

## **‘It is better that ten guilty persons escape than that one innocent suffer’: the African Court on Human and Peoples’ Rights and fair trial rights in Tanzania**

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**ABSTRACT:** The African Court on Human and Peoples’ Rights (African Court) has recently been flooded with fair trial cases against its host state, Tanzania. To date, the African Court has disposed with five of these cases on the merits, and dismissed the other as being inadmissible. These cases are *Abubakari v Tanzania*, *Jonas v Tanzania*, *Nganyi v Tanzania*, *Onyachi v Tanzania*, and *Thomas v Tanzania*. Numerous similar cases, all alleging that Tanzania is in violation of fair trial rights as guaranteed in the African Charter on Human and Peoples’ Rights and other human rights instruments, are pending before the African Court. This article traces the involvement of the African Court, in the context of the five decided cases, in nurturing fair trial norms in Tanzania. On the one hand, the emerging Court jurisprudence on fair trial is of importance for the promotion and protection of fair trial norms on the continent; and, on the other hand, it is an opportunity for the African Court to firmly stamp its authority in this thematic domain, taking into account of the little jurisprudence it has in its disposal. In some cases, the African Court has shied away from granting effective remedies in favour of the applicants, whose fair trial rights were ruled to be violated. Further, an assessment of the cases gives an impression that the country’s judiciary and prosecuting authority are careless and sloppy in their application of fair trial standards. There therefore is a need for domestic fair trial rights to be strengthened.

### **TITRE ET RÉSUMÉ EN FRANÇAIS:**

**‘Il vaut mieux laisser s’échapper dix personnes coupables que de voir souffrir un seul innocent’: La Cour africaine des droits de l’homme et des peuples et le droit à un procès équitable en Tanzanie**

**RÉSUMÉ:** La Cour africaine des droits de l’homme et des peuples (Cour africaine) a récemment été inondée d’affaires concernant le droit à un procès équitable contre son pays d’accueil, la Tanzanie. À ce jour, la Cour africaine s’est prononcée au fond sur cinq de ces affaires et en a déclaré une autre irrecevable. Ces affaires sont *Abubakari c Tanzanie*, *Jonas c Tanzanie*, *Nganyi c Tanzanie*, *Onyachi c Tanzanie* et *Thomas c Tanzanie*. De nombreuses affaires similaires, toutes alléguant que la Tanzanie viole le droit à un procès équitable tel que garanti par la Charte africaine des droits de l’homme et des peuples et d’autres instruments relatifs aux droits de l’homme, sont pendantes devant la Cour africaine. Cet article retrace l’implication de la Cour africaine, en ce qui concerne les cinq affaires jugées, dans la promotion des normes de procès équitable en Tanzanie. D’un côté, la jurisprudence émergente de la Cour sur le procès équitable est importante pour la promotion et la protection des normes de procès équitable sur le continent; et, de l’autre, c’est l’occasion pour la Cour africaine d’affirmer fermement son autorité dans ce domaine thématique, compte tenu de la faible jurisprudence dont elle dispose. Dans certains cas, la Cour africaine s’est

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abstenu d'accorder des demandes efficaces aux requérants dont elle a conclu que les droits à un procès équitable avaient été violés. En outre, une évaluation de la jurisprudence donne l'impression que les autorités judiciaires et celle en charges des poursuites de l'Etat concerné sont imprudentes et négligentes dans l'application des normes du procès équitable. Il est donc nécessaire de renforcer le droit national en matière de procès équitable.

**KEYWORDS:** African Court on Human and Peoples' Rights, fair trial rights, effective remedies

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## 1 INTRODUCTION

The right to a fair trial is a foundational principle of democratic societies. This norm facilitates due legal processes and manifests the rule of law in all aspects of the administration of justice. That is why various national and international legal regimes establish safeguards for guaranteeing fair trials. Universally accepted for some time now, the right to a fair trial is fundamental to humankind,<sup>1</sup> and is closely associated with the principles of natural justice. In fact, some have gone as far as endorsing the right to a fair trial as a candidate for having acquired the status of customary international law.<sup>2</sup>

Fair trial rights apply in both civil and criminal matters.<sup>3</sup> Notwithstanding the commonality of application, fair trial rights possess an 'inherent inclination towards criminal trials.'<sup>4</sup> Being a fundamental right, the right to a fair trial contains immutable principles which law enforcers have to strictly abide by.<sup>5</sup> These principles, accompanied by rules and procedures, are implemented during the entire process of a court trial.<sup>6</sup> It is worth stating that the

<sup>1</sup> D Harris 'The right to a fair trial in criminal proceedings as a human right' (1967) 16 *International and Comparative Law Quarterly* 352.

