AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

THE MATTER OF

RAJABU YUSUPH

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 036/2017

RULING

24 MARCH 2022

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The Court composed of: Blaise TCHIKAYA, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA and Modibo SACKO - Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court [1] (hereinafter referred to as "the Rules"), Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

Rajabu YUSUPH
Self-represented

Versus

UNITED REPUBLIC OF TANZANIA
Represented by:

i. Mr Gabriel P. MALATA, Solicitor General, Office of the Solicitor General;
ii. Ms Sarah MWAIPOPO, Director, Division of Constitutional Affairs and Human Rights, Principal State Attorney, Attorney General's Chambers;
iii. Ambassador Baraka LUVANDA, Director Legal Affairs, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation;
iv. Ms Nkasori SARAKIKYA, Assistant Director, Division of Constitutional Affairs and Human Rights, Principal State Attorney, Attorney General's Chambers;
v. Mr Richard KILANGA, Senior State Attorney, Attorney General's Chambers;
vi. Mr Elisha SUKU, Foreign Service Officer, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation; and

[1] Rule 8(2) of the Rules of Court, 2 June 2010.

vii. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation.

after deliberation,

renders the following Ruling:

I. THE PARTIES

1. Rajabu Yusuph (hereinafter referred to as "the Applicant") is a national of Tanzania who, at the time of filing the Application was at Uyui Central Prison, Tabora Region, serving a sentence of life imprisonment having been convicted of the offence of rape of a six (6) year old minor. He challenges the circumstances of his trial.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.[2]

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

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record before the Court, that the Applicant was arrested and charged before the District Court of Tabora, in Criminal Case No. 112/2005, with the offence of rape of a six (6) year old minor. The Applicant was convicted and sentenced to serve life imprisonment on 1 November 2005.

4. The Applicant filed an appeal before the High Court sitting at Tabora, being Criminal Appeal No. 31/2006, and on 27 June 2007 this appeal was dismissed.

5. The Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Tabora, being Criminal Appeal No. 457/2005. In its judgment of 28 October 2009, the Court of Appeal dismissed this appeal in its entirety and the Applicant was ordered to pay compensation to the victim amounting to one hundred thousand shillings (TZS 100,000).

B. Alleged violations

6. The Applicant alleges that the Respondent State violated his rights, notably:

   i. The right to equality before the law and equal protection of the law, protected by Article 3(1) and (2) of the Charter;
   ii. The right to have his cause heard, protected under Article 7(1) of the Charter;
   iii. The right to legal representation, protected by Article 10(2) of the Protocol of the African Charter and Section 2 of the Child and Young Offenders Act Cap 13 R.E. [2002].

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was filed on 8 November 2017 and was served on the Respondent State on 23 February 2018.

8. The parties filed their pleadings on merits and reparations within the time stipulated by the Court.

9. Pleadings were closed on 23 July 2019 and the parties were duly notified.

IV. PRAYERS OF THE PARTIES

10. The Applicant prays the Court to restore justice where it was overlooked, quash both the conviction and the sentence of life imprisonment imposed upon him and order his release from prison. He further prays the Court to grant any other orders that may be appropriate in these circumstances.

11. In its Response, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to order the following measures:

    i. That, the Honorable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate on this Application;
    ii. That, the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;
    iii. That, the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;
    iv. That, the Application be declared inadmissible;
    v. That, the Application be dismissed.

12. With regard to the merits of the Application, the Respondent State prays the Court to order the following measures:

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

ii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided by Article 3(1)(2) of the African Charter on Human and Peoples' Rights;

iii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 7(1) of the African Charter on Human and Peoples' Rights;

iv. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided by Article 7(1)(c) of the African Charter on Human and Peoples' Rights;

v. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided by Article 107A(2)(b) of the Constitution of United Republic of Tanzania, 1977;

vi. That, the Application be dismissed in its entirety for lack of merit;

vii. That, the Applicant's prayers be denied;

viii. That, the Applicant be ordered to pay the costs of this Application.

