. In that score, the Respondent State submits that these are procedural measures afforded an accused to enable him to defend himself, and that the said measures have all been applied, and no exception was made with regard to the Applicant.

131. The Respondent State further maintained that the right to defence is not curtailed when, as was the case in this matter, the accused must remain on remand during his trial, because due to the nature of the crime, his release is precluded under the law. In conclusion, it prayed the Court to dismiss this allegation as utterly baseless and devoid of merit.

132. At the Public Hearing, the representative of the Respondent State also pointed out that the Applicant never requested the assistance of a lawyer and has never raised this issue before the municipal courts.

133. At the same hearing, the representative of the Respondent State argued that legal aid is contingent on the availability of financial resources and the capability of the

Respondent State to provide it; and that as "legal aid is provided only in homicide cases, the Respondent State cannot therefore provide legal assistance to all those who seek it, since this is directly related to the financial capacity and capability of the country".

134. The Respondent repeatedly argued that the Applicant has never brought to the attention of the judge the fact that he was in need of legal aid; that at the onset of the proceedings, the Applicant had said that he had the means to hire a lawyer, that thereafter he never told the judge why he did away with his lawyer; and that even where the penalty is that of life imprisonment, legal aid is not automatic and must be requested.

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135. The question that arises at this juncture is whether or not, after the departure of Advocate Njau, the State had the obligation to provide the Applicant the services of a lawyer under the free legal assistance scheme.

136. Under Articles 3 and 7 of the Protocol, the Court applies the Charter and other relevant human rights instruments and not the national laws of the Respondent State. It follows that the Court is not bound by the national laws of States, as such laws themselves can be at variance with the Charter or the said other instruments, where the laws in question are incompatible with the Charter and the instruments, or do not meet the standards emanating from their interpretation.

137. The Court notes, in this regard, that Article 7 of the Charter does not specifically address the issue of provision of free legal assistance. In contrast, the International Covenant on Civil and Political Rights explicitly provides in its Article 14(3)(d) that "any person charged with a criminal offense shall be entitled to the following minimum guarantees in full equality: ... 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"* (italics added).

138. The Court holds that Article 7 of the Charter read together with Article 14 of the Covenant, guarantees for any one charged with a criminal offence, the right to be automatically assigned a Counsel free of charge, where he does not have the means to pay him, whenever the interests of justice so require.

139. Moreover, the Court is of the opinion that an indigent person under prosecution for a criminal offence is particularly entitled to free legal assistance where the offence is serious, and the penalty provided by law is severe. As the Court noted in the Matter of *Alex Thomas v. United Republic of Tanzania*, the Respondent State "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".[18]

140. In the instant case, the question is whether the fact that the Respondent State, pursuant to its laws and relevant court decisions, did not automatically and compulsorily grant legal assistance to a person liable to thirty years imprisonment sentence, is compliant with Article 7 of the Charter and Article 14 of the Covenant and other relevant international standards.

141. The Court notes in this regard that Article 7 of the Charter and 14(3)(d) of the Covenant does not make any distinction between the different categories of criminal offence in terms of the applicable penalty, or as to whether the issue is that of capital punishment or imprisonment.

142. The Court notes that a sentence of 30 years in prison is severe though not as severe as the death sentence or a sentence of life imprisonment.

[18] Judgment of 20 November 2015, para 115. See also paragraphs 116 to 124, as well as the jurisprudence and international practice cited.

143. The Court also notes that nothing in the records indicates that the Applicant has or had other sources of regular income; and that having been incarcerated, he could no longer have such an income - which grounds prompted this Court to assign a lawyer to him at his request in the instant case.

144. The Court notes, lastly, that the Respondent State failed to adequately demonstrate that it had absolutely no financial capacity to grant free legal assistance to indigent persons, alleged perpetrators of serious crimes liable to punishment as severe as thirty years imprisonment.

145. For these reasons, the Court in the instant case, holds that the Respondent State ought to have afforded the Applicant, automatically and free of charge, the services of a lawyer throughout the proceedings in the local courts. In failing to do so, the Respondent State violated Article 7 of the Charter and Article 14 of the Covenant.

**F) The allegation that the Applicant was discriminated against in terms of legal assistance**

146. In his written submissions annexed to the Application, the Applicant alleges that he did not have the benefit of legal aid, and that he was discriminated against, especially for reasons of his state of poverty, in violation of Article 13 of the Tanzanian Constitution.

147. At the Public Hearing, Counsel for the Applicant invoked the Principles and Guidelines of the African Commission on Human and Peoples' Rights on the Right to a Fair Trial and Legal Assistance in Africa, particularly principle (f) thereof on the role of Prosecutors who should carry out their functions without bias and eschew all political, social, racial, ethnic, religious, cultural, sexual, gender or any kind of discrimination, should protect the public interest and act objectively taking into proper account the position of both the suspect and the victim.

148. At that same Public Hearing, Counsel for the Applicant also cited Article 3 of the Charter which guarantees the right to equality before the law.

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149. In its Response, the Respondent State refutes the allegation of discrimination and demanded that the Applicant provide concrete proof of this allegation; it affirmed that the Applicant has never been discriminated against.

150. The Respondent State also reiterates that the Applicant has not been discriminated against on the grounds that he did not have the means to pay a lawyer; that the fact of not having a lawyer does not place him at a disadvantage given that the Criminal Procedure Act allows him to understand the charges brought against him and to defend himself. The Respondent State concludes that the allegation is baseless, lacks merit and should be dismissed.

151. At the Public Hearing, the Respondent State reiterated its position and argued that "the Applicant has not demonstrated in what way he was discriminated against and does not say what he calls preferential treatment of other accused persons who were in the same situation and circumstances as he is in".

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152. The Court reiterates that the right to equality and non-discrimination is guaranteed by Article 3 of the Charter which provides that:

> "1. Every individual shall be equal before the law.
> 2. Every individual shall be entitled to equal protection of the law ".

153. The Court holds that it is incumbent on the Party purporting to have been a victim of discriminatory treatment to provide proof thereof.[19]

154. In the instant case, the Court notes that the Applicant has not shown how he has been discriminated against in terms of the way the Tanzanian law on legal assistance was applied to him. He has not shown, in particular, that the law was applied differently to other people in the same situation as himself. The Court therefore dismisses the allegation and holds that the Respondent State has not violated Article 3 of the Charter.

**G) The allegation that the Applicant did not receive timely communication of the indictment and statements of witnesses to enable him defend himself**

155. At the Public Hearing, Counsel for the Applicant alleged that the latter repeatedly requested copies of the indictment and the witnesses' statements to enable him defend himself, but without success; that his first request was made on 26 May 1997 but that it was only fifty days later that he received only one witness statement; that five months later, the Prosecutor admitted to failure to bring the statements of the other witnesses due to shortage of stationery; that on 17 October 1997, the Applicant reminded the court that he had received only one witness statement, but that, at that point, the Prosecutor denied and claimed that all the documents had been given; and that despite all that, the court decided to proceed with consideration of the case without investigating these shortcomings.

