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

024/2015
07/12/2018
(000346 – 000314) RM

THE MATTER OF

WEREMA WANGOKO WEREMA AND WAISIRI WANGOKO WEREMA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 024/2015

JUDGMENT

7 DECEMBER 2018

The Registrar
ARUSHA
TANZANIA

TABLE OF CONTENTS

The Court composed of: Sylvain ORÉ, President; Ben KIOKO, Vice President; Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Blaise TCHIKAYA, Judges; and Robert ENO, Registrar.

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

In the matter of

Werema Wangoko WEREMA and Waisiri Wangoko WEREMA

Self-represented

versus

UNITED REPUBLIC OF TANZANIA

represented by:

i. Ms. Sarah MWAIPOPO - Acting Deputy Attorney General and Director of Constitutional Affairs and Human Rights, Attorney General's Chambers

ii. Mr. Baraka LUVANDA - Ambassador, Head of Legal Unit, Ministry of Foreign Affairs and International Cooperation

iii. Ms. Nkasori SARAKIKYA - Assistant Director of Human Rights, Principal State Attorney, Attorney General's Chambers

iv. Mr. Elisha E. SUKA - Foreign Service Officer, Legal Affairs Unit, Ministry of Foreign Affairs and International Cooperation

v. Mr. Mark MULWAMBO - Principal State Attorney, Attorney General's Chambers

after deliberation,

renders the following Judgment,

I. THE PARTIES

1. The Applicants, Werema Wangoko Werema and Waisiri Wangoko Werema are nationals of the United Republic of Tanzania (hereinafter, the Respondent State). The Applicants were sentenced to thirty (30) years' imprisonment each for the crime of armed robbery.

2. The Respondent State 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 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") on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State deposited the declaration required under Article 34 (6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. SUBJECT OF THE APPLICATION

A. Facts of the Matter

3. The Application relates to alleged human rights violations stemming from convictions and sentences of thirty (30) years' imprisonment and twelve (12) strokes of the cane each imposed on the Applicants for the crime of armed robbery. The Applicants are currently serving their sentence in Butimba Central Prison, Mwanza, Tanzania.

4. It emerges from the file that on 25 February 2001 at midnight, a gang of burglars broke into the house of Mr. Maiko Matiko Nyisurya and stormed into his room where he was sleeping with his wife, Mrs. Sara Maiko, and their children. It is alleged that the burglars were armed with 'pangas' (machetes) and a gun and when Mr. Maiko confronted them, having lit a torchlight, they inflicted eleven panga cuts on his body causing him serious bodily harm. The burglars also stole two (2) suitcases of clothes and cash of Seventy Thousand Tanzania Shillings (75,000 TZS).

5. On the basis of a testimony proffered by six (6) Prosecution Witnesses (PW), including Mr. Maiko (PW1) and his wife (PW5), the Applicants were, on 30 November 2001, in Criminal Case No. 169/2001 convicted of armed robbery contrary to Sections 285 and 286 of the Penal Code of Tanzania by the District Court of Tarime and sentenced to thirty (30) years' imprisonment and twelve (12) strokes of the cane.

6. The High Court in Criminal Appeal No. 02/2002 and the Court of Appeal in Criminal Appeal No. 67/2003 subsequently upheld the decision of the District Court on 9 October 2002 and 1 March 2006, respectively.

7. Aggrieved by the verdict, the Applicants filed a request for the review of the decision of the Court of Appeal on the ground that the judgment contained "manifest errors" and that this resulted in a miscarriage of justice. On 19 March 2015, the Court of Appeal declared their request inadmissible asserting that the application for review was not filed within the time prescribed by law.

B. Alleged Violations

8. The Applicants submit that both their conviction and the refusal of the Court of Appeal to review the convictions on the basis that their application for review was filed out of time contravene the provisions of the Charter and the 1977 Tanzanian Constitution. In this regard, the Applicants allege that they were convicted based on a mistaken identity and solely on the basis of incriminating evidence of visual identification which is "perjured, concocted and privy". According to the Applicants:

   i) The primary victim (PW 1) of the alleged crime contradicted himself while testifying and that the victim saw other burglars rather than them. He named them only on 4 March 2001 even though he claimed to have identified them on the day of the incident, that is, 25 February 2001. In addition, though he denied having made his first statement on 26 February 2001, which was tendered in the trial court, his co-witness (PW 3) confirmed that the complainant (PW 1) made two statements, the first on the day of the incident without naming the suspects and the second at a later date mentioning names of suspects.

   ii) With regard to the second witness (PW 2), although he claimed to have been present at the scene of the crime, "the trial court had recorded his demeanor while testifying that at the same time he was laughing and joking as [if he] was not serious of what he [was] talking [about]", thus, proving that the witness was lying.

iii) The third prosecution witness (PW 3), who was a crime investigation officer "confirmed that PW 1 made two statements, the first one on the day of the incident without naming any suspects [and the other day, mentioning the names of the Applicants]" despite the fact that PW 1 denied making two statements on different days.

iv) The fourth Prosecution Witness (PW 4) was not at the scene of the incident and named them to the police as was informed by the victim (PW 1) and only a month after the incident.

v) The statements of the fifth Prosecution Witness (PW 5), the wife of PW I, were contradictory. Even if she claimed to have identified them during the incident, it was not possible for her to identify them if, as she confirmed, she hid herself far outside of the house. She also forgot the date when she reported to the police and that her statement indicating that on the day of the incident her husband did not report to the police conflicts with the testimony given by PW 3.

vi) The sixth Prosecution Witness (PW 6), who was a cell leader working under PW 1 claimed that he saw the Applicants at the scene of the crime but he did not justify why he did not raise the alarm during the incident nor did he make a follow up to effect their arrest.

vii) The intimate relationship that existed among the Prosecution Witnesses: PW I, PW 2, PW 4 and PW 6, and in view of their contradictory statements, the accusation made against the Applicants was rather a fabrication by PW

9. The Applicants further state that their conviction on the basis of a mistaken identity was substantiated by the "unfolding truth" that emerged from the investigation of the Tanzanian Commission for Human Rights and Good Governance (CHRGG). The Applicants allege that the observations made by the Commission following

such investigation reveal that the victim was later paid compensation by the true burglars under the aegis of the local authority. This, according to the Applicants, was not included in the record of the court proceedings as the said investigation was carried out after all domestic court proceedings were concluded. The Applicants also add that the witnesses admitted to the Applicants' relatives that they made an error in identifying the true culprits of the crime and even offered an apology to the Applicants' relatives.

10. The Applicants accordingly submit that, given the circumstances of their case, the Court of Appeal should have allowed their petition for review by complying with Article 107 (A) (2) (c) and (e) of the Constitution of the Respondent State. They contend that the Court`s refusal to allow their request for review violated the Constitution and their conviction on the basis of a mistaken identity and without the Prosecution having proven the charges laid against them beyond reasonable doubt violated Article 3 (1) and (2) and Article 2 of the Charter.

11. The Applicants further allege that they "were isolated on the procedure and the decision of the [domestic] courts, thus violating their fundamental rights which need to be served pursuant to Article 27 (1) of the Protocol and Rule 34 (5) of the Rules of the Court in order to rectify the violation".