V. JURISDICTION

13. The Court observes that Article 3 of the Protocol provides as follows:

> 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
>
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

14. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[3]

15. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

16. In the present Application, the Court notes that the Respondent State has raised two types of objections to its jurisdiction. Firstly, it argues that the Court does not have material jurisdiction and, secondly, that the Court lacks temporal jurisdiction.

A. Objections to material jurisdiction

17. The Respondent State raises three objections in respect of the Court's material jurisdiction.

18. Firstly, the Respondent State asserts that the Court has no jurisdiction to grant the relief of releasing the Applicant. Noting Article 27(1) of the Protocol and in reference to the Court's Jurisprudence in *Alex Thomas v Tanzania*, the Respondent State submits that the prayer sought by the Applicant to be released from custody is beyond the mandate of the Court since the Applicant has not provided specific or compelling circumstances to warrant the Court to grant an order for his release.

19. Secondly, the Respondent State asserts that this Application calls for the Court to sit as a Court of first instance and adjudicate on matters that have never been raised within the national justice system.

20. Thirdly, the Respondent State argues that the Court is not vested with jurisdiction to adjudicate on this matter because the present Application calls for the Court to sit as an appellate court and adjudicate on matters of

[3] Rule 39(1), Rules of Court, 2 June 2010.

law and evidence already finalised by the Respondent State's highest court, the Court of Appeal of Tanzania.

21. Citing the Court's jurisprudence in *Ernest Francis Mtingwi v Malawi* [4], the Respondent State claims that the Court does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic or regional courts.

22. For the preceding reasons, the Respondent State prays that the Application should be dismissed.

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23. In his Reply, the Applicant states that the Court has jurisdiction to adjudicate over this Application because the rights that he alleges to have been violated are protected by the African Charter and the Protocol thereto.

24. Citing the Court's jurisprudence in *Peter Joseph Chacha,* [5] the Applicant submits that as long as the rights allegedly violated are protected by the Charter or any other human rights instrument, the Court will have jurisdiction over the matter.

25. The Applicant avers that the rights violated by the Respondent State concern the rights protected under Articles 2, 3(1)(2) and 7(2) of the Charter [sic]. For these reasons, the Applicant submits that the Court has material jurisdiction to adjudicate on this matter.

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26. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which

[4] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190.
[5] *Peter Joseph Chacha v. United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398.

a violation is alleged, are protected by the Charter or any other human rights instrument ratified by the Respondent State.[6]

27. The Court notes that the Respondent State's objection is three–pronged. Firstly, concerning the claim that the Court does not have jurisdiction to grant an order for release, the Court notes Article 27(1) of the Protocol which provides that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation." Therefore, the Court has jurisdiction to grant different types of reparations, including the release from prison. For this reason, the Court dismisses the objection raised by the Respondent State in this regard.

28. Secondly, in relation to the allegation that the Court is being invited to sit as a court of first instance, the Court reaffirms that its jurisdiction, under Article 3 of the Protocol, extends to any application submitted to it, provided that an applicant invokes a violation of rights protected by the Charter or any other human rights instrument ratified by the Respondent State.[7] In the instant case and in view of the allegations made by the Applicant, which all involve rights protected under the Charter, the Court finds that the said allegations are within the purview of its material jurisdiction. [8] The Court, therefore, dismisses this objection raised by the Respondent State.

29. Thirdly, as regards the contention that the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's domestic courts, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to

[6] *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 18.
[7] *Bernard Balele v. United Republic of Tanzania*, ACtHPR, Application No. 026/2016, Judgment of 30 September 2021, § 37.
[8] *Alex Thomas v. Tanzania* (merits) § 130. See also, *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 29; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 28; and *Ingabire Victoire Umuhoza v. Republic of Rwanda* (merits) (24 November 2017) 2 AfCLR 165 § 54.

claims already examined by national courts. [9] At the same time, however, and even though the Court is not an appellate court *vis-à-vis* domestic courts, it retains the power to assess the propriety of domestic proceedings against standards set out in international human rights instruments ratified by the State concerned.[10] In conducting the aforementioned task, the Court does not thereby become an appellate court. The Court, therefore, dismisses the Respondent State's objection and holds that it has material jurisdiction.