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156. At the same Public Hearing, the Respondent State, relying on the records of the proceedings in the local courts, explained that on the day of the hearing, the Prosecutor had two witnesses ready to testify; that the Applicant indicated that he had the indictment

[19] See in this regard: International Criminal Tribunal for Former Yugoslavia: In the *Matter of Celebici (IT-96-21 A), Judgment on Appeal of 20 February 2001*, para 607

and the witness statements, but requested a stay of the case because he was suffering from hypertension and a headache; but that the Applicant was in reality trying to delay consideration of the case for fear of the outcome of the trial.

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157. The Court notes that under Article 7(1)(c) of the Charter, every individual shall have the right to defence, and that under Article 14(3) of the Covenant, everyone charged with a criminal offense shall be entitled "... a) [to] be informed promptly and in detail in a language which he understands, of the nature and cause of the charge against him; [and] b) [to] have adequate time and facilities for the preparation of his defence ... ".

158. The Court is of the opinion that the right of the accused to be fully informed of the charges brought against him is a corollary of the right to defence, and is above all, a key element of the right to a fair trial.[20]

159. The Court notes that, in the instant case, consideration of the records of the domestic judicial proceedings shows that on 26 May 1997, the defendant requested the court to forward to him the witnesses' statements and the indictment and that on 4 July 1997, the Prosecutor informed the court that the witnesses' statements were not available due to shortage of paper. The records again show that on 14 July 1997, the Prosecutor handed to the defendant the statement of one witness; that on 9 September 1997, the Prosecutor again informed the court that he had not been able to bring the witnesses' statements to the accused due to shortage of stationery. It also indicates that on 17 October 1997, the accused again asked the court to forward to him the charge sheet and the outstanding witness statements but the Prosecutor was opposed to the request, arguing that he had already handed the witnesses' statements to Counsel for the accused; and that the court ordered that, as the accused had received two witnesses' statements, the case could proceed forthwith.

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[20] See in this regard: ECHR: *Matter of Pélissier and Sassi v. France*, Judgment of 25 March 1999, para 52; *Balta and Demir v. Turkey,* Judgment of 23 June 2015, para 37; Inter-American Court of Human Rights: *Matter of Yvon Neptune v. Haiti* (*Merits, Reparation and Costs*), Judgment of 6 May 2008, paras 102-109.

160. It is thus apparent from the records that the indictment and the witnesses' statements were not promptly communicated by the Prosecutor; that some evidence was not communicated to the Applicant for reasons as flimsy as shortage of paper; that the evidence was made available to him with considerable delay; that the court decided to proceed with the case whereas the Applicant was not personally in possession of all the evidence substantiating the charge preferred against him; that in these circumstances, it is clear that the Applicant was not in a favourable position to proceed with his own defence.

161. The Court thus holds that the police and judicial authorities, having not acted with due diligence to communicate in due time to the Applicant all the elements of the charge, the Respondent State has violated his right to a defence, as guaranteed by Article 7(1) (c) of the Charter and Article 14(3)(a) and (b) of the Covenant.

**H) The allegation that the charge was based solely on the testimony of a single witness who, moreover, had made contradictory statements**

162. The Applicant alleges in his Application that his identification was based on the testimony of one person, and that the conviction and sentence relied on a single piece of evidence which was weak, tenuous, unreliable and uncorroborated.

163. In his written submissions attached to the Application, the Applicant explains in detail how the witness Suzan Justin Frank is not credible. He produces extracts from this person's testimony which he finds contradictory, and argues that she lied in the sense that she never knew the house or place where the accused was living prior to being told by the visitor who went to sympathise with her. He maintained that, according to the Tanzanian jurisprudence, for purposes of identification of a suspect, one witness shall be valid only if the Court is fully satisfied that the witness is telling the truth; but in this case,

this precondition was not met. He asked the Court to revisit the testimonies used as evidence by the Tanzanian courts.

164. In his Reply, and still on the fact that the conviction relied on the contradictory testimony of one person, the Applicant reiterated that this constitutes an irregularity; and that it was needful, in accordance with Tanzanian law, to have scrupulously checked whether the only witness was telling the truth.

165. At the Public Hearing, Counsel for the Applicant, relying on the tenor of the Judgments rendered by the national courts, that on the day of the robbery, 5 April 1997, all those who went to the police station, including the complainant, prosecution witness No. 1, indicated that they could not identify the robbers considering that it all happened in the evening, and the conditions were not favourable; however, that several days later and at the hearing, the same complainant stated that only she has been able to identify the Applicant and that the other witnesses could not identify the robbers. He added that there are a number of other inconsistencies in her written statements and in her testimony before the court and in particular that she said during cross-examination before the lower courts that she went on the same day of the robbery [5 April 1997] to the home of the Applicant for the purpose of identifying him, pretending to buy milk, and that after she has identified him, she went to the police station; whereas during cross-examination, she changed her statement saying that she had in fact been to the home of the Applicant on 9 April 1997 and this led to his arrest on 10 April 1997. The Counsel for the Applicant further submitted that this same witness had also said that the day after the robbery, she was absent for five days, without explaining how, that if she had travelled, she could be there on 5 or 9 April 1997. that she again contradicted her first statement in Swahili saying, on the one hand, that the Applicant was among the robbers at the time of the robbery, and on the other, that no, he was instead picked up along the way when the vehicle she was in, with some thieves was driving from point A to point B .

166. Grounding his argument on the jurisprudence of the Court of Appeal of Tanzania, according to which corroboration of the evidence of a single witness is required in the

identification of an accused made under unfavourable conditions, unless the judge is fully satisfied that the witness is telling the truth, Counsel for the Applicant concluded that "in view of the inconsistencies, the Court could not have been satisfied that the witness could identify the accused with those who committed the robbery under those unfavourable conditions ".

167. At the same hearing and in regard to the identification of the Applicant, Counsel for the Applicant maintained that no identification parade in respect of the accused was even carried out.

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168. In its Response, the Respondent State refuted the allegation that the sole witness was not telling the truth, and demanded that the Applicant provide concrete proof of this allegation; adding that the Evidence Act does not prescribe the number of witnesses required to prove any fact.

169. It further requested the Court to apply the doctrine of margin of assessment, as there is established case law in the Respondent State which states that a conviction can be based on the evidence of a single witness, provided the trial magistrate is satisfied that the witness is telling the truth.[21]

170. In conclusion, the Respondent State contends that the argument of the Applicant that his conviction based on the identification by one witness is irregular and baseless , since the highest court of the land has deemed that a conviction based on a single witness is permissible only as long as the trial court is satisfied with the credibility of the witness and the circumstances of the identification of an accused; and consequently, that the allegations of the Applicant lack merit and should be dismissed with costs.