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

12. The Application was filed on 2 October 2015 and was served on the Respondent State on 4 December 2015 in accordance with Rule 35 and Rule 37 of the Rules.

13. On the same date, pursuant to Rules 35 and 53 of the Rules, the Registry also transmitted the Application to all State Parties to the Protocol, the African Union Commission and the Executive Council of the African Union, through the Chairperson of the African Union Commission.

14. On 11 February 2016, the Respondent State requested the Court for an extension of time to file its Response on the basis that it is still collecting information from stakeholders involved in the matter.

15. During its Fortieth Ordinary Session held from 29 February to 18 March 2016, the Court granted a thirty (30) days extension of time to the Respondent State to file its Response from the date of receipt of the notice dated 21 March 2018. The Court also instructed the Registry to request CHRGG for any observations on the Applicants' claims.

16. On 10 May 2016, CHRGG responded by indicating that it does not have any comments to submit on the matter. It stated that as *per* the law, it cannot investigate any matter that has been adjudicated by a court or is *sub-judice*. The Commission also indicated that it only carried out a preliminary rather than a full investigation into the matter.

17. The Registry notified the Respondent State on 7 June 2016 that the Court, *suo motu,* granted sixty (60) additional days for filing of the Response.

18. On 28 November, 2016, citing that the Respondent State has failed to defend its case, the Applicants applied for the Court to issue a judgment in default in their favour.

19. On 20 March 2017, the Court *proprio motu* granted forty five (45) days extension of time to the Respondent State to file the Response and indicating that it would proceed to issue a judgment in default should the Response not be filed.

20. The Respondent State filed its Response on 25 May 2017, which was served on the Applicants on 29 May 2017 requesting them to file their Reply within 30 days of receipt.

21. The Applicants filed their Reply to the Response on 21 June 2017 and this was transmitted to the Respondent State for its information by a notice of the same date.

22. On 6 October 2017, the Registry notified the Parties of the closure of pleadings.

IV. PRAYERS OF THE PARTIES

23. The Applicants pray to the Court:

"

i. To quash both the conviction and the sentence and to set them at liberty;
ii. To redress the violation of their fundamental rights in accordance with article 27 (1) of the Protocol and Rule 34 (1) of the Court; and
iii. To restore justice where it was overlooked and to grant any other remedy that deems fit in the circumstances of the complaint."

24. In its Response, the Respondent State prays the Court to grant the following orders:

"i. That, the Court is not vested with jurisdiction to adjudicate on this Application;
ii. That, the Application has not met the admissibility requirements stipulated under Rule 50 (5) of the Rules of the Court and it is therefore inadmissible and be duly dismissed;
iii. That, the Application is dismissed with costs."

V. JURISDICTION

25. In accordance with Rule 39 (1) of the Rules, the Court "shall conduct a preliminary examination of its jurisdiction ..."

26. In the instant Application, the Court notes from the Respondent State's submission that the Respondent State disputes only the Court's material jurisdiction. However, the Court shall also satisfy itself that it has personal, temporal and territorial jurisdiction.

A. Objection to material jurisdiction

27. The Respondent State disputes the jurisdiction of the Court by submitting that the instant Application contains legal and factual issues which were conclusively determined by its domestic courts. According to the Respondent State, the Protocol does not vest the Court with the power to adjudicate on issues involving matters of law and evidence by placing itself as an appellate court; however, in the instant Application, the Court is being requested to make determination on issues that would require it to sit as such. In this regard, the Respondent State indicates three allegations the assessment of which would require the Court to sit as an appellate court:

> "(i) the visual identification evidence which was used to convict the Applicants was fabricated;
>
> (ii) the witnesses who testified against the Applicants contradicted themselves"; and
>
> (iii) the Applicants were isolated during the Courts' procedures and decisions"

28. The Applicants do not dispute the Respondent State's assertion that the Court is not vested with appellate jurisdiction. Nevertheless, they argue that their Application relates to the violation of human rights protected by the Charter on which the Court has unlimited jurisdiction. The Applicants, citing the jurisprudence of the Court[1], aver that the Court has the power to receive and consider matters, including those relating to decisions of domestic courts and determine whether the

[1] Application No. 005/2013. Judgment of 20/11/2015, *Alex Thomas v. United Republic of Tanzania*, (hereinafter referred to as "Alex Thomas v. Tanzania Judgment").

proceedings and judgments of the national courts are in accordance with international human rights standards.

* * *

29. Article 3 (1) of the Protocol and Rule 26 (1) (a) of the Rules specify that the material jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned." In this regard, the Court has observed that it exercises its jurisdiction over an Application in so far as the subject matter of the Application involves alleged violations of rights protected by the Charter or any other international human rights instruments ratified by a Respondent State.[2] The Court has further stated that it does not have appellate jurisdiction to uphold or reverse judgments of domestic courts merely depending on the manner in which evidentiary issues were considered in the national proceedings.[3]

30. In the instant Application, the Court notes that the Applicants raise issues relating to alleged violations of human rights protected by the Charter. The Court further notes that the Applicants' allegations essentially challenge the manner in which the domestic courts of the Respondent State evaluated the evidence that was used to justify their conviction.

31. However, the fact that the Applicants question the manner in which domestic courts have assessed evidence does not prevent the Court from making determination on the allegations contained in the Application. It is also well-established in the jurisprudence of this Court that where allegations of violations

[2] Application No. 003/2014. Ruling on Admissibility of 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania (*hereinafter referred to as "Peter Chacha v Tanzania Ruling"*)*, § 114.
[3] *Application No. 001/201.* Judgment of, 15/03/2015, Ernest Francis Mtingwi v The Republic of Malawi, § 14.

of human rights relate to the way in which domestic courts evaluate evidence, the Court retains the power to examine whether such assessment is compatible with international human rights standards.[4] This is within the purview of its jurisdiction and doing so, does not require the Court to sit as an appellate Court. The Respondent State's objection in this regard is thus dismissed.

32. The Court therefore finds that it has material jurisdiction to consider the instant Application.

B. Other aspects of jurisdiction

33. The Court notes that the other aspects of its jurisdiction are not contested by the Respondent State and nothing on the record indicates that the Court lacks jurisdiction in this regard. The Court thus holds:

i. that it has personal jurisdiction given that the Respondent State is a Party to the Protocol and deposited the declaration required under Article 34(6) thereof which enabled the Applicants to access the Court in terms of Article 5(3) of the Protocol;

ii. that it has temporal jurisdiction on the basis that the alleged violations are continuous in nature, in that the Applicants remain convicted and are serving a sentence of thirty (30) years' imprisonment on grounds which they consider are wrong and indefensible[5]; and

iii. that it has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

34. From the foregoing, the Court concludes that it has jurisdiction to examine this Application.

---

[4] *Alex Thomas v Tanzania Judgment*, § 130; Application No. 007/2013. Judgmentof 20/05/2016, *Mohamed Abubakari v. United Republic of Tanzania*. (hereinafter referred to as "*Mohamed Abubakari v Tanzania* Judgment"), § 26.