B. Objection to temporal jurisdiction

30. The Respondent State also contests the temporal jurisdiction of the Court, because in its view the alleged violations raised by the Applicant are not ongoing. The Respondent State states that the Applicant is serving a lawful sentence for the commission of an offence as provided by statute.

31. The Applicant did not make any submissions on this point.

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32. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicant arose after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the Court observes that the Applicant remains convicted on the basis of what he considers an unfair process. Therefore, it holds that the alleged violations can be considered to be continuing in nature. [11] For these reasons, the Court finds that it has temporal jurisdiction to examine this Application.

[9] *Ernest Francis Mtingwi v Malawi* (jurisdiction) §§ 14-16.
[10] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Werema Wangoko Werema and Another v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520 § 29 and *Alex Thomas v. United Republic of Tanzania* (Merits) (20 November 2015) 1 AfCLR 465, § 130.
[11] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71 – 77.

C. Other aspects of jurisdiction

33. The Court observes that no objection has been raised with respect to its personal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

34. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further recalls that it has held that the withdrawal of a Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect. [12] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[13] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.

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

36. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that it has territorial jurisdiction.

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

[12] *Andrew Ambrose Cheusi v United Republic of Tanzania,* §§ 35-39.
[13] *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

VI. ADMISSIBILITY

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

39. In line with Rule 50(1) of the Rules,[14] "the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

40. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all of the following conditions:
>
> a) Indicate their authors even if the latter request anonymity;
> b) Are compatible with the Constitutive Act of the African Union and with the Charter;
> c) Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
> d) Are not based exclusively on news disseminated through the mass media;
> e) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f) Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> g) Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

[14] Rule 40 of the Rules of Court, 2 June 2010.

A. Objections to the admissibility of the Application

41. The Respondent State has raised two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies and the second relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of local remedies

42. The Respondent State argues that the Applicant is raising before this Court two allegations which he never raised before Court of Appeal of Tanzania.

43. The Respond State submits that the Applicant "did not raise the allegation that he was convicted and sentenced in a charge which did not refer to a section of the enactment creating the offence charged." The Respondent State claims that the legal remedy of raising this ground of appeal before the Court of Appeal was available to the Applicant but that he did not pursue it.

44. The Respondent State further claims that the Applicant "did not raise the allegation before the Court of Appeal that he was not afforded legal representation thus violating his right to be heard and to be treated equal before the law".

45. The Respondent asserts that since the Applicant is claiming he was denied the right to a fair hearing, he could have filed for an Application to review the Court of Appeal's decision under Rule 66(1)(b) of the Court of Appeal Rules, 2009. This Rule provides for a review on the basis of a party being "wrongly deprived of an opportunity to be heard", which the Respondent State considers to be a component of the right to a fair hearing.

46. The Respondent State submits that since the Applicant did not pursue these remedies that were available to him and that there was no delay in

accessing them, this Application has not met the admissibility requirement under Rule 40(5) of the Rules[15] and should therefore be dismissed.

47. In his Reply, the Applicant objects to the submissions by the Respondent State. He asserts that he has gone through all remedies available in the Respondent State's judicial system. He submits that the Respondent State's Court of Appeal, being the highest court of the land, dismissed his appeal in its entirety on 28 October 2009, thereby bringing to finality the local judicial remedies available to the Applicant.

48. Regarding the Respondent State's contention that he should have pursued an application for review of the Court of Appeal's decision, the Applicant argues that the Court had already held in *Alex Thomas* that an application for review "was neither necessary nor mandatory. The final appeal in criminal trials lies, as of right, to the Court of Appeal, which the Applicant has proved that he accessed."[16]

49. The Applicant, therefore, claims that he fully exhausted all available local remedies.

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50. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2) (e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.[17]

51. The Court recalls its position where it held that, in so far as the criminal proceedings against an applicant have been determined by the highest

[15] Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.
[16] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 63.
[17] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

appellate court, the Respondent State will be deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[18]

52. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 28 October 2009. Therefore, the Respondent State had the opportunity to address the violations alleged by the Applicant arising from the Applicant's trial and appeals.