171. At the Public Hearing, the Respondent State's representative reiterated this position.

[21] The Respondent State cites the Matter of *Hassan Juma Kanenyera and Others v. United Republic of Tanzania* (1992) TLR, 100] and the Matter of Waziri *Amani v The Republic* (1980) TLR, 250.

172. Finally, as regards the identification of the Applicant, the Respondent State's representative explained that under Tanzanian law, "when a person knows the perpetrator, there is no need to have an identification parade, and this is what happened in this particular case".

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173. The Court recalls that even if it has no power to re-evaluate the evidence on which the national court relied for the conviction, it retains the power to determine whether, in general, the manner in which the national court has evaluated the evidence is compliant with the relevant provisions of the applicable international human rights instruments [*supra*, para 26].

174. In this regard, the Court first notes that a fair trial requires that the imposition of a sentence in a criminal offence, and in particular a heavy prison sentence, should be based on strong and credible evidence. That is the purport of the right to presumption of innocence also enshrined in Article 7 of the Charter.

175. The Court notes that even in Tanzanian jurisprudence, criminal conviction on the basis of a single witness is subject to strict conditions, and is clearly a situation that should arise only in exceptional circumstances. As noted by the Respondent State itself, in the Matter of *Waziri Amani v. United Republic of Tanzania,* the Court of Appeal/High Court declared that "no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight"[22] . The wording of this *dictum* clearly shows that the judge should in principle not convict on the basis of a single witness, but he may exceptionally do so only if all the possibilities of mistaken identity are eliminated and unless the testimony is absolutely unassailable.

[22] See supra, note 21 [20].

176. In the instant case, the Court notes that the records of the domestic judicial proceedings show that the complainant, prosecution witness No.1 and the only witness who claims to have recognised the Applicant, repeatedly says that she identified the Applicant because " he sat next to her in the back seat of the car ; that she knew the address of the Applicant before the incident occurred, but that some people had directed her to his home; that she identified the Applicant's face and voice and that she went to his home on 5 April 1997, the very day of the incident pretending that she was going to buy milk; that the police arrested him the next day; that after the incident, she had travelled for five days and returned on 9 April 1997, and that she was in no hurry to get the Applicant arrested

177. The records also show that the date on the last page of the written statement of the complainant is 11 April 1997, whereas the first page indicates other dates which are not clear.

178. The same records further show that the husband of the complainant, prosecution witness No.2, indicated that the incident was reported to the police on the same evening of the crime; that the complainant did not know where the Applicant lived before the incident; that she told him that the Applicant had entered the car later with a gun and a spear, and not at the onset of the incident.

179. The records show, lastly, that three prosecution witnesses, including the husband of the complainant, said that they were not able to recognise the perpetrators of the robbery because it was dark; and that the robbery occurred on 5 April 1997 at 9.45 pm.

180. A perusal of the entire record and, in particular, the statement of the complainant and that of prosecution witness No.1 reveals uncertainties in at least the following points: the moment at which the Applicant purportedly intervened in the course of the incident; the fact that the complainant knew the domicile of the Applicant before the incident; the day the complainant went to the home of the Applicant; the date the incident was reported to the police; and the day on which the Applicant was arrested.

181. In the circumstances, it is difficult to say that all possibilities of error especially with respect to the identity of the perpetrator of the crime have been eliminated, since the witness statements were either contradictory or, to say the least, riddled with inconsistencies, and are far from constituting a watertight testimony.

182. The Court then notes that even if he had ultimately asked for the conviction of the Applicant, the *Senior State Attorney* admitted such possibility of error before the Court of Appeal, as reported by the Judgment of the aforesaid Court dated 5 October 2004 on the same case.

> "He [the Senior State Attorney} did not support the conviction on the ground that the identification of the appellant was solely based on the evidence of the single witness, PW 1, under unfavourable conditions. The circumstances were such that, in his view, the possibility of mistaken identity could not be ruled out" [fifth sheet].

183. In view of the aforesaid, it cannot be said that the testimony in question constituted unassailable evidence.

184. As regards the identification of the Applicant, in particular, the Court notes that in the special circumstances in which the robbery occurred in the instant case, it would have been safer for the competent authorities to also carry out an identification parade.

185. For all these reasons, the Court holds that the conviction of the Applicant based on the testimony of a single individual and riddled with inconsistencies, did not meet the requirements of a fair hearing under Article 7 of the Charter.

**l) The allegation that the issue of the Applicant's alibi has not been adequately addressed by national courts**

186. At the Public Hearing, Counsel for the Applicant argued that the issue of alibi invoked by the Applicant before the national courts was not adequately addressed by the latter. He stated further that the Applicant indeed maintained that between 20 March and 7 April 1997, he was in admission at the Muhimbili hospital in Dar es Salaam, hundreds of kilometres from the crime scene, and that he could therefore not have been in Moshi on 5 April 1997; and in that regard, he tendered two pieces of evidence, namely, a bus ticket showing the transport to Dar es Salaam and a discharge certificate issued by the hospital upon his leaving the hospital - a certificate which he handed to the investigating officer. The Counsel for the Applicant indicated that while admitting the bus ticket in evidence, the trial magistrate at the same time claimed that the alibi had not been notified to the court as required by law, and that it is therefore an after-thought. He emphasised the point that in regard to the discharge sheet issued by the hospital, that although the trial magistrate had accepted the same as evidence, the appellate magistrate held that there was no discharge sheet; that despite the fact that the Applicant had indicated that he had handed the certificate to the investigating officer, the latter was never called to testify, despite the Applicant's request to this effect. He concluded that in the circumstances, the issue of the alibi evidence has not been properly treated by the national courts, which therefore cannot persuade themselves that they properly convicted the Applicant for the very serious offence of armed robbery.

187. At the same Public Hearing, Counsel for the Applicant pointed out that, he had in any case raised the issue of the alibi from the onset of the investigation procedure, handing his client's bus ticket and hospital discharge sheet to the investigating officer.

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188. In the course of that same Public Hearing, the representative of the Respondent State argued that, with respect to the hospital discharge sheet, the Applicant contradicted himself by saying, on the one hand, that it is his relatives who would produce the

discharge sheet before the judge, and on the other hand, that he handed it to the police officer in charge of the investigation; and that the judicial records rather show that it was his lawyer who was in possession of the discharge certificate. Regarding the issue of alibi in general, the representative of the Respondent State stressed that the law requires that the alibi be raised by prior notice and that in any case, the trial magistrate had considered the defence of alibi and dismissed the same.