[5] See Application No. 013/2011. Ruling on Preliminary Objections, 21/06/2013, *Norbert Zongo and Others v. Burkina Faso*, (hereinafter referred to as "*Norbert Zongo and Others* Ruling"), §§ 71 to 77.

VI. ADMISSIBILITY OF THE APPLICATION

35. Pursuant to Rule 39 (1) of the Rules, "the Court shall conduct a preliminary examination of ... the admissibility of the Application in accordance with Article 50 and 56 of the Charter, and Rule 40 of these Rules".

36. Rule 40 of the Rules which in substance restates the provisions 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 Union and the Charter ;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any mater or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility in contention between the Parties

37. The Respondent State has raised two objections to the admissibility of the Application relating first to, the requirement of exhaustion of local remedies and second, to the filing of the Application within a reasonable time after local remedies were exhausted.

i) Objection based on non-exhaustion of local remedies

38. The Respondent State contends that the Applicants have appealed before its High Court and Court of Appeal and both courts upheld their conviction and the request for review of their conviction at the Court of Appeal was struck out for being filed out of the time. The Respondent State submits that the time to apply for review before the Court of Appeal is an ordinary procedure and may be extended for a good cause and the Applicants, rather than filing the Application before this Court, could have sought and may still seek an extension of time and file their request for review. Accordingly, the Respondent State argues that the Application fails to meet the admissibility requirement specified under Rule 40 (5) of the Rules on exhaustion of local remedies.

39. On their part, the Applicants contend that the violations of their rights were occasioned by the highest court of the Respondent State through its judgments; thus, the domestic procedures on their application are completed. They add that the records of the Court of Appeal on applications for review show that it does not often grant leave for review. The Applicants therefore submit that they have no other alternative avenues to seek the correction of the wrong done by the Respondent State, and hence, they have exhausted all local remedies.

* * *

40. The Court notes that any application filed before it shall meet the requirement of exhaustion of local remedies and this requirement may only be dispensed with if the said remedies are unavailable, ineffective, insufficient, or the domestic procedures to pursue them are unduly prolonged.[6] In its established jurisprudence, the Court has consistently stressed that in order for this admissibility requirement

[6] Application. No 004/2013. Judgment, 05/12/2014, *Lohé Issa Konaté v. Burkina Faso*, (*hereinafter* referred to as *Lohé Issa Konaté v. Burkina Faso* Judgment) § 77; See also *Peter Chacha v Tanzania* Ruling, § 40.

to be met, the remedies that should be exhausted must be *ordinary judicial* remedies.[7] In this regard, in the Matter of *Alex Thomas v. United Republic of Tanzania* and other similar cases filed against the Respondent State, this Court has further held that in the Tanzanian judicial system, the procedure for review of the Court of Appeal's judgments is an extraordinary remedy and Applicants are not required to exhaust this remedy before seizing this Court.[8]

41. In the instant case, the Court notes from the file that, before filing their Application in this Court, the Applicants went through the trial and appellate proceedings for their criminal cases up to the Court of Appeal, which is the highest court in the Respondent State. The Applicants have further attempted to pursue the review procedure at the Court of Appeal, but this application was declared inadmissible due to being filed out of time. Considering that the review procedure in the Court of Appeal is an extraordinary remedy, the Applicants were neither required to pursue it nor seek an extension of time to file their petition for the same. The Court therefore finds that the Applicants have exhausted local remedies available in the Respondent State.

42. Accordingly, the Court dismisses the objection of the Respondent State that the Applicants did not exhaust local remedies.

ii) Objection based on the ground that the Application was not filed within a reasonable time

43. The Respondent State contends that, should the Court find that the Applicants have exhausted local remedies, it should reject the Application on the basis that it was not filed within a reasonable time after local remedies were exhausted. In this

[7] *Alex Thomas v Tanzania* Judgment, § 64; See also Application No. 006/2013, Judgment of 18/03/2016, *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania*, § 95.
[8] Ibid; See also *Mohamed Abubakari v Tanzania* Judgment, §§ 66-68; Application No. 032/2015. Judgment of 21/03/2018, *Kijiji Isiaga v United Republic of Tanzania* (hereinafter referred to as "*Kijiji Isiaga v Tanzania* Judgment"), §§ 46-47.

regard, the Respondent State asserts that even though Rule 40 (6) of the Rules is not specific on the question of a reasonable time, international human rights jurisprudence has established six (6) months as a reasonable time but the Applicants in the instant Application seized the Court five (5) years after the Respondent State deposited the declaration required under Article 34 (6) of the Protocol providing the individual complaints mechanism.

44. In their Reply, the Applicants dispute the Respondent State's submission and argue that, in accordance with the jurisprudence of the Court, the determination of a reasonable time depends on the circumstances of each case. In the light of the specific circumstances of their case, the Applicants contend that their Application should be considered as having been filed within a reasonable time.

* * *

45. The Court observes that Rule 40 (6) of the Rules refers to 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."

46. In the Matter of *Norbert Zongo and Others v. Burkina Faso*, the Court stated that "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."[9]

47. In the instant case, the Court notes that the judgment of the Court of Appeal in Criminal Appeal No. 182 of 2010 was delivered on 1 March 2006. However, the Applicants were able to file their Application before this Court only after 29 March 2010, the date on which the Respondent State, in accordance with Article 36 (4) of the Protocol, deposited the declaration allowing individuals to file cases before the Court.

[9] Norbert Zongo and Others v Burkina Faso Ruling, § 92; See also *Kijiji Isiaga v. Tanzania* Judgment, § 56.

48. The Court further notes that the Application was filed on 2 October 2015, that is, after five (5) years and five (5) months from the date of the deposit of the said declaration. In the intervening period, the Applicants attempted to use the review procedure at the Court of Appeal, but their application for review was dismissed on 19 March 2015 as having been filed out of time. In this regard, the key issue for determination is whether the five (5) years and five (5) months' time within which the Applicants could have filed their Application before the Court is reasonable.

49. The Court takes note that the Applicants do not invoke any particular reason as to why it took them five (5) years and five (5) months to seize this Court after they had the opportunity to do so, the Respondent having deposited the declaration envisaged under the Protocol, allowing them to directly file cases before the Court. Nonetheless, although they were not required to pursue it, the Applicants chose to exhaust the abovementioned review procedure at the Court of Appeal. It is evident from the file that the five (5) years and five (5) months delay in filing the Application was due to the fact that the Applicants' were awaiting the outcome of this review procedure and at the time they seized this Court, it was only about six (6) months that had elapsed after their request for review was dismissed for filing out of time.

50. In view of these circumstances, the Court dismisses the Respondent State's objection in this regard.

B. Conditions of admissibility that are not in contention between the Parties

51. The conditions of admissibility regarding the identity of the Applicants, the Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence adduced, and the principle that an Application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act

of the African Union, the provisions of the Charter or of any other legal instruments of the African Union as required by Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules are not in contention between the Parties.

52. The Court also notes that nothing in the record before it indicates that these requirements are not fulfilled. Consequently, the Court holds that these admissibility requirements have been fully met in the instant case.