<sup>2</sup> J Dugard *International law: a South African perspective* (2001) 241.

<sup>3</sup> *Ringelsen v Austria* (1971) 1 EHRR 455.

<sup>4</sup> CS Namakula 'The court record and the right to a fair trial: Botswana and Uganda' (2016) 16 *African Human Rights Law Journal* 178.

<sup>5</sup> HN Muhammad 'Due process of law for persons accused of crime' in L Henkin (ed) *The international bill of rights: the Covenant on Civil and Political Rights* (1981) 139.

<sup>6</sup> *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (2000) AHRLR 48 (AHRLR 2000) para 16.

realisation of fair trial rights is dependent on the existence of certain conditions, and are impeded by others.<sup>7</sup> To that effect, well-defined elements aimed at safeguarding the rights of accused persons are in place within different legal regimes.<sup>8</sup>

When depriving a criminal accused of a just and fair trial, other rights, such as the right to life and liberty, are also at a high risk of infringement.<sup>9</sup> Essentially, fairness in the administration of justice accommodates the rule of law and the maintenance of public confidence in the legal system. Significantly, fair trial norms facilitate due legal processes aimed at preventing unlawful and arbitrary curtailment of individual rights. In emphasising the importance of observing fair trial norms, the South African Constitutional Court noted that the consequences of disregarding the right to a fair trial may be as dire as cancelling an election.<sup>10</sup>

In the quest to instil fairness and credible ends of justice, a number of international instruments, heavily influenced by the Universal Declaration of Human Rights (Universal Declaration), accord numerous fair trial rights.<sup>11</sup> Alongside the existing normative framework, international judicial and quasi-judicial bodies are instrumental in upholding the norm within their respective spheres of jurisdiction.

The African Court on Human and Peoples' Rights (African Court) is an adjudicative body designed to ensure the protection of human and peoples' rights in Africa.<sup>12</sup> Its foundational edifice was established in June 1998, with the adoption of its Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol or Court Protocol) by the Member States of the then Organization of African Unity (OAU), in Ouagadougou, Burkina Faso.<sup>13</sup> The date 25 January 2004, when the Protocol entered into force, marks the completion of the establishment of a long awaited human rights bastion within the continent. However, delay in the appointment of Judges stalled the start of its functioning. Eventually, on 12 July 2006, the first batch of Court Judges took their oath of office, marking the official commencement of the operationalisation of the African Court. It delivered its first decision in 2009,<sup>14</sup> and its first

<sup>7</sup> R Murray 'The right to a fair trial: The Dakar Declaration' (2001) 45 *Journal of African Law* 140.

<sup>8</sup> Namakula (n 4 above) 178.

<sup>9</sup> See *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

<sup>10</sup> *S v Jaipal* 2005 (4) SA 581 (CC) para 56 ('To compromise the right to a fair trial may in principle be as dangerous as to cancel or postpone democratic elections because of a lack of facilities or resources.').

<sup>11</sup> J Zhang 'Fair trial rights in ICCPR' (2009) 2 *Journal of Politics and Law* 39. See articles 10-11 of the Universal Declaration of Human Rights, 1948.

<sup>12</sup> For more information on the Court's decisions, publications and statistical information, see <http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court> (accessed 12 June 2017). See also generally, F Viljoen *International human rights law in Africa* (2012) 426-448.

<sup>13</sup> Article 1 of the African Court Protocol.