189. At the same hearing, the Respondent State's representative explained that under Tanzanian law, an accused must first notify the Court and the Prosecution of the intention to invoke an alibi, and thus allow the Prosecution enough time to conduct investigations into allegations of alibi advanced by the accused. He stated further that if the defence is raised after the prosecution case is closed, the Court may in its discretion admit the evidence but accord no weight whatsoever to ensure that justice is done; that raising the defence of alibi after closing its case is rather prejudicial and does not reflect justice. He added that with regard to the hospital discharge sheet, investigation was not conducted, in view of the fact that this question was raised after the presentation of the prosecution's pleadings; and that on cross-examination, the Applicant said he had sent his parents to bring the discharge sheet, thus continuing to contradict himself.

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190. The Court notes that the records of the domestic judicial proceedings show that the Applicant had indeed invoked an alibi, but that the trial magistrate had found that the alibi defence had not been submitted to the court in accordance with the law, and that it was just an after-thought.

191. The Court holds that at the time of the police investigation and in the course of the trial, the Applicant clearly raised the issue of his alibi; and this should have been seriously considered by the police and the judicial authorities of the Respondent State. Where an alibi is established with certainty, it can be decisive on the determination of the guilt of the accused. This issue was all the more crucial especially as, in the instant case, the

indictment of the Applicant relied on the statements of a single witness, and that no identification parade was conducted [supra, paras 162 et seq. and 186 et seq].

192. The Court also holds that, in the instant case, the police and the judicial authorities of the Respondent State have not taken seriously the alibi argument advanced by the Applicant, regardless of the uncertainties or possible contradictions in his allegations. Implicit in the right to a fair trial is the need for a defence grounded on possible alibi to be thoroughly examined and possibly set aside, prior to a guilty verdict. In this regard, the Respondent State is not justified in invoking the state of its domestic judicial system and technicalities that may be used to subvert compliance with its international commitments in matters of human rights.[23]

193. The Court further holds that by failing to further its investigations on the alibi defence raised by the Applicant, and by relying on only the evidence adduced by the prosecution, the national Judge violated the principle of equality of arms between the Parties in matters of evidence, which is absolutely vital for justice[24].

194. For all the foregoing reasons, the Court holds that the absence of detailed investigation of the alibi allegation made by the Applicant, and the non-consideration of this defence by national courts constitute a violation of his right to a fair trial as guaranteed by Article 7 of the Charter.

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[23] See also in this regard, the Court's judgment in the Matter of *Tanganyika Law Society and Others v. United Republic of Tanzania,* 14 June 2013, paras 108-109; Commission: Communication No 212/98 *Amnesty International v. Zambia*, para 50.

[24] See in this regard: ECHR: *Dombo Beheer B.V. v. The Netherlands* Judgment of 27 October 1993, para. 33.

**J) The allegation that the Applicant was convicted without the crime weapons or the stolen items being recovered**

195. At the Public Hearing, Counsel for the Applicant submitted that at the time of his arrest he was found neither with the crime weapons nor with the items stolen, and that he had mentioned all that to both the trial magistrate and the appellate Judge.

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196. At the same Public Hearing, the Respondent State's representative argued that according to the witnesses, there were weapons such as guns, a club, a machete and a sword used to threaten the victims; that by law, all that the prosecution has to prove is that an offensive weapon has been used, that the Applicant was in the company of two or more persons, and at that time or later, he used this offensive weapon to intimidate victims.

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197. The Court notes that the Respondent State recognises that the crime weapons have not been found, and that the existence and nature of the said weapons have been established based on testimonies.

198. The Court notes, however, that the fact that the crime weapons have not been recovered does not mean that the offence of armed robbery cannot be established based on factors other than physical evidence, provided these other factors have weighty probative value.

199. Consequently, the Court cannot infer from the mere absence of the crime weapons, that the Applicant did not have a fair trial under Article 7 of the Charter.

**K) The allegation that the sentence pronounced by the judge against the Applicant was not applicable under Tanzanian law at the relevant time**

200. In his Application, the Applicant alleges that even if there had been evidence indicting him - which is not the case - the sentence of thirty years imprisonment meted against him was not applicable, and therefore that his conviction was unconstitutional [para 8]. He further alleged that the thirty years prison sentence was introduced and published in Government Notice No. 269 of 2004 in Section 287 A of the Penal Code.

201. In his written submissions attached to the Application, the Applicant states that as of 2002, the Criminal Code did not provide for imprisonment of thirty (30) years; that the Code provided for twenty (20) years imprisonment or life imprisonment; that the penalty of thirty (30) years imprisonment was therefore unconstitutional; and that the 2002 amendment which prescribed thirty (30) years imprisonment occurred after his conviction on 21 July 1998. He invoked two Judgments of the Moshi High Court rendered in 2012 and 2013[25], which annulled the sentences of thirty years imprisonment handed down in 2001 and 2003.

202. In his Reply, the Applicant reiterated this position.

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203. In its Response, the Respondent State refutes the allegation that the sentence could not be thirty years in prison, and explains that according to Section 286 of the Penal Code, the punishment prescribed was actually life imprisonment, but that the judge reduced it to thirty years in consideration of the Minimum Sentences Act which provided for this minimum sentence for armed robbery. It maintained that the Government Notice No. 269 of 2004 cited by the Applicant was merely correcting a simple typographical error in the numbering of Sections of the Penal Code of 2004.

[25] The Applicant cites the following cases: Ramadhani Shekiondo and Alfayo Michael H/C Moshi, Criminal Revision No. 2/2013; Emanuel Estomi H/C Moshi App. No. 28/2012

204. At the Public Hearing, the Respondent State explained that in 1994 the Parliament by Law No. 6 of 1994 amended Section 5 of the Minimum Sentence Act by setting a minimum sentence of thirty years in jail for the offence of armed robbery, and that that sentence was applied to the instant case, even though the penalty provided by Section 286 of the Penal Code was life imprisonment.

205. On the Judgment setting aside the thirty year prison sentence in the case of *Alfayo Michael Shemwilu and Ramadhani Shekiondo v. The Republic* cited by the Applicant (*supra*, para 201), the Respondent State's representative argued that that was a decision of the High Court [Criminal Revision No. 2 of 2013], but that the Court of Appeal, in contrast, ruled in the case of *William R. Gerrison v. Republic* that a sentence of thirty years imprisonment was appropriate for the crime of armed robbery [Criminal Appeal No. 69 of 2004.

206. At the same Public Hearing, the Respondent State's representative reiterated that it is Act No. 6 of 1994 which provides for the thirty years minimum sentence for the offence of armed robbery that was applied to the Applicant in 1997. It further argued that Act No. 4 of 2004 entered into force by virtue of Government Notice No. 269 of 2004 which simply clarified that armed robbery is deemed to have occurred where the accused is in possession of dangerous weapons.

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207. The Court notes that the only relevant question in contention here is whether the penalty to which the Applicant was sentenced in 1998 and upheld in 1999 and 2004 was not provided by the law.