53. In view of the foregoing, the Court declares that the instant Application is admissible.

VII. THE MERITS

A. Allegations of violations of the right to a fair trial

54. The Applicant makes allegations of violations which fall within the scope of Article 7 of the Charter. The Court will examine them one after the other as follows.

i) Allegation that the Applicants' conviction was based on contradictory evidence

55. The Applicants submit that their conviction in the domestic courts was based solely on incriminating evidence of visual identification which is "perjured, concocted and privy". The Applicants as indicated in paragraph 8 above, cite what they consider contradictory statements made by the witnesses who testified against them and those that, were not credible enough to support their conviction. The Applicants emphasise that four (4) of the prosecution witnesses have a close relationship which, in view of their contradictory testimonies, attests to their fabrication of the story that the Applicants were the ones who committed the crimes in question.

56. On its part, the Respondent State disputes the Applicants' allegation and submits that the issue of visual identification was analysed and determined by the Court of Appeal. The Court of Appeal, according to Respondent State, thoroughly examined the issue and concluded that the evidence proffered by the witnesses was credible enough to sustain the Applicants' conviction. The Respondent State emphasised that the witnesses testified the truth and there was nothing perjured or concocted in their testimony, the Applicants' allegations lacks merit and, as such, should be dismissed.

57. In their Reply, the Applicants submit that the Respondent State's argument that the matter of their identification was analysed and concluded by the Court of Appeal in one procedure but the other procedure to determine whether their identification was credible was perjured, concocted and contradictory.

* * *

58. Article 7 (1) of the Charter stipulates that:

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

a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b) The right to be presumed innocent until proved guilty by a competent court or tribunal;

c) The right to defence, including the right to be defended by counsel of his choice;

d) The right to be tried within a reasonable time by an impartial court or tribunal."

59. The Court 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".[10]

[10] Ibid, § 174.

60. The Court also observes that when visual identification is used as a source of evidence to convict a person, all circumstances of possible mistakes should be ruled out and the identity of the suspect should be established with certainty. This is also the accepted principle in the Tanzanian jurisprudence.[11] In addition, the evidence of visual identification must demonstrate a coherent and consistent account of the scene of the crime. The Court has also previously stated that it is not an appellate court and as a matter of principle, it is up to national courts to decide on the probative value of a particular piece of evidence.[12] The Court cannot assume this role of the domestic courts and investigate the details and particulars of evidence used in domestic proceedings to establish the criminal culpability of individuals.[13]

61. In the instant case, the record before this Court shows that the domestic courts convicted the Applicants on the basis of evidence tendered by six (6) prosecution witnesses, three (3) of whom were present at the scene of the crime. The statements made by these witnesses were generally similar and revealed a consistent account of the scene of the crime.

62. As regards the Applicants' claim that there were some inconsistencies in the testimonies of prosecution witnesses, the Court notes from the record of the trial court that indeed PW 2 was laughing while testifying before the trial court "as [if he] was not serious of what he [was] talking [about]". It is also true that the four (4) prosecution witnesses (PW 1, PW2, PW 4 and PW 6) had a close relationship which might have created the possibility of collusion. Furthermore, the fourth Prosecution Witness (PW 4), an investigation officer "confirmed that PW 1(main victim) made two statements, the first one on the day of the incident without naming any suspects" and the second one, mentioning the Applicants as the perpetrators. This

[11] In the *Matter of Waziri Amani v. United Republic of Tanzania*, the Court of Appeal 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". Ibid, § 175.
[12] *Kijiji Isiaga v Tanzania Judgment*, § 65.
[13] Ibid.

was despite the fact that the PW 1 denied that he made statements on the day of the incident, again disclosing some inconsistencies and casting doubts on the veracity of PW 4's statements.

63. Nevertheless, both the High Court and the Court of Appeal subsequently addressed these and other related issues raised by the Applicants and determined that the evidence was enough to convict the Applicants. This Court is of the opinion that the manner in which the domestic courts evaluated the evidence does not *per se* reveal any manifest error or resulted in a miscarriage of justice to the Applicants and hence, requires the Court's deference.[14] In addition, the Applicants' other allegations questioning the credibility of the testimony of PW 5 relate to specific details of evidence which this Court is not positioned to assess and thus, leaves this role to the national courts, which have already made their determinations by examining the particular circumstances of the case.

64. In view of the above, the Court thus finds that, the allegation relating to the Applicants' conviction on the basis of contradictory testimony is not founded and therefore, the Respondent has not violated Article 7(1) of the Charter.

ii) Allegation that the Applicant's conviction was based on mistaken identity

65. The Applicants submit that their conviction was based on a mistake of fact with regard to the identity of the actual perpetrators of the crimes in question. The Applicants allege that this was substantiated by the "unfolding truth" that emerged from the investigation of the Commission for Human Rights and Good Governance (CHRGG) of the Respondent State, which reveals that the victim (PW 1) was later paid compensation by the real burglars under the aegis of the local authority. According to the Applicants, this was not included in the record of the court

[14] Ibid, § 73.

proceedings because the investigation was carried out after all trial and appellate proceedings their cases were concluded.

66. The Applicants also add that the witnesses admitted to their relatives that they made an error in identifying the true perpetrators of the crime and even offered an apology to the relatives. The Applicants further allege that the Court of Appeal's refusal to consider their application for review filed on the basis of the new evidence contravenes the provisions of the Charter.

67. The Respondent State has not responded to this allegation directly but in its submission on admissibility in paragraph 38 above, the Respondent State maintains that the Applicants can still pursue the matter within the domestic courts by seeking an extension of time to file their application for review.

* * *

68. The Court observes that the right to have one's own cause heard as enshrined under Article 7 (1) of the Charter is a fundamental human right that bestows upon individuals a wide range of entitlements pertaining to due process of law, including the right to be given an opportunity to express their views on matters and procedures affecting their rights, the right to file a petition before appropriate judicial and quasi-judicial authorities for violations of these rights and the right to appeal to higher judicial authorities when their grievances are not properly addressed by the lower courts.

69. The Court also notes that the right to have one's cause heard does not cease to exist after the completion of appellate proceedings. In circumstances where there are cogent reasons to believe that the findings of the trial or appellate courts are no longer valid, the right to be heard requires that a mechanism to review such findings should be put in place. This is the case if there is new evidence which

would potentially lead the trial or appellate court to reverse its decision or make substantially different findings.

70. In the instant case, the Court notes from the file that the Applicants raise an allegation that they are not the real perpetrator of the crime they were charged with and they were convicted as a result of a mistake relating to their identity. In this regard, the Applicants indicate that the prosecution witnesses admitted to have erred in identifying the real culprits and they apologised to the Applicants' relatives for the same. The Applicants substantiate their allegation by submitting a letter which they have received from the Commission for Human Rights and Good Governance (CHRGG), a governmental organ in the Respondent State established under the Constitution, with a mandate of promoting and protecting human rights.

71. The Court observes that in the said letter, which displays the Commission's official stamp, the Commission wrote to the Applicants indicating that from its preliminary investigation into the matter, it had established that the true perpetrators of the crime were other persons and these other persons paid a compensation of six (6) cows and Tanzania Shillings one hundred and twenty thousand (120,000 TZS) to the victim.