53. Regarding the Respondent State's contention that the Applicant ought to have filed an application for review of the Court of Appeal's judgment, the Court has previously held that such an application for review is an extraordinary remedy which applicants are not required to exhaust. [19] The Court, therefore, finds that the Applicant is deemed to have exhausted local remedies since the Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had upheld his conviction and sentence, following proceedings which allegedly violated his rights.

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

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

55. The Respondent State claims that since the Application was not filed within a reasonable time after the local remedies were exhausted, the Court should find that the Application has failed to comply with the provisions of Rule 40(6) of the Rules.[20]

[18] *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.
[19] *Mohamed Abubakari v. Tanzania*, (merits) § 78.
[20] Corresponding to Rule 50(2)(f) of the Rules of 25 September 2020.

56. The Respondent State recalls that the judgment of the Court of Appeal was delivered on 28 October 2009, that the instrument to accept the competence of the Court under Article 5(3) of the Protocol was deposited on 29 March 2010 and that this Application was filed on 8 November 2017. The Respondent State notes that a period of seven (7) years and eight (8) months elapsed from when the Respondent State accepted the jurisdiction of the Court to when the Applicant filed his Application at the Court.

57. In his Reply, the Applicant, relying on the Court's jurisprudence in *Mtikila*,[21] submits that there is no fixed period of time within which to seize the Court and that each case would be decided on its own facts and circumstance. The Applicant avers that this Court, its Protocol, its Rules and its Practice Direction, were all unknown at Uyui Prison, before May 2017, where he was serving his custodial sentence at the time of filing the Application.

58. The Applicant further submits that the first Application to be lodged at the Registry of this Court from Uyui Prison, Tabora was on 13 June 2017 and was registered as Application No. 017/2017 *Abdallah Sospeter Mabomba and others v United Republic of Tanzania.* The Applicant claims that proof of this fact can be found at the Registry of the Court that no Application from Uyui Prison in Tabora has been filed before this Court earlier than 13 June 2017.

59. In view of the reason stated above, the Applicant submits that he filed his Application within a reasonable time after exhaustion of local remedies.

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60. Pursuant to Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, in order for an application to be admissible, it must be "submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

[21] *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (14 June 2013) 1 AfCLR 34.

61. In the present case, the Court notes that the Court of Appeal dismissed the Applicant's appeal on 28 October 2009 and the Applicant filed the Application on 8 November 2017. As the judgment of the Court of Appeal was on 28 October 2009, prior to the deposit of the Declaration provided under Article 34(6) of the Protocol, on 29 March 2010, the Applicant was able to file an application only after the latter date. Therefore, the assessment of reasonable time will be from 29 March 2010.

62. In this regard, the Court observes that between the date of deposit of the Declaration on 29 March 2010 and when the Application was filed on 8 November 2017, a period of seven (7) years, seven (7) months and ten (10) days elapsed.

63. The Court further notes that Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, does not set a time limit within which it must be seized. However, the Court has held that "the reasonableness of the time limit for referral depends on the particular circumstances of each case and must be determined on a case-by-case basis".[22]

64. In this regard, the Court has considered as relevant factors, the fact that an applicant is incarcerated;[23] their indigence, the time taken to utilise the procedures of the application for review at the Court of Appeal, or the time taken to access the documents on file, [24] the recent establishment of the Court, the need for time to reflect on the advisability of seizing the Court and determine the complaints to be submitted.[25]

65. Importantly, the Court has confirmed that it is not enough for applicants to simply plead that they were incarcerated, are lay or indigent, for example,

[22] *Beneficiaries of late Norbert Zongo and Others v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92; *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 56; *Alex Thomas v. Tanzania* (merits), § 73.
[23] *Diocles William v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52; *Alex Thomas v. Tanzania* (merits), § 74.
[24] *Nguza Viking and Johnson Nguza v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 61.
[25] *Beneficiaries of late Norbert Zongo and Others v. Burkina Faso* (preliminary objections), § 122.