208. According to Article 7(2) of the Charter:

> "No penalty may be inflicted for an offence for which no provision was made at the time it was committed."

209. In the instant case, the law applicable at the time of the offence (armed robbery), that is April 1997, is the Tanzanian Penal Code and the Minimum Sentences Act of 1972 as amended in 1989 and then in 1994.

210. It follows from Section 286 of this Penal Code that a person convicted of armed robbery is liable to a penalty of imprisonment for life, with or without corporal punishment. It also follows from Section 5 (b) of the Minimum Sentences Act that the minimum sanction for this offence is thirty years in prison. These provisions, read together, show that the applicable penalty for armed robbery was clearly a thirty (30) year minimum prison sentence.

211. Furthermore, the High Court judgment of 1 June 1999 recounts that the penalty imposed in this case is the minimum set by law for convicted offenders.

212. Moreover, it follows from the records that Act No. 4 of 2004, which the Court of Appeal could have applied in its judgment of 5 October 2004 did not amend the sentence applicable to armed robbery.

213. For all the foregoing reasons, in pronouncing and upholding the thirty years imprisonment sentence against the Applicant in the instant case, the Tanzanian national courts have not violated the principle of non-retroactivity of penalties.

**L) The allegation that the Judgment of the District Court [1997] was not pronounced in open court**

214. In his Application, the Applicant claims that the Court Judgment by which he was sentenced in 1998, was not pronounced in public, in contravention of Section 311 of the Criminal Procedure Act.

215. In his written submissions annexed to the Application, the Applicant maintained that the records show that the Judgment was read in an office on 21 July 1998, instead of being delivered in open court.

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216. In his Reply, the Applicant reiterated this position.

217. At the Public Hearing, Counsel for the Applicant again argued that at the District Court, decision was taken in the chambers of a Judge and that no reason for that was given in the said decision.

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218. In its Response, the Respondent State refutes this allegation and argues that if Section 311 of the Criminal Procedure Act provides that Judgments shall be delivered in public, the same Section also makes provisions for options.

219. The Respondent State further argues that due to limitation of space, the Chambers of Judges are used as courtrooms, whereby the public can be present during oral pleadings and delivery of Judgments. It also maintains that the case against the Applicant was neither heard *in camera,* nor was the Judgment delivered *in camera*, because anyone who wanted to be present on the two occasions was allowed to do so.

220. At the Public Hearing, the Respondent State's representative again explains that because of the problem of space, offices are used during procedures; and that the Applicant was not tried *in camera* given the fact that anyone who wanted to participate in the proceedings could do so.

221. The Respondent State's representative further explains that when the chambers are used, Public Hearings are held only when the doors are wide open and that any member of the public can access and sit in; it is only under these conditions that the Court may sit as an open court; the cause list of the Court is posted in public outside the Courts; and

that closed courts are held only when the victim is a child and the offence the accused has been charged with is for instance rape; and this is to protect the dignity of the child. He further argued that the fact that the chambers are regarded as courtrooms when the doors are wide open is the "Court's practice and we interpret this widely".

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222. The Court notes that the Charter is silent on the principle of publicity of court decisions in relation to the right to a fair trial under its Article 7. In contrast, Article 14(1) of the Covenant provides in part that "... any Judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

223. The Court notes that, in the instant case, the Parties agree that the judgment should have been delivered in open court, and the fact that, in this case, the judgment of the trial court was pronounced in the chamber of a magistrate. The only issue in contention is whether a hearing held in the chamber of a judge, which is entirely open to the public, can be regarded as open court, and if therefore the judgment delivered in such circumstances can be deemed to have been pronounced in public.

224. In the opinion of the Court, the question as to whether the judgment was delivered in public should be determined with some flexibility and not too formally. As declared by the European Court of Human Rights in the matter of *Lorenzetti v. Italy*, "the requirement whereby a judgment must be rendered in public was interpreted with a measure of flexibility[26]. In the same matter, the Court recalled that "it is necessary to determine in each case in light of the peculiar nature of the relevant procedure and depending on the purport and objective of Article 6 (1), the form of publicity to be given to a judgment as provided under the domestic law of a particular State.[27] It holds that "the requirement to publicise judgments should not necessarily take the form of oral pronouncement, and

[26] Judgment of 10 April 2012, para 37.
[27] *Ibidem. See also the jurisprudence cited.*

declared that the requirements under Article 6 (of the European Human Rights Convention) have been met because any interested person could consult the full text of the judgments of the Military Court of Cassation"[28]. (Registry translation)

225. In the opinion of the Court, publicity of a judgment is assured as long as it is rendered in a premises or open area; provided the public is notified of the place and the latter can have free access to the same.

226. In the instant case, it is not indicated that the Judge's chamber in which the hearing took place was not open and accessible to the public, and there is no allegation either, that the public has not been notified and could not freely access the said chamber. The record shows, on the contrary, that the delivery of court decisions in judges' chambers is a common practice due to insufficient space, and it can therefore be assumed that the public is aware of this practice.

227. Consequently, the Court holds that the fact that the delivery of the Judgment sentencing the Applicant took place in the chamber of a Judge is not, in itself, a violation of his right to a fair trial.

## IX. THE ISSUE OF REPARATIONS

228. In his Application, the Applicant requested, among other things, that justice be restored in his favor; that his conviction and the sentence meted to him be quashed; that he be set free and that the Court order such other measures as it may deem appropriate.

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[28] *Ibidem.* 38. The Court recalls that "in the matter of *Ernst v. Belgium* (No. 33400/96, judgment of 15 July 2003), it held that the publicity requirements set forth under Article 6 (1) of the Convention had been sufficiently complied with due to the fact that the Applicants were able to procure for themselves the texts of the decision by approaching the Registry a few days after delivery of the said judgment in the Chamber of the Counsel of the Court of Cassation". It further indicated that in the instant case "*the order of the Court of Appeal and the judgment of Court of Cassation had been deposited in the Registry and that the Applicant was notified accordingly*" and that "*in view of the jurisprudence mentioned above, the Court holds that the publicity requirements set forth by Article 6 (1) of the Convention have been sufficiently complied with*" (*Ibidem, para 39).*

229. At the Public Hearing, Counsel for the Applicant prayed the Court to order the Respondent State to have the case retried by the national courts taking into account the defects found, and this, within a reasonable time to be determined by the Court; order the Respondent State to provide legal aid and free representation to the Applicant for the retrial; and order that reparation be awarded in respect of all the human rights violations established.

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230. In its submissions at the same Public Hearing, the Respondent State's representative for his part asked that "...no reparation should be granted to the Applicant with regard to this Application..."

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231. Article 27(1) of the Protocol establishing the Court provides that "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation."

232. In this regard, Rule 63 of the Rules of Court provides that "the Court shall rule on the request for reparation... by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

233. In the instant case, the Court will decide on certain forms of reparation in this judgment, and rule on other forms of reparation at a later stage of the proceedings.