72. The key issues for determination therefore are whether this letter from the Commission is properly before it as evidence and can be relied upon in determining the present Application and whether it could be considered to have such value that, had it been available during the trial and appellate proceedings, it would have substantially affected the outcome of the decisions of the national courts of the Respondent State.

73. The Court notes from the Commission's letter that the Applicants were convicted of crimes committed by other persons and this casts some doubt on the Applicant's culpability and conviction. However, as indicated in paragraph 16 above, the

findings of the Commission communicated by a letter to the Applicants were said to have been made following a preliminary investigation rather than after a full investigation into the matter. In these circumstances, the Court is thus not in a position to conclude that there would have been a substantially different outcome in the decisions of the domestic courts, had this letter been available during the trial and appellate proceedings.

74. In view of the above, the Court therefore finds that the allegation according to which the Applicants' culpability was based on mistaken identity is not founded and therefore the Respondent State has not violated Article 7(1) of the Charter.

iii) Allegation that the Applicants were isolated during the domestic proceedings

75. The Applicants contend that they were isolated during the procedures when the decision of the domestic courts were rendered and this violated their fundamental rights.

76. The Respondent State denies the allegation and argues that the Applicants were present during their trial from the time the armed robbery charge was read out to them on 7 May 2001 in which they pleaded not guilty, up to the conclusion of the trial on 16 November 2001. The Respondent State also avers that the Applicants were also present when their appeal was heard at the High Court on 12 August 2002. The Respondent State further indicates that the Applicants were, except at the Court of Appeal, represented by a lawyer and at the Court of Appeal, they were not provided with legal counsel because they did not apply for it, as required under Rule 31 of the Tanzania Court of Appeal Rules, 2009.

* * *

77. The Court notes that the right to a fair trial, in particular, the right to defence under Article 7 (1) requires that an accused person must be given the opportunity to take part in all the hearings in respect of his trial, and to adduce his arguments and evidence in accordance with the adversarial principle.[15] This is an inherent component of the basic precept of equality of arms, which demands that both the accused and the prosecution must have the possibility to present in an equal manner their case and examine or cross-examine the evidence proffered by the other party.

78. In the instant case, the Applicants generally allege, without indicating the violation of a specific right, that they were isolated during the procedures and the decisions of the domestic courts. In their submissions however, they did not clearly state how and why they were isolated in the domestic proceedings. As submitted by the Respondent State, the Applicants indeed participated in all the trial and appeal proceedings and they were also represented by a lawyer at the District Court and at the High Court. The Court observes in this regard that, nothing on record indicates that the Applicants were kept in isolation or isolated in any manner during their trial and appellate proceedings.

79. The Court is therefore of the view that the allegation that the Applicants were isolated during domestic proceedings is not founded and accordingly, holds that the Respondent State has not violated Article 7(1) of the Charter.

B. Allegation of violation of the right to equality before the law and equal protection of the law

80. The Applicants allege that both their conviction on the basis of a mistaken identity and the refusal of the Court of Appeal to review their conviction to rectify the wrong citing the reason of filing the application of review out of time contravene Articles

[15] Application No. 020/2016. Judgment of 21/09/2018. Anaclet Paulo v United Republic of Tanzania, § 81.

3(1) and (2) of the Charter. The Applicants submit that the Court of Appeal should have applied not only the Charter but also Article 107A (2) (c) and (e) of the Respondent State's Constitution to allow their application for review as the victim was paid compensation by the real perpetrators under the aegis of the local authority.

81. On its part, the Respondent State denies the allegation and contends that the Applicants should be put to strict proof thereof. The Respondent State indicates that its Constitution contains provisions similar to Article 3 (1) and (2) of the Charter and the rights enshrined therein are therefore duly protected. The Respondent State submits that the Applicants have not showed how their rights in the said provisions were infringed upon to the extent that they have been so aggrieved as to file the instant Application before the Court to seek remedy.

82. The Respondent State avers that, in the course of their trial and appeals, the Applicants had a lawyer of their own choice and they never raised the issue of discrimination during those proceedings, rather they raise the claim of unequal treatment for the very first time before this Court. The Respondent State argues that the Applicants therefore enjoyed the right to defend themselves and to file their first and second appeals and they were not subjected to any wrong procedure in that regard. The Respondent State reiterates its position that the Applicants could have had the chance to apply for review of their conviction, if only they sought an extension of the time to file the application for review.

83. The Respondent State further contends that Article 107A (2) (c) and (e) of its Constitution require national courts to deliver justice in civil and criminal matters in accordance with the laws, which its Courts have duly done. According to the Respondent State, the Applicants have not shown how the Respondent State has breached these provisions of the Constitution.

* * *

84. The Court notes from the outset that it does not have jurisdiction to interpret or apply the domestic legislation of the Respondent State, rather it has jurisdiction only to interpret and apply the Charter and other human rights instruments ratified by the Respondent State. Accordingly, it limits its assessment to the relevant provisions of the Charter and makes reference to the domestic legislation including the Constitution of the Respondent State, only in the course of interpreting and applying those provisions.

85. Article 3 of the Charter provides that:

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

86. The Court notes that Article 3 is essentially intertwined with Article 2 of the Charter prohibiting discrimination.[16] For the Court to find a violation of Article 3, it shall be demonstrated either that an applicant was discriminated against before judicial or quasi-judicial authorities or that the domestic law allows a discriminatory treatment against him or her as compared to other persons who are in the same situation as he or she is.

87. In the present Application, the Court notes that Articles 12 and 13 of the Constitution of the Respondent State provides for the right to equality and equal protection of law in the same terms as the provisions in the Charter, including by prohibiting discrimination among individuals on unjustified grounds. To this extent, the Applicants have the right to equality before the law and equal protection of the law just as any other individuals within the jurisdiction of the Respondent State and

[16] Application No 009&011/2011. Judgment of 14/05/1015.*Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila V. The United Republic of Tanzania*, §§105.1 and 105.2, Application No. 006/2012. Judgment of 26/0502017. African Commission on Human and Peoples' Rights v. Republic of Kenya, § 138.

there is nothing on record showing that this is not the case with respect to the Applicants.

88. The issue for determination then is whether the Applicants' conviction and, the alleged refusal of the Court of Appeal to review their conviction amounts to a violation of their right to equal protection of the law and equality before the law, that is, whether the domestic courts have treated the Applicants in a discriminatory manner while considering their case. In the case of *Abubakari v United Republic of Tanzania*, this Court held that "it is incumbent on the Party purporting to have been a victim of discriminatory treatment to provide proof thereof".[17]

89. In the instant case, the Applicants merely allege that their conviction and the Court of Appeal's dismissal of their application for review of their conviction reveal discriminatory treatment. The Applicants do not state the circumstances in which they were subjected to unjustified differential treatment in comparison to other persons in a similar situation.[18] As this Court has stated in *Alex Thomas v Tanzania*, "general statements to the effect that a right has been violated are not enough. More substantiation is required."[19]

90. The Court therefore dismisses the Applicants' allegation that their rights under Article 3 (1) and (2) of the Charter were violated.