<sup>14</sup> *Yogogombaye v Senegal*, Application 1/2008.

decision on the merits in the case of *Mtikila v Tanzania* (the *Mtikila* case), in 2013.<sup>15</sup> In this case, the African Court found that Tanzania had violated the African Charter on Human and Peoples' Rights (African Charter) by not allowing independent candidates to contest for elected office in its general elections. The decision was seen as a 'watershed moment' in Africa's political and legal fortunes: a prophesy awaiting to be realised.<sup>16</sup>

The African Court enjoys two forms of jurisdiction: contentious and advisory. When exercising its mandate, the African Court interprets and applies the African Charter, the Court Protocol and any other instrument which a state involved in the dispute has ratified.<sup>17</sup> By 31 October 2017, 30 states have accepted the Court's authority by ratifying the Court Protocol.<sup>18</sup> Accessibility by natural and legal persons to the Court is subject to a declaration entered by a state party, accepting to be taken to the Court by its citizens and non-governmental organisations in accordance with article 34(6) of the Court Protocol.<sup>19</sup> The Court is not an appellate Court.<sup>20</sup> When exercising its authority in determining matters such as the right to a fair trial, it examines relevant proceedings in the national courts and assesses whether such proceedings comply with the African Charter and other relevant human rights instruments.

Having adhered to the African Charter as far back as 9 March 1984, Tanzania ratified the African Court Protocol on 10 January 2006, and formally accepted direct individuals access to the Court, in accordance with article 34(6) of the Protocol, on 29 March 2010. It therefore follows that Tanzania should be prominent on the radar of potential individual litigants in Tanzania.

Lately, the registry-docket of the Court has piled up with applications against Tanzania, all of them alleging the violations of fair trial rights. As of 20 September 2017, there were 78 pending cases, all contending that Tanzania is in violation of fair trial standards provided

<sup>15</sup> *Mtikila v Tanzania*, Application 11/2011. For a general discussion on the case, see O Windridge 'A watershed moment for African human rights: *Mtikila & Others v Tanzania at the African Court on Human and Peoples' Rights*' (2015) 15 *African Human Rights Law Journal* 299.

<sup>16</sup> See AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: does the African Court on Human and Peoples' Rights have the final say?' (2016) 16 *African Human Rights Law Journal* 1.

<sup>17</sup> Article 3 of the Court Protocol.

<sup>18</sup> These states are Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. See the status of ratification on [https://au.int/sites/default/files/treaties/7778-sl-protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoplesrights\\_on\\_the\\_estab.pdf](https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf) (accessed 21 October 2017).

<sup>19</sup> As of the date of preparing this article, eight states have made a declaration. These are: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Rep. of Tunisia. See the list at [http://en.african-court.org/images/Basic%20Documents/Ratification\\_and\\_Deposit\\_of\\_the\\_Declaration\\_final-jan\\_2017.pdf](http://en.african-court.org/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-jan_2017.pdf) (accessed 12 June 2017). Rwanda initially accepted its private litigants to access the Court, but it withdrew its acceptance in February 2016, and became effective from March 2017.

<sup>20</sup> *Mtingwi v Malawi*, Application 1/2013.

for in various international human rights instruments.<sup>21</sup> So far, five fair trial cases concerning Tanzania have been decided on the merits, namely, *Abubakari v Tanzania* (the *Abubakari* case),<sup>22</sup> *Jonas v Tanzania* (the *Jonas* case),<sup>23</sup> *Nganyi v Tanzania* (the *Nganyi* case),<sup>24</sup> *Onyachi v Tanzania* (the *Onyachi* case),<sup>25</sup> and *Thomas v Tanzania* (the *Thomas* case).<sup>26</sup> Two further cases, also dealing with fair trial rights, namely, the *Chacha* case<sup>27</sup> and *Omary v Tanzania*,<sup>28</sup> were dismissed as inadmissible.

The *Chacha* case<sup>29</sup> is the first matter that alleged a violation of fair trial rights against Tanzania. Chacha, remanded without trial for over five years, alleged a violation of his right to liberty and also complained about the seizure of his property.<sup>30</sup> Within the domestic system, there was a long fought legal battle between the applicant and the prosecutors. The applicant took legal and administrative measures to claim his rights. He persistently filed a number of applications to the High Court claiming a violation of his rights in the eight overlapping criminal charges against him, which were pending before the Arusha District Court. It is also a matter of record that the applicant wrote a number of letters to the judiciary, including the Chief Justice, complaining about unlawful arrest and detention, without any response. On the eight overlapping charges, the prosecuting authority consistently withdrew and reinstated the charges contrary to the *non bis in idem* principle, one of the fair trial safeguards.<sup>31</sup> Eventually, the Tanzanian authorities released the applicant, after he had spent five years behind bars, on the basis of what turned out to be frivolous charges against him.