234. Regarding the Applicant's prayer to be set free, as the Court stated in the matter of *Alex Thomas v. United Republic of Tanzania*, such a measure could be ordered by the Court itself only in special and compelling[29] circumstances. In the instant case, the Applicant has not indicated such special and compelling circumstances.

[29] Judgment of 20 November 2015, para 157.

235. As regards the prayer for a retrial, the Court holds that such a measure would not be fair to the Applicant in as much as he has already spent 19 years in prison, more than half of the sentence, and given that a fresh local judicial procedure could be long.[30]

236. Taking this special consideration into account, the Court instead orders the Respondent State to take all other appropriate measures within a reasonable time, to remedy the human rights violations established.

237. As for other forms of reparation, the Court will make a ruling on the prayers of the Parties, after hearing them more fully.

## X. COSTS

238. In the submissions in Response, the Respondent State prayed the Court that the costs of the procedure be charged to the Applicant.

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239. The Applicant did not make any statement on this issue.

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240. The Court notes that Rule 30 of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs."

241. The Court shall decide on the issue of costs when making a ruling on other forms of reparation.

[30] See in this regard, *Ibidem,* para. 158.

242. *For these reasons,*

THE COURT,

*Unanimously:*

i) *Dismisses* the objection to the Court's jurisdiction *ratione materiae* based on the argument that, by examining the evidence of the Applicant's guilt, it would be constituting itself as an appellate Court;

ii) *Dismisses* the objection to the Court's jurisdiction *ratione materiae* based on the argument that the Applicant did not invoke the relevant provisions of the Protocol and the Rules of Court;

iii) *Declares* that it has jurisdiction to hear the Application;

iv) *Dismisses* the objection regarding inadmissibility of the Application on the grounds that it is incompatible with the Constitutive Act of the African Union and the Charter;

v) *Dismisses* the objection regarding inadmissibility of the Application on grounds of non-exhaustion of local remedies;

vi) *Dismisses* the objection regarding inadmissibility of the Application on grounds of failure to file the Application before the Court within reasonable time;

vii) *Declares* the Application admissible;

viii) *Rules* that the Respondent State has not violated Article 7 of the Charter and/or Article 14 of the Covenant as regards the Applicant's allegations that: the police post where he was held at the time of his arrest was not provided with basic facilities; he was discriminated against in terms of free legal assistance; the charge sheet was marred with irregularities; he was sentenced without the crime weapons and the stolen items being found; and he was sentenced to a term of imprisonment not provided for by the law at the time the offence occurred;

ix) *Rules* that the Respondent State has violated Article 7 of the Charter and Article 14 of the Covenant as regards the Applicant's rights to defend himself and have the benefit of a Counsel at the time of his arrest; to obtain free legal assistance during the judicial proceedings; to be promptly given the documents in the

records to enable him defend himself; his defence based on the fact that the Prosecutor before the District Court had a conflict of interest with the victim of the armed robbery, to be considered by the Judge; not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification parade; and to have his alibi defence given serious consideration by the Respondent State's police and judicial authorities;

*By majority of seven for and two against,* Judge Elsie N. THOMPSON and Judge Rafâa BEN ACHOUR dissenting:

x) *Declares* that the Respondent State has not violated Article 7 of the Charter and/or Article 14 of the Covenant as regards the allegation that the sentence was not pronounced at a Public Hearing;

xi) Rules that the Applicant's prayer to be released from prison is refused;

*Unanimously:*

*xii)* *Orders* the Respondent State to take all appropriate measures within a reasonable time frame to remedy all the violations established, excluding a reopening of the trial, and to inform the Court of the measure so taken within six (6) months from the date of this Judgment ;

xiii) *Reserves* its ruling on the prayers for other forms of reparation and on costs;

xiv) *Orders* the Applicant to submit to the Court his brief on other forms of reparation within thirty days from the date of this Judgment; also *orders* the Respondent State to submit to the Court its response on other forms of reparation within thirty days of receipt of the Applicant's brief.

Signed:

Elsie N. THOMPSON, Vice- President

Gérard NIYUNGEKO, Judge

Fatsah OUGUERGOUZ, Judge

Duncan TAMBALA, Judge

Sylvain ORÉ, Judge

Ben KIOKO, Judge

Rafâa BEN ACHOUR, Judge

Solomy B. BOSSA, Judge

Angelo V. MATUSSE, Judge; and

Robert ENO, Registrar.

Done at Arusha, this third day of June, in the Year Two Thousand and Sixteen in English and French, the English text being authoritative

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the dissenting opinions of Judges Elsie N. THOMPSON and Rafâa BEN ACHOUR are attached to this Judgment.

**IN THE MATTER OF**

**MOHAMED ABUBAKARI**

**V.**

**UNITED REPUBLIC OF TANZANIA**

**APPLICATION 007/2013**

# PARTLY DISSENTING OPINION

## JUSTICE ELSIE N. THOMPSON, VICE PRESIDENT

1. I agree substantially with the merits of the judgment of the Court except for the order of the Court at paragraphs 236, 242 (xii) and 242 (ix) which I would approach in a different manner to 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 finds violation of Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) based largely on lack of fair hearing, and then orders the state to:

> "to take all the necessary measures, within a reasonable time, to remedy the violations established, excluding the re- opening of the trial, and to notify the Court of the measures taken within six months from the date of this Judgment".

4. On the issue regarding the Court's finding that the Respondent did not violate Article 7 of the Charter when the conviction and sentencing of the Applicant was conducted in the magistrate's Chambers, I also depart from the finding of the Court. The Charter may be silent on the issue of public delivery of judgment but the Court is empowered by Articles 60 and 61 of the Charter "to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognized by the African States as well as legal precedents and doctrine".

5. The ICCPR, which the Applicant alleges to have been violated, specifically provides, in Article 14(1) thereof, that "any judgement rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children"[1].

6. Also, in General Comment No. 13, the Human Rights Committee[2] stated that: "the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized". I wish to add that the European Court of Human Rights (ECtHR) has observed that the purpose of publicity of judgment is "to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial"[3].

7. In the instant case, the Respondent's own national laws are unambiguously clear as to the mode of delivery of judgment. Section 311(1) of the Tanzanian Criminal Procedure Act states:

> 311.-(1) The Decision of every trial of any criminal case or matter shall be delivered in an open court immediately or as soon as possible after termination of trial, but in any case not exceeding ninety days, of which notice shall be given to the parties or their advocates, if any, but where the decision is in writing at the time of pronouncement, the Judge or Magistrate may, unless objection to that that course is taken by either the prosecution or the defence, explain the substance of the decision in an open court in lieu of reading such decision in full.