to justify their failure to file an Application within a reasonable period of time.[26]

66. As the Court has previously pointed out, even for lay, incarcerated or indigent litigants there is a duty to demonstrate how their personal situation prevented them from filing their Applications in a more timely manner. It was because of the foregoing that the Court concluded that an Application filed after five (5) years and eleven (11) months was not filed within a reasonable time.[27] The Court reached the same conclusion in respect of an Application filed after five (5) years and four (4) months. [28] In yet another case, the Court found that the period of five (5) years and six (6) months was also not a reasonable period of time within the meaning of Article 56(5) of the Charter.[29]

67. The Court further notes the Applicant's claim that until May 2017, this Court, its Protocol, its Rules and its Practice Direction, were all unknown at Uyui Prison, where he was serving his custodial sentence prior to the filing of the Application.

68. From the Court's docket it emerges that this Application originating from Uyui Prison in Tabora, was filed four (4) months and twenty-six (26) days after the first Application from that prison, Application No. 017/2017 *Abdallah Sospeter Mabomba and others v. United Republic of Tanzania.*

69. The Court finds, however, that this argument is insufficient to persuade the Court that the Applicant diligently pursued his case and that he was not in a position to know about the Court prior to the filing of Application No. 017/2017 *Abdallah Sospeter Mabomba and others v. United Republic of Tanzania*.

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[26] *Layford Makene v. United Republic of Tanzania*¸ ACtHPR, Application No. 028/2017 Ruling of 2 December 2021 (admissibility), § 48.
[27] *Hamad Mohamed Lyambaka v. United Republic of Tanzania*, ACtHPR, Application No. 010/2016. Ruling of 25 September 2020 (admissibility) § 50.
[28] *Godfred Anthony and another v. United Republic of Tanzania*, ACtHPR, Application No. 015/2015. Ruling of 26 September 2019 (admissibility) § 48.
[29] *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application No. 020/2015. Ruling of 28 November 2019, (admissibility) § 55.

70. It is clear from the record before the Court that the Applicant had been incarcerated since 2005, when he was a seventeen (17) years old minor. However, when the Applicant submitted his Application before this Court in 2017, he was twenty-nine (29) years old. The Court therefore doesn't consider this element to be a determining factor that would justify such a long time to submit his Application before this Court.

71. Furthermore, the Court holds that, in consideration of the principle of legal certainty, it is also constrained in its interpretation of reasonable time. The Court can therefore not continue to extend what can be considered as reasonable time without decisive elements that are sufficiently proven.

72. In the instant case, and although the Applicant was, at the material time, incarcerated, he hasn't provided the Court with compelling arguments and sufficient evidence to demonstrate that his personal situation prevented him from filing the Application in a more timely manner.

73. In view of the foregoing, the Court finds that the filing of the Application seven (7) years, seven (7) months and ten (10) days after exhaustion of local remedies is not a reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules. The Court therefore upholds the Respondent State's objection in this regard.

B. Other conditions of admissibility

74. Having found that the Application has not satisfied the requirement in Rule 50(2)(f) of the Rules, the Court need not rule on the Application's compliance with the admissibility requirements set out in Article 56(1), (2), (3), (4), and (7) of the Charter as restated in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules, as these conditions are cumulative.[30]

[30] *Jean Claude Roger Gombert v. Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 61; *Dexter Eddie Johnson v. Republic of Ghana*, ACtHPR, Application No. 016/2017, Ruling of 28 March 2019 (jurisdiction and admissibility), § 57.

75. In view of the foregoing, the Court declares the Application inadmissible.

VII. COSTS

76. The Applicant did not make any submissions on costs.

77. The Respondent State prayed that costs be borne by the Applicant.

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78. Pursuant to Rule 32 of the Rules of Court "unless otherwise decided by the Court, each party shall bear its own costs".[31]

79. The Court finds that there is nothing in the instant case warranting it to depart from this provision.

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

VIII. OPERATIVE PART

81. For these reasons:

THE COURT,

Unanimously,

On jurisdiction

i. *Dismisses* the objections to material jurisdiction;
ii. *Dismisses* the objection to temporal jurisdiction;
iii. *Declares* that it has jurisdiction.