The African Court controversially dismissed the matter for want of exhaustion of domestic remedies. It would appear that, in this case, the African Court was not aware of the gravity of challenges associated with the country's criminal justice system. At the national level, the applicant's efforts to question the constitutionality of his arrest, detention and seizure of his properties proved futile. In one of the cases, the High Court declined to grant the applicant's prayers on the premises that there were other pending charges against him. In the circumstances of the applicant's case, after his release, he ought to file a fresh case in the local courts. Such a case would have been for claiming his violated constitutional rights, or alternatively, a civil claim for

<sup>21</sup> The list of pending cases at <http://www.african-court.org/en/index.php/cases#pending-cases> (accessed 20 September 2017).

<sup>22</sup> Application 7/2013.

<sup>23</sup> Application 11/2015.

<sup>24</sup> Application 6/2013.

<sup>25</sup> Application 3/2015.

<sup>26</sup> Application 5/2013.

<sup>27</sup> Application 3/2012.

<sup>28</sup> Application 1/2012.

<sup>29</sup> *Chacha* (n 27 above).

<sup>30</sup> *Chacha* (n 27 above) para 65.

<sup>31</sup> Article 14(7) of the ICCPR. An expansive interpretation of article 6 of the African Charter fits well with the principle.

damages against the government. All these are obviously extraordinary remedies, taking into account of the already made claims to the High Court and the time the applicant had spent in the domestic courts seeking for his rights.

In a minority opinion, Judge Ouguerouz expressed the view that the application ought to be adjudicated, on the grounds that the remedies before the national courts were inaccessible and unduly prolonged.<sup>32</sup> He noted that the rule of exhausting domestic remedies ought to be examined in light of the right claimed to be violated.<sup>33</sup> He further remarked that the rule is to 'be applied with a certain degree of flexibility and without excessive formalities' in respect of the rights alleged to be violated.<sup>34</sup>

Following the filing of Chacha's application, a string of similar applications was lodged to the African Court. Seemingly, news of the Chacha application spread to other inmates in Arusha, where the Court has its seat, and the Kilimanjaro region, a few kilometres from Arusha. This is due to the fact that most applications in subsequently submitted cases are from these two regions, where inmates have become aware of the avenues and possibilities of reaching the African Court, apparently to a much greater extent than in other regions of the country. The large number of fair trial cases against Tanzania before the African Court is a reflection of the extent to which fair trial rights are overlooked in the country by those involved in the administration of criminal justice.

The main objective of this article is to reveal the current trend in the functioning of the African Court, associated with its unique experience of having an influx of fair trial allegations against one country in particular, Tanzania. Its objective is attained by identifying some elements of fair trial rights that have been dealt with by the African Court in applications involving Tanzania. This article has five sections. The first section introduces fair trial norm as well as outlining the scope of this paper. The second section illustrates the place of fair trial safeguards under contemporary international human rights law. Essentially, the section demonstrates the extent to which fair trial rights are guaranteed in various international human rights law instruments. Being a party to a number of international human rights treaties, the manner in which Tanzania domesticates fair trial norms is highlighted in the third section of this article. The section looks at the normative framework and the approach of the national courts in upholding fair trial rights. The fourth section analyses and critiques the current fair trial jurisprudence of the African Court in five matters decided on the merits against Tanzania. This section may assist in setting the tone for the application of fair trial norms in other parts of Africa. The last section provides some concluding remarks and recommendations.

<sup>32</sup> Joint Dissenting Opinion of Judge ABS Akufo, EN Thomson, and B Kioko (28 March 2014) para 26.

<sup>33</sup> Dissenting Opinion of Judge F Ouguerouz para 2.

<sup>34</sup> Dissenting Opinion of Judge F Ouguerouz para 20.