8. The magistrate at the national level did not give any reason for delivering the judgment in Chambers. The Applicant alluded to this, as elaborated in paragraphs 215 and 216 of this Court's judgment. The Respondent answered this by stating that due to limitation of space, the chambers of Judges are used as courtooms, whereby the public can be present during oral pleadings and delivery of judgments. This is of no moment as the the trial itself was held in open court.

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[1] See also Article 6(1) of The Convention for the Protection of Human Rights and Fundamental Freedoms better known as the European Convention which stipulates that judgement "shall be pronounced publicly"; Article 8(5) of the American Convention on Human Rights refers only to the publicity of the proceedings as such; Articles 22(2) and 23(2) of the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, respectively, provide for the delivery "in public" of the judgment of the Trial Chamber. Finally, according to Article 74(5) of the Statute of the International Criminal Court, the "decisions or a summary thereof shall be delivered in open court"

[2] United Nations Compilation of General Comments, page 123, para 4

[3] Application 7984/77 *Pretto and Others v Italy* Judgment of 8 December 1983 para 27
Application 8273/78 *Axen v Federal Republic of Germany* Judgment of 8 December 1983 para 32

9. Having found that the Applicant's sentencing and conviction was not done in open court, the Court would have found a violation of his rights to fair trial and in the circumstance find a violation of Article 7 and Article 14(1) of the ICCPR. The majority Judgment has relied on *Lorenzetti v. Italy* where the ECtHR held that, "the requirement whereby a judgment must be rendered in public was interpreted with a measure of flexibility"[4]. The majority Judgment has found that the lack of adequate courtrooms is reason enough for flexibility. In my opinion, the totality of the prevailing conditions in the judicial process must be examined to determine whether such flexibility can be allowed. This would be appropriate where a judgment can be accessed immediately, despite it not having been rendered in open court.

10. This is not the case in the local circumstances of this matter as judgments are not immediately available to parties and the public, therefore the most appropriate means by which they would access the judgment would be when it is being rendered in open court[5]. In the instant case, since in all likelihood, as is common, the judgment would not be immediately accessible to the Applicant and it was not read in open court, a violation of Article 7 of the Charter was occasioned.

11. On the specific issue as to the Order of the Applicant's release, the Court is of the opinion and I 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 also that the fact that the conviction and sentence was not delivered in open court did not constitute a violation of Article 7 of the Charter by the Respondent. This is where I depart with the majority Judgment.

12. In spite of the fact that the Applicant does not state that particular facts exhibit exceptional circumstance, I am of the firm view that the Court found such specific and/or compelling circumstances when it noted that the resumption of the trial or retrial of the Applicant would not be "fair to the Applicant in as much as he has already spent 19 years in prison, more than half of the sentence, and given that a fresh local judicial procedure could be long".

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[4] Judgment of 10 April 2012, para 37

[5] Application No. 005/2013, *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 paras 108 and 109

13. The Court also found that the Applicant was convicted on "inconsistent testimony of a single witness in the absence of any identification parade" and that "the Applicant's alibi defence was not given serious consideration by the Respondent State's police and judicial authorities".

14. From the foregoing, I cannot find more "specific and/or compelling" circumstances than that the Applicant's conviction was based on the inconsistent testimony of a single witness in the absence of any identification parade; that the Applicant's alibi defence was not given serious consideration by the Respondent's police and judicial authorities; and that the Applicant has been in prison for 19 years out of the 30 years prison term, following a trial which the Court has declared to have been an unfair trial, in violation of the Charter.

15. The Court in this case is hesitant in making an order of releasing the Applicant and has opted to leave the issue to the discretion of the Respondent. The Court may want to note that it had previously made similar Orders in Application No. 005/2013, *Alex Thomas v United Republic of Tanzania*[6], which the Respondent State has not complied with.

16. The ECtHR in the case of *Del Río Prada v Spain* [7] after finding that the Applicant had been unjustly kept in prison and her rights violated had held "by sixteen votes to one, that the respondent State is to ensure that the applicant is released at the earliest possible date". This case related to the alleged violation of Article 7 of the European Convention on Human Rights which provides that "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

17. The applicant in that matter argued that an amendment to the criminal code and the adoption of a new approach to the remission of sentences which resulted in the extension of her release date by 9 years amounted to the retroactive application of a penalty that did not exist at the material

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[6] Application No. 005/2013, *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 page, 65, 161(ix)

[7] Judgment in Application No. 42750/09 *Case of Del Río Prada v. Spain*, 21 October 2013 at page 51, para 3 of the disposition

time she was sentenced. The Respondent State in that case maintained that the changes in the law and the new approach to remission of sentences were outside the scope of the requirement of non-retroactivity as they did not create a penalty retroactively, but were only addressing the enforcement of a penalty. The European Court found that where changes to the law or the interpretation of the law affected a sentence or remission of sentence in such a way as to seriously alter the sentence in a way that was not foreseeable at the time when it was initially imposed, to the detriment of the convicted person and his or her Convention rights, those changes, by their very nature, concerned the substance of the sentence or penalty and not the procedure or arrangements for executing it, and accordingly fell within the scope of the prohibition of retroactivity[8]. That Court therefore found a violation of Article 7 of the Convention and having done so, decided on the alleged violation of Article 5 of the Convention, which is in terms similar to Article 6 of the Charter setting out the right "not to be deprived of one's freedom except for reasons and conditions laid down by law". The applicant had argued that a finding of a violation of Article 7 of the Convention would mean that her continued imprisonment from the date when she was due to have been released from prison based on the former sentencing and remission of sentences approach, was therefore not according to a procedure prescribed by law as is required by Article 5 of the Convention. The European Court, having found that the new sentencing and remission of sentences approach fell within the scope of the principle of non-retroactivity set out in Article 7 of the Convention, found that the applicant's continued imprisonment was therefore not according to a procedure prescribed by law and therefore found a violation of Article 5 of the Convention.[9] It is on this basis that the Court ordered her release from prison.

18. In the case of *Loayza-Tamayo v. Peru*, the Inter-American Court of Human Rights ordered the release of the victim as not doing so would have resulted in a situation of double jeopardy, which is prohibited by the American Convention on Human Rights[10].

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[8] Ibid paras 108, 109 and 171

[9] Ibid para 131

[10] Inter-American Court of Human Rights *Case of Loayza-Tamayo v. Peru* Merits Judgment of 17 September 1997 Series C No. 33, Resolutory paras 5 and 84

19. My view is therefore that, there is no other remedy in the circumstances of this case other than that, the Applicant be released. The Court even in the operative paragraph fell shy of pronouncing itself on the release and sought to leave it to the discretion of the State. Going by the attitude of the Respondent in the compliance with the Court's orders in the *Alex Thomas* case, the Court would have granted the Applicant's relief and ordered that he be released, rather than leaving the issue to the discretion of the Respondent, a discretion which the Respondent may never exercise.

Done at Arusha this 3rd day of June in the year 2016 in English and French, the English text being authoritative.