[31] Rule 30(2) of the Rules of Court, 2 June 2010.

On admissibility

iv. Dismisses the objection based on non- exhaustion of local remedies;

By a majority of Nine (9) for, and One (1) against (Justice Chafika BENSAOULA)

v. *Finds* that the Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules;

vi. *Declares* that the Application is inadmissible.

On costs

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

Signed:

Blaise TCHIKAYA, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

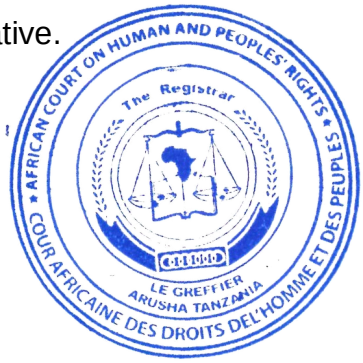
Dumisa B. Ntsebeza, Judge;

Modibo SACKO, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 70 of the Rules, the Declaration of Justice Chafika BENSAOULA is appended to this Judgment.

Done at Arusha, this Twenty-Fourth Day of March, in the Year Two Thousand and Twenty-Two in English and French, the English text being authoritative.



African Court of Human and Peoples' Rights

Case of Rajabu Yusuph vs United Republic of Tanzania.

Application No. 036/2017

Judgment of March 25, 2022

STATEMENT

1. I do not share the conclusions reached by the Court in its judgment referred to above and the provided grounds as to the inadmissibility of the application on the basis of its filing within an unreasonable time.

2. I wished to write this statement because I am convinced that the Court had to declare the application admissible on the basis of the same elements on which it relied to declare it inadmissible.

3. **In fact**, in its judgment in the case of "rightful claimants of the late Norbertzongo and others" v. Burkina Faso rendered on 21/06/2013 ruling on the preliminary objections and with regard to the reasonable time for its referral, the Court expressly declared that "the reasonableness of the time limit for its referral depends on the particular circumstances of each case and must be assessed on a case-by-case basis".

4. In its judgment on the merits of 24/06/2014 the Court also considered and with regard to prior local remedies that "the assessment of the normal or abnormal nature of the procedure duration relating to local remedies must be carried out at "case by case" according to the specific circumstances of each case".

5. **This principle of "case by case"** with regard to the reasonable time, the Court has applied it in many cases and to name but a few:

- The Sadik Marwakisase v. United Republic of Tanzania judgment of December 2, 2021 when the Court declared the exception raised by the defendant state, as to the reasonable delay, dismissed for the simple reason that the applicant was detained, had no representative before national courts or before this Court (paragraphs 51 and 52) and therefore considered the period of 16 months reasonable.

- The Christopher Jonas judgment against the United Republic of Tanzania of 28/09/2017 and Amiri Ramadhani against the same State, where the Court considered that the applicants being imprisoned, restricted in their movements, laymen in law, indigent, having no access to information, nor benefiting from the assistance of a lawyer during the trial, illiterate and not having knowledge of the existence of the Court made the delay of 5 years and one month reasonable.

- And finally in its judgment 013/2016, Stephen John Rutakikirwa v. United Republic of Tanzania of 24/03/2022 rendered on the same day when the Court reiterated this principle in its paragraph 45 and in its paragraph 48 when it declared the application filed within a reasonable period of 4 years and 4 months because the applicant is imprisoned and restricted in his movements with limited access to information and has not benefited from legal aid!

6. **In the judgment which is the subject of the statement**, the facts show that the Court reiterated in its paragraphs 70 the fact that the applicant, imprisoned since 2005, was a minor then aged 17 and that he was convicted to life imprisonment on November 1 st of the same year ! and then see his conviction confirmed by the High court in 2007 then in 2009 by the Court of appeal! …

7. It is obvious from the same facts, taken up by the Court in its grounds, that the applicant, although a minor, did not benefit from legal aid before the national courts and I would add before this Court as well!