## 2 FAIR TRIAL UNDER INTERNATIONAL LEGAL REGIME

Ever since World War II, human rights have shaped the international community.<sup>35</sup> The right to a fair trial is one of the norms recognised under international human rights law.<sup>36</sup> In 1948, the Universal Declaration initially acknowledged the right to a fair trial;<sup>37</sup> later, this right was replicated and expanded upon in other human rights instruments,<sup>38</sup> as well as rules of procedure of judicial and quasi-judicial bodies.<sup>39</sup> Article 14 of the International Covenant on Civil and Political Rights (ICCPR) constitutes a set of elements aimed at safeguarding fair trial rights. In its general context, the article reconciles the safeguards with divergent scope of application. Such safeguards include: equality of all persons before courts and tribunals;<sup>40</sup> fair hearing before an independent and impartial body;<sup>41</sup> the presumption of innocence;<sup>42</sup> the right for an appeal or review;<sup>43</sup> compensation;<sup>44</sup> and *non bis in idem*.<sup>45</sup> Article 14 also covers juvenile justice, by emphasising the relevance of age and the need for rehabilitating to accused persons of a tender age.<sup>46</sup>

In Africa, where there are frequent reports of criminal injustice, all the three major human rights instruments provide for the right to a fair trial.<sup>47</sup>

Article 7 of the African Charter outlines the components necessary to accommodate one's right to be heard. These include the right to

<sup>35</sup> Dugard (n 2 above) 234.

<sup>36</sup> T van der Walt & S de la Harpe 'The right to pre-trial silence as part of the right to a free and fair trial: an overview' (2005) 5 *African Human Rights Law Journal* 70.

<sup>37</sup> Article 10 of the Universal Declaration.

<sup>38</sup> Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, as amended by Protocol No. 11, 1998; articles 7 & 26 of the African Charter. There are international guidelines adopted by the United Nations (UN) safeguarding means of treating criminal offenders, see: Guidelines on the Role of Prosecutors and Basic Principles on the Role of Lawyers, both adopted on 1990, by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx> and <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx> respectively (accessed on 10 June 2017).

<sup>39</sup> Article 20(2) of the Statute of the International Criminal Tribunal for Rwanda; Article 21 of the Statute of the International Criminal Tribunal for Yugoslavia; article 67 of the International Criminal Court.

<sup>40</sup> Article 14(1) of the ICCPR.

<sup>41</sup> As above.

<sup>42</sup> Article 14(2) of the ICCPR.

<sup>43</sup> Article 14(5) of the ICCPR.

<sup>44</sup> Article 14(6) of the ICCPR.

<sup>45</sup> Article 14(7) of the ICCPR.

<sup>46</sup> Article 14(4) of the ICCPR.

<sup>47</sup> Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (African Women's Rights Protocol); article 17 of the African Charter on the Rights and Welfare of the Child adopted 11 July 1990 entry into force 28 November 1999 (African Children's Rights Charter).

appeal, the presumption of innocence, the right to defence, and the right to be tried within a reasonable time.<sup>48</sup> Further, the Charter prohibits *ex post facto* laws.<sup>49</sup> Notably, article 7 is not as expansive as article 14 of the ICCPR. Worth mentioning, however, is that fair trial norms in the Charter are non-derogable.

A glance at the Charter might mislead one to conclude that article 7 is the only provision dedicated to protect fair trial rights.<sup>50</sup> This impression is incorrect, as the Charter represents a tapestry of rights essential to the dispensation of justice. For instance, it reaffirms the equal protection of every person, without any form of discrimination.<sup>51</sup> Individuals whose fair trial rights have been violated are often victims of arbitrary treatment, to the extent of their humanity being degraded. To that effect, the Charter prohibits any form of arbitrary treatment that diminishes the dignity of a person.<sup>52</sup> In the *Onyachi* case, the African Court adopted an expansive approach in interpreting article 7 of the African Charter, by stating as follows:

The term ‘comprises’ in article 7(1) of the Charter predicates that the list is not exhaustive and the right to be heard may also include other entitlements available for individuals both in international law and the domestic law of the concerned state.<sup>53</sup>

The African Charter on the Rights and Welfare of the Child (African Children’s Rights Charter)<sup>54</sup> deals with the administration of juvenile justice.<sup>55</sup> Whenever a child is involved in a trial, due care is needed.<sup>56</sup> Testimony by a child needs to be corroborated. A key feature of article 17 of the Children’s Rights Charter is the prohibition of the press and the public during juvenile trials.<sup>57</sup> The main purpose of treating children with due care when facing trials is their reformation, reintegration, and social rehabilitation.<sup>58</sup> The mental status of children in understanding issues is the major test in administering juvenile justice. States are required to set a ‘minimum age below which children shall be presumed not to have the capacity to infringe the penal law.’<sup>59</sup>

<sup>48</sup> Article 7(1)(a) & (d) of the African Charter.