Justice Elsie N. THOMPSON - Vice President

AFRICAN UNION

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

# DISSENTING OPINION
# JUDGE RAFÂA BEN ACHOUR

1. I subscribe to most of the reasoning and decisions of the Court in the Matter of Mohamed Abubakari versus the United Republic of Tanzania (Application 007/2013).

2. However, I am unable to go along with the majority of members of the Court on two issues which, in my view, are important:

- The first issue relates to the refusal of the Court to order the release of the prisoner who is currently serving 30 years prison sentence pronounced by the Moshi District Court on 21 July 1998. I had expressed similar disagreement on this point in the Matter of Alex Thomas[1].

- The second issue relates to the absence of publicity of the trial due to the fact that the Applicant's conviction was pronounced in the chamber of a judge; which in my view constitutes a serious breach of the principle of publicity of proceedings in general, and criminal proceedings in particular.

## I - Refusal of the Court to order the release of the prisoner

3. As in the Matter of Alex Thomas[2], the Applicant (Mohamed Abubakari) alleges the violation of several of his rights, upon his arrest, during his remand and indeed in the course of his trial[3].

4. In light of the said allegations, the Court rightly held that the Respondent State "violated Article 7 of the Charter and Article 14 of the Covenant as regards the

[1] Judgment of 20 November 2015
[2] *Idem*
[3] *Cf.* paragraph 5 of the Judgment

Applicant's alleged right to defend himself and have the benefit of a Counsel at the time of his arrest; to free legal assistance during the judicial proceedings; be promptly given the documents in the records to enable him defend himself; not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification parade, etc". In sum, the Court admits that Mr. Abubakari did not have a fair trial.

5. The Court ordered the Respondent State to "take all the necessary measures, within reasonable time, to remedy the violations established." However, in paragraph 234 of its judgment, the Court held that the release of the Applicant could be ordered… only in special and compelling circumstances." The Court further finds that the Applicant has not indicated such exceptional and compelling circumstances. I do not share this opinion.

6. I wish to first emphasize that I accept that the order for release can be pronounced "only in special and compelling circumstances". This is an established jurisprudence of international human rights courts. It happened, however, that an order for release was indeed ordered[4].

7. In the instant case, despite the fact that the Applicant did not invoke special facts to justify exceptional circumstances, I reiterate my firm belief that the Court has itself established the said exceptional and/or compelling circumstances when it upheld all the irregularities that marred the various stages of the case, from arrest to the stage of heavy sentence of 30 years imprisonment.

8. I do not see any "circumstance" more "exceptional and/or compelling" than the one in which the Applicant found and still finds himself, having been languishing in prison for 18 years out of the 30 years inflicted on him following a trial that the Court declared unfair and at variance with certain provisions of the Charter.

9. Unfortunately, by refusing to order the release of the Applicant, the Court did not take its reasoning to its logical conclusion. Yet, it is the only "reparatory" measure that the Court could have ordered, given the circumstances of the case. Indeed, rather than leave to the Respondent the discretion to take appropriate measures, the Court should have ordered the release of the Applicant.

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[4] *Cf.* ECHR, Grand Chamber, the case of *Del Rio Prada* v. Spain, Application No. 42750/09, Judgment of 21 October 2013. " 3. *Rules by sixteen votes against one*, that it is incumbent on the respondent State to ensure the release of the applicant as soon as possible". Available: http://hudoc.echr.coe.int/eng#{"fulltext":["Arret Del RioPrada"],"languageisocode":["FRE"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-127680"]}

## II - Applicant's conviction was pronounced in the chamber of the judge

10. The 30 years imprisonment conviction for the armed robbery charge was, as repeatedly alleged by the Applicant, pronounced not "in open court" but "in the chamber of a judge without any reason".

11. The Respondent State did not refute this allegation. It even confirmed the allegation, somehow. Indeed, in its response Brief, it invoked Article 310 of the Tanzanian Criminal Procedure Code which enshrines the principle that judgments should be pronounced in public, subject to certain exceptions (paragraph 218 of the judgment).

12. The Respondent State went so far as to provide justification for this practice by advancing the argument of "lack of space" and maintaining that "judges' chambers are used as courtroom", adding that "any person who wanted to be present was allowed to do so."

13. It goes without saying that the argument is specious and indeed misleading. Not only that the reasonable dimensions of a judge's chamber do not normally allow for the presence of a significant number of people; but, even if the chamber is sufficiently spacious and specially designed to receive the public, a public hearing in a judge's chamber is in itself intimidating both for the accused and for the public.

14. The Respondent State argues that hearings in judge's chambers are held only "when the doors are wide open" and that "the cause list of the court is posted in public and is available outside the courtroom"(paragraph 221 of the judgment).

15. By implication, the Court accepts this argument by affirming that "in the opinion of the Court, publicity of a judgment is assured as long as it is rendered in the premises or open area, provided that the public is notified of the place and the latter has free access to the same"(§ 225 of the judgment). The Court goes as far as finding for this *curiosity* an argument in the Charter which is "silent on the principle of publicity of court decisions pronounced in relation to the right to a fair trial under its Article 7". However, the Court does not fail to note that this principle is indeed enshrined in Article 14 of the International Covenant on Civil and Political Rights duly ratified by the Respondent State on 16 July 1976.

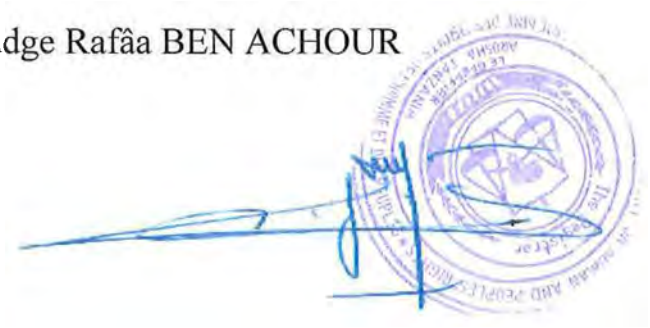
16. The Human Rights Committee, commenting on Article 14 (1) of the ICCPR states in paragraph 6 of General Comment 13 that "The publicity of hearings is an important safeguard in the interest of the individual and of society at large". It added however in Article 14, paragraph 1 that it "acknowledges that courts have the power to exclude all or

part of the public for reasons spelt out in that paragraph." It noted in conclusion that, *"apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons..."*[5].

17. It follows from the foregoing that pronouncing a criminal judgment in a judge's chambers even where its doors are open, and even if it is not strictly *in camera*, is nonetheless an unacceptable limitation to the principle of publicity set forth in Article 14 (1) of the ICCPR and is a key component of a fair trial. For this reason, I cannot go along with the Court's reasoning on this particular point.

Arusha, 3rd June, 2016

Judge Rafâa BEN ACHOUR



[5] Emphasis added