VIII. REPARATIONS

91. In their submissions, the Applicants pray the Court to quash both their conviction and the sentence imposed on them and to set them at liberty, to redress the violation of their fundamental rights in accordance with Article 27 (1) of the Protocol

[17] *Mohamed Abubakari v Tanzania* Judgment, § 153.
[18] Ibid, § 154.
[19] *Alex Thomas v Tanzania* Judgment, § 140.

and Rule 34 (1) of the Rules and to restore justice where it was overlooked and to grant any other remedy that deems fit in the circumstances of the complaint.

92. On the other hand, the Respondent State prays the Court to deny the request for reparation and all other reliefs sought by the Applicants and dismiss the Application with costs.

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

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

95. The Court notes in the instant case, that as no violation has been established, the issue of reparation does not arise, and therefore dismisses the Applicant's prayers for reparation.

IX. COSTS

96. In its submissions, the Respondent State prays the Court "to dismiss the Application with Costs".

97. The Applicants did not make any submissions concerning costs.

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

99. The Court holds that in the instant Application, there is no reason for it to depart from the provisions of Rule 30 of the Rules and, consequently, rules that each Party shall bear its own costs.

X. OPERATIVE PART

100. For the above reasons:

THE COURT,

Unanimously:

On *jurisdiction*:

(i) *Dismisses* the objection to the jurisdiction of the Court;

(ii) *Declares* that it has jurisdiction.

By a majority of nine (9) for, and one (1) against, Justice Blaise TCHIKAYA Dissenting

On *admissibility*:

(iii) Dismisses the objection to the admissibility of the Application;

(iv) Declares the Application is admissible;

Unanimously:

On the *merits:*

(v) Finds that the Respondent State has not violated the Applicants' right to a fair trial in Article 7 of the Charter

(vi) Finds that the Respondent State has not violated the Applicants' right to equality before the law and equal protection of the law provided for in Article 3 of the Charter

On reparations:

(vii) Consequently, does not grant all requests for reliefs sought by the Applicants.

On costs:

(viii) Decides that each Party shall bear its own costs.

Signed:

Sylvain ORÉ, President;

Ben KIOKO, Vice-President;

Rafaâ BEN ACHOUR, Judge;

Ângelo V. MATUSSE, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

Blaise TCHIKAYA, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules, the Dissenting Opinion of Justice Blaise TCHIKAYA and Joint Separate Opinion of Justice Ben KIOKO and Justice Tujilane R. CHIZUMILA are attached to this Judgment.

Done at Tunis, this Seventh Day of December in the year Two Thousand and Eighteen in English and French, the English text being authoritative.

024/2015
07/12/2018
(000313 – 000310) RM

Joint Separate Opinion of Justice Ben KIOKO and Justice Tujilane R. CHIZUMILA

1. We fully agree with the findings of the majority on the merits of this application. However, there is one particular issue in the judgement which we believe that the majority could have been more robust in its reasoning and eventually order the Respondent State, even if as *obiter dictum*, to take necessary steps to clarify the doubt cast by the new evidence obtained from the Commission on Human Rights and Good Governance (CHRGG), which is the national human rights institution of the Respondent State.

2. The letter from the CHRGG to the Applicants informed them that the former had established, as indicated in Paragraph 70 of the Judgment, that the true perpetrators of the crime were other persons and who had in fact paid compensation of six (6) cows and Tanzania Shillings one hundred and twenty thousand (120,000 TZS) to the victim.

3. The Court in paragraph 73 of its decision has observed that the letter issued by CHRGG was not adequate evidence for it to conclude that it would potentially annul the conviction of the Applicants or likely result in a substantially different outcome to the one reached by the domestic courts. This is, as the majority noted, because of the fact that the said letter, indicating that the true perpetrators of the crime in question were others, not the Applicants, was issued following a preliminary investigation by CHRGG into the matter. However, it should be noted that this aspect was not contained in the letter to the Applicants and was highlighted only in the letter to the Court, perhaps, with the intention of justifying why the Commission could not appear before the Court on this matter.

4. In their submissions, the Applicants have not indicated that the attention of the Respondent State's judicial or justice authorities was drawn to the letter or that they had an opportunity to undertake a further enquiry on the issues raised in it. This is partly because the Applicants received the letter only in 2011 long

after the appellate proceedings in the domestic courts were completed in 2006 and it was not practically possible for them to file it as evidence to challenge their conviction in the course of such proceedings. It is also not clear whether the CHRGG on its part communicated the contents of the letter to judicial or justice authorities or whether the latter had attached the letter to their request for review at the Court of Appeal, which was declared inadmissible only in 2015 for being filed out of time.

5. Indeed, if the Applicants had alleged in their application before this Court that the letter was attached to their application for review before the Court of Appeal, in our view, this court would have had to examine whether domestic courts had violated applicant's rights by not doing substantial justice without regard to technicalities. In the circumstances, we concur with the majority's conclusion that there are no sufficient grounds to find violations of the rights of the Applicants entailing the responsibility of the Respondent State.

6. Granted that the findings of the CHRGG point to the possibility that the Applicants may have spent over 17 years in prison for a crime they did not commit, it is our strong opinion that a human rights court ought to explore all avenues to ensure that the Respondent State undertakes full investigations on this matter to establish the culpability or otherwise of the Applicants. This could have included requiring the parties to appear before the Court and making submissions on this matter. In addition, the letter tendered by the Applicants, as the majority observed, comes from a government institution, that is, CHRGG, with a constitutional mandate to protect human rights in the Respondent State. Although it is not clear whether the full investigations have been concluded by CHRGG, we are of the considered view that the fact that it is a constitutionally established body gives some weight to the probative value of the letter.

7. Furthermore, we do not see how the categorical finding by the CHRGG can change even after further investigations. Payment of compensation of cows and money in a traditional setting in an African village cannot be a confidential exercise. In any event, the information given by the CHRGG was collaborated

by the Applicants' assertions that the prosecution witnesses had admitted to the former's witnesses that they erred in identifying the real culprits and that they apologised to the Applicants' relatives for the same.

8. Despite the fact that the Respondent State's responsibility is not engaged, we also think that the Court should have given some importance to the said letter and taken judicial notice of its contents to urge or at least, encourage the Respondent State to take necessary measures to clear the shadow of doubt cast on the Applicants' conviction. We understand that the majority's hesitance to do so stems from the lack of an explicit normative basis that would enable the Court to make such order in circumstances where it has not found the Respondent State in breach of its international obligations in the Charter or other human rights treaties to which is it is a party.

9. However, it is also not unusual for international courts to make remarks, including in the form of *obiter dictum* when the need arises and we are of the view that the majority could have done the same in the instant Application.

10. In view of the above, we regret that the Court failed to nudge or urge the Respondent State to take judicial or other administrative measures to decisively establish the truth of the preliminary findings of the CHRGG and to clear any doubt about the culpability of the Applicants.