8. In my opinion, the case-by-case principle in the present case was absolutely to be applied because the essential element which holds the attention is the age of the applicant at the time of the facts of his arrest and his conviction first and then the fact that he did not benefit from legal aid for such serious acts and such a heavy punishment!

9. Moreover, it appears from the rolls of the Court, that the first case enrolled before it, on June 13, 2017 by a prisoner of the same penitentiary establishment where the applicant is imprisoned and this since the creation of the Court, was 4 months and 26 days before that filed by the applicant.

10. What seems to me to be irrefutable proof that the applicant was not really aware of the existence of the Court, especially since respondent state made its statement on 29/03/2010, i.e. 7 months after the decision rendered by the Court of Appeal on 28/10/2009 and that therefore it would have taken time for the applicant to be aware of the existence of the Court and the terms of its referral!

11. And that it also remains undeniable that, for a minor prisoner who, until the decision of the national courts was pronounced, was defenseless, a period of 7 years could not and in no case be considered unreasonable because the primordial and crucial element on which the Court had to apply the principle of the case by case was this new element concerning the age of the applicant!

12. As for the grounds of the Court in paragraphs 70 and 71 of the judgment, that at the time of the filing of the application the applicant was 29 years old! It has been set aside the fact that this applicant reached that age in prison in the life sentence cell and all that time without a lawyer!

13. Which makes me say that expecting this applicant to provide evidence that the elements on which the Court relied in its previous judgments in application of the “case by case” principle are met, remains unthinkable! “Demonstrating that his personal situation prevented him from submitting the application in a timelier manner” as stated in paragraph 72 of the judgment suggests that the applicant

has been free to move and not depending on prison rules since the age of 17 and that he is assisted by a lawyer for the trial purpose!

14. With this very significant detail, because of case law reversal is that in the cited above Marwa case against the same defendant (paragraph 52) the Court indeed stated that "…. The applicant was imprisoned, did not benefit from legal assistance during the proceedings before the domestic courts and is defending himself before the present Court. **More specifically, the facts of the case occurred between 2007 and 2013, that is to say during the first years of the Court's activities at a time when the general public and a fortiori people in the situation of the applicant in the present case could not necessarily be expected to have sufficient knowledge of the requirements governing the proceedings before this Court, finally the Respondent State filed its statement in 2010. In these circumstances, the Court considers that the time which elapsed before the applicant lodged his application must be considered reasonable".**

15. Applied, this conclusion in the Marwa judgment, to the judgment object of the statement would have been fair and logical and would have led to the admissibility of the application because responding to the same facts and elements with this essential detail the age of the applicant at the time of the facts of his indictment and incarceration!

16. **I will therefore conclude** that for a minor imprisoned at the age of 17, reaching 29 years in prison is not and cannot be a sound ground to declare the application filed within an unreasonable time, especially if in the judgment the years of existence of the Court have been highlighted , so in the present issue the Court had to consider in the same way because the key element remains the minority of the applicant and the non-assistance of a lawyer first and then that it is the same respondent State that is involved and therefore the same date of the statement and a fortiori the same period announced by the Court to prove his knowledge or not of the existence of the Court! paragraph 69)

17. **As regards legal certainty** referred to in paragraph 71, I do not think that applying it at the expense of human rights is in itself a certainty! In the present case, it is not about acquired rights nor about stability of situations that have generated rights but of a minor judged in the non respect of the elementary rules concerning the juvenile delinquency!

18. **I will conclude** by saying that the Court in its grounds completely set aside the element of the lack of legal assistance both before the national courts and this Court, which seems to me to be a lack of grounds because a minor detained at the age of 17 convicted to life imprisonment without the assistance of a lawyer, can only be an element in his favor to explain the relatively long delay in filing the application.

Judge Bensaoula Chafika

Judge at Court