11. As the traditional legal adage goes 'It is far *better* that ten *guilty* men go *free* than one *innocent* man is wrongfully *convicted'. Even after conviction, the right to be heard requires the possibility of review of such conviction when, for example, there is new evidence, which, as is the case in the instant Application, casts doubt on the Applicants' conviction.* Every government owes a duty of care to its citizens and since the CHRGG is a government agency it should not be difficult for the authorities to implement whatever final findings have been reached relevant to the culpability of the Applicants.

12. Furthermore, in our view, the Court's reasoning should not have been predicated on speculation as to the potential impact of the letter on the Applicants' conviction, had it been available at the time of their trial and appellate proceedings. What is more relevant and which the majority should have relied on, rather, is the fact that there is nothing on record to show that the letter was presented and considered by the domestic courts although it was in the possession of the Applicants at the time of the Application for review of the Court of Appeal's decision.

13. In spite of the fact that the Court has not urged the Respondent State to ensure that investigations initiated by CHRGG are concluded and necessary action taken as may be necessary, we express the hope that the State will still do so in exercise of its international responsibility and the duty it owes to its citizens.,

Done at Tunis, this 7th of December in the year Two Thousand and Eighteen in English and French, the English text being authoritative.

Justice Ben KIOKO-Vice President

Justice Tujilane R. CHIZUMILA

024/2015
07/12/2018
(000309 - 000303) RM

000309

Dissenting Opinion

Blaise Tchikaya, Judge

African Court on Human and Peoples' Rights (ACHPR)

The Matter of *Werema Wangoko Werema and Waisiri Wangoko Werema v. United Republic of Tanzania*

7 December 2018

1. Having not been able to agree with my colleagues in the decision *Werema Wangoko Werema and Waisiri Wangoko Werema v. United Republic of Tanzania*, I hereby explain why I hold a different view. My idea is that this case should have been dismissed as inadmissible by the Court sitting in Tunis. The matter has been brought too late before this Court.

2. In the instant case, the Applicants are serving 30 years prison sentence at Butimba Central Prison in Mwanza, Tanzania, following their conviction for armed robbery. They petitioned the African Court on 2 October 2015. The petition came after the Tanzanian courts (the High Court and the Court of Appeal) upheld their conviction by Judgments of 9 October 2002 and 1 March 2006[1]. The Application was filed before the African Court in 2015, that is, nine years after the last decisions of the domestic courts. This Application should have been rejected by this honourable Court because of the time - too long - elapsing between 2006 and 2015.

3. Procedural incidents seem to have been debated in the case, but this could not convince. The context of the case, indeed, shows that no legally valid element intervened to breach the nine years period preceding the Application before the African Court. The Court should have proffered as reason for rejecting the Applicant's case the general principle of reasonable time[2].

4. It will therefore be shown that this appeal is manifestly out of time (I). Besides, the imperativeness of reasonable time will be raised as it renders

[1] ACHPR, Matter of *Werema Wangoko Werema and Waisiri Wangoko v. Tanzania*, 7/12/2018, p. 3, § 6.

[2] Fauveau (I. N.), Duration of international trial and the right to a fair trial, *Revue québécoise de droit international*, Hors-série, October 2010, p. 243

legally incomprehensible the decision of the Court in this case. The appeal of *Messers Werema* against Tanzania should be deemed inadmissible (II).

I. That the Application was filed out of time is clearly established

5. The mere fact that an appeal is out of time obliges the judge to dismiss it, whatever the cause. This is somehow a counterpart to the obligation on the part of States to organize their judicial system in a way that ensures that their courts can guarantee for everyone the right to obtain a final decision on disputes within a reasonable time.

6. As has been stated, the dates, which are not contested by the Applicants, indicate clear nine years between the Tanzanian domestic judges and the date on which this Court was seised (2006-2015). Two elements, which are fairly broadly recognized in the Court's jurisprudence could have interrupted and reactivated these time frames; they are the present application for review in this case (A) and the incident resulting from a letter from the Tanzania Human Rights Commission(B). The inadmissibility of the application for review as submitted confers no new right in as much as the appeal was submitted out of time. The issue is therefore no longer that of exhaustion of local remedies, since the local remedies had been exhausted in this case. This can therefore be considered as having no legal effect, same as the issue of the letter from the Tanzania Human Rights Commission referred to in the case file.

A. The Applicants' Application for review was out of time, and hence fruitless

7. The review remedy was one of the arguments available to reactivate the case. It is apparent from the case file that the application for review of their conviction before the Court of Appeal was dismissed on the ground that it had been brought out of time. An appeal may be considered only if it is positive, regardless of its merits. It legitimately must not amount to a maneuver or a diversion. It must fulfill the conditions of admissibility. The appeal for review of a decision must itself be valid and must be filed within deadlines, if the appeal is to reactivate the deadlines.

8. The applicants could have requested, and could still request, an extension of time. *Messers Werema* do not challenge this observation, but instead sought to circumvent it through extra-judicial elements, elements that Tanzanian justice refuses to internalize. Even if one holds the view that the national judge must not lend himself to a rigid interpretation of the domestic

law[3], he retains the power of control over the time in which to render justice in the interest of all. The view may be held that the Tanzanian judge had been able to assess the merits of the appeal brought before him.

9. Since the time limit had been set, the applicants could have requested an extension of time. They simply suggest that they hardly cooperated in a proper administration of justice. It is in these circumstances that the Respondent State, concerned about the idea of rendering justice to the victims, was able declare that the Application could not succeed. We are faced in this regard with the assumption from which the idea was forged that the right of access to the courts that benefits the litigants is not absolute; that it has obvious and accepted limitations. This is particularly the case for the conditions of admissibility of an application. The said conditions, by their very nature, call for regulation by the State. The latter has a margin of manoeuver in making assessment[4]. This, indeed, have been accepted by jurisprudence and doctrine. These powers of the State are always in a relation of tension between the offense committed and the administration of a just and proportionate punishment.

B. The incident introduced by the Tanzania Human Rights Commission does not prosper

10. An investigation by the Commission for Human Rights and Good Governance (CHRGG) supposedly revealed that the victim had received reparation from the actual aggressors, at the request of the local authorities That procedural incident seemed to show that the conviction of *Messers Werema* was either wrong or improper. It is presumably based on a mistake of fact as regards the identity of the true perpetrators of the crimes. The applicants allege that this finding was confirmed by "the unfolding truth". These facts were presumably not mentioned in the records of all the proceedings conducted by the domestic courts.

11. The aforesaid allegations are contained in a letter from the Commission for Human Rights and Good Governance, an organ of the Government of the Respondent State established for the purpose of promoting human rights. The

[3] ECHR: Judgment *Ivanova and Ivashova v. Russia*, 26/4/2017

[4] ECHR: Matter of *Luordo v. Italy*, 17/7/2003 : "The Court also recalls that the right to a tribunal is not absolute; it lends itself to implicitly accepted limitations, particularly with regard to the conditions of admissibility of an appeal, because by its very nature it requires a regulation by the State, which enjoys in this respect a certain margin of manoeuvre in making assessment" (*Ashingdane v. United Kingdom*, Judgment of 28/5/1985, Série A No. 93, pp. 24-25, § 57) », § 85.

evidence on file shows that the Respondent State was aware of the Commission's findings. In any event, only the national judge, subject to a denial of justice, may re-examine and validly adjudicate on the facts initially placed on the file record of a case.

II. Messers Werema's Application against Tanzania should be deemed inadmissible for having been filed in an unreasonable time

12. An action can only be brought within an acceptable period of time, mindful of the procedure and guaranteeing the rights of others. "Reasonable period of time"[5] presupposes three dimensions, that is, the reasonable period of time to be respected in domestic proceedings, the reasonable period of time within which the international court must render its decision and, finally, the reasonable period of time that the applicant must observe in submitting his application to the international judge[6]. It is the latter dimension that is at issue in the *Werema case* before this Court. In the same vein, the International Court of Justice recognized a *corpus* of rules in its *Advisory Opinion on the Review of Judgment No. 158 of the United Nations Administrative Tribunal in 1973*[7], which includes procedural rights, "the right of access to an independent and impartial tribunal established by law, the right to obtain a court decision within a reasonable time ... ". This is the line followed by the Court and as expressed in *Norbert Zongo v. Burkina Faso*[8], of which the famous paragraph 121 states that the Court "appreciates the reasonableness of reasonable time on a case-by-case basis" (A). This analysis leads to the conclusion that the *Messers Werema* arrived late before the African Court and that their application does not respect the fundamental principle of reasonable time (B).

A. An infringement of the fundamental principle of reasonable time

13. Desperate, the applicants seem to have simply gone in search of new judgments in disregard of the time and the role of each jurisdiction. In *Ernest Francis Mtingwi v.*

---

[5] Article 8.1 of the Inter-American Convention on Human Rights provides that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law..."

[6] Article 7 of the African Charter on Human and Peoples' Rights stipulates that: "Every individual shall have the right to have his cause heard. This comprises: ... the right to be tried within a reasonable time by an impartial court or tribunal".

[7] ICJ : *Application for review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion,* 12/7/1973, Rec. 1973, p. 209, §92

[8] ACHPR, Matter of *Norbert Zongo*, Preliminary objection and merits, 29/6/2013 and 28/3/2014

Tanzania, however, the Court declared that it is not an appellate body for decisions rendered by national courts. This position was also emphasized in its judgment of 20 November 2015 in the matter of *Alex Thomas v. Tanzania*. It is up to each court to ascertain whether actions have been brought before it within a reasonable time. The Court had to indicate that it did not deviate from its jurisdiction to ascertain whether the proceedings before the national courts had met the international standards established by the Charter or other applicable human rights instruments[9].

14. It turns out that, in this case, the Court should dismiss this Application for having been filed within unreasonable time. The applicants in fact lodged an application for review of the judgment of the Court of Appeal on the ground that it contains "manifest errors". On 19 March 2015, the Court of Appeal dismissed the Application on the ground that it had not been filed within the time frame prescribed by law. The Applicants do not dispute the lateness of their application for review pursuant to Article 107(A)(2)(c) and (e) of the Constitution of Tanzania. The time limit for appealing to the Court of Appeal in this case is the one applicable to ordinary proceedings, and this period may be extended for just cause. The Application did not meet the conditions of admissibility set out in Article 40(5) of the Rules concerning the exhaustion of local remedies.

15. It is clear that the application for review was not presented in acceptable terms before the domestic judge who had jurisdiction to hear it. As such, it cannot justify the fact that the Court regards it as an element capable of reactivating the assessment of reasonable time. Presented in 2015, the African Court accepts, in the interest of effective preservation of human rights, that extraordinary remedies do reactivate deadlines, but it is right that the said remedies comply with the law and that they meet the required conditions. The application for review *Werema et al.* has been submitted out of time and the Applicants themselves do not dispute this.

16. It was during the *Genie Lacayo* case, subject of the decision of 29 January 1997, that the Inter-American Court was able to adjudicate for the first time on application of Article 8, § 1 of the Inter-American Convention on Human Rights. The Court had defined the principle of reasonable time. On the criteria defined by the inter-American judge in the afore-mentioned important jurisprudence, one of them is notable in the *Werema case*: the non-diligent character of the applicants[10].

---

[9] ACHPR, Matter of *Norbert Zongo*, Preliminary objection and the merits, 29/6/2013 and 28/3/2014.
[10] Among the three criteria identified for assessing reasonable time, complexity of the case, behavior of the parties and the attitude of the courts, are recognized.

B. A position dismissing the Application in this case would not have contradicted the Court's jurisprudence

17. The Court had two options: (1) to dismiss, by way of an order, after finding that the 19 March 2015 review decision had been dismissed for having been filed out-of-time; or, 2) having associated the merits with the procedure, take a relatively simple decision to dismiss.

18. Our jurisprudence is precise. Applicants are not required to exhaust extraordinary remedies. The Court had noted that in the Tanzania judicial system, the procedure for filing an application for review before the Court of Appeal is an extraordinary remedy which the applicants are not required to exhaust before bringing a case before it[11]. When they exercise this remedy to activate a deadline, the balance of rights and legal certainty must be recognized in order to recognize the procedural and substantive conditions that must be respected. The *Werema* review application did not meet these conditions.

19. The duty of promptness attached to human rights litigations has been observed by the Tanzania judicial authorities. The deficiencies were not held against them until the late application submitted for review. In *Wong Ho Wing v.Peru*[12], the Inter-American Court analyzed compliance with the right to judicial protection and procedural safeguards. In that case, the Inter-American Court sets forth four elements to be taken into account in determining whether a procedure has exceeded the reasonable time. These are: the complexity of the case, the procedural activity of the person concerned, the conduct of the judicial authorities and the sufferings of the person concerned as a result of his legal situation. These conditions were followed in the *Werema* case until rejection of the request for review.

20. To take into account the peculiarity of the case, it may be noted that it involved a period of too long a stagnation. The Court noted that the Court of Appeal delivered its criminal appeal judgment on 1 March 2006. The Court further found that the application was lodged before it on 2 October 2015. The unduly long stagnation period ended. This state of affairs has already been denounced in international human rights law. The applicants must be diligent and not provoke inactions in the

---

[11] ACHPR: Matter of *Mohamed Abubakari*, 3/6/2016, § 66 to 68,

[12] IACHR Matter of *Wong Ho Wing v. Peru*, Preliminary Objection, Merits, Reparation and Costs 30/6/2015

judicial process. The applicants are required to do so in their own interest and for equilibrium of the law[13]

In view of the foregoing, I file this dissenting opinion as I could not be convinced of the outcome of this case.

Done at Tunis, this Seventh Day of December in the Year Two Thousand and Eighteen, in English and French, the French text being authoritative

Blaise Tchikaya, Judge

[13] The time-limits for bringing proceedings leading to inadmissibility (*Melnyk v. Ukraine*, § 26, *Miragall Escolano and Others v. Spain* § 38). It is however up to the litigants to act with due diligence (*Kamenova v. Bulgaria**, §§ 52-55).

2018-12-07

Werema Judgement Delivered on 07 December 2018

African Court on Human and Peoples' Rights

African Court on Human and Peoples' Rights