<sup>49</sup> Article 7(2) of the African Charter.

<sup>50</sup> NJ Udombana ‘The African Commission on Human and Peoples’ Rights and the development of fair trial norms in Africa’ (2006) 6 *African Human Rights Law Journal* 302.

<sup>51</sup> Article 3 read together with article 2 of the African Charter.

<sup>52</sup> Articles 4, 5 & 6 of the African Charter.

<sup>53</sup> *Onyachi* case, para 117.

<sup>54</sup> For an overview of the African Children’s Charter, see T Kaime ‘The foundations of rights in the African Charter on the Rights of the Child: A historical and philosophical account’ (2009) 3 *African Journal of Legal Studies* 120.

<sup>55</sup> Article 17 of the African Children’s Rights Charter.

<sup>56</sup> Article 17(1) of the African Children’s Rights Charter.

<sup>57</sup> Article 17(2)(d) of the African Children’s Rights Charter.

<sup>58</sup> Article 17(3) of the African Children’s Rights Charter.

<sup>59</sup> Article 17(4) of the African Children’s Rights Charter.



Along with other fair trial standards, the African Women's Rights Protocol gives special attention to access to justice.<sup>60</sup> It does so by upholding the equality in accessing justice with gender consciousness. Access to legal services has also emerged as a point of emphasis in the African Women's Rights Protocol.<sup>61</sup>

At the institutional level, the African Commission on Human and Peoples' Rights (African Commission) has, to its credit, for some time now 'steered the ship' in realising fair trial rights in Africa.<sup>62</sup> This is justified by its rich jurisprudence on fair trial rights.<sup>63</sup> Apart from the jurisprudence, the Commission has adopted a number of resolutions, declarations, principles and guidelines for modelling the scope of application of fair trial rules.<sup>64</sup> In contrast, the Committee of Experts on the Rights and Welfare of the Child is yet to provide a telling contribution in the administration of juvenile justice. On the African Court, the focus of this article, it has recently joined forces with the Commission in grappling with fair trial rights on the continent.

Tanzania is committed to adhere to human rights standards accorded by various human rights treaties. A perusal of the website of the Office of the UN High Commissioner for Human Rights shows that Tanzania has ratified and acceded to six out of the nine main human rights treaties.<sup>65</sup> At the AU level, Tanzania has ratified all three major human rights instruments.<sup>66</sup> Therefore, Tanzania is responsible to fulfil whatever it has committed itself before these human rights instruments. Thus, the next section looks at the extent to which

<sup>60</sup> For a general reflection on the African Women's Rights Protocol see F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11-45.

<sup>61</sup> Article 8(a) and (b) of the African Women's Rights Protocol.

<sup>62</sup> Udombana (n 50 above) 299-332.

<sup>63</sup> *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999); *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999); *Civil Liberties Organisation v Nigeria* (2001) AHRLR 75 (ACHPR 2001); *Courson v Equatorial Guinea* (2000) AHRLR 93 (ACHPR 1997); *Jawara v The Gambia*, 2000) AHRLR 107 (ACHPR 2000).

<sup>64</sup> See African Commission, Resolution 4 on the Right to Recourse and Fair Trial, adopted March 1992 <http://www.achpr.org/sessions/11th/resolutions/4/> (accessed 11 June 2017); Resolution 21 on the Respect and the Strengthening on the Independence of the Judiciary, adopted April 1996 <http://www.achpr.org/sessions/19th/resolutions/21/> (accessed 11 June 2017); Resolution 41 on the Right to Fair Trial and Legal Aid in Africa, adopted November 1999 <http://www.achpr.org/sessions/26th/resolutions/41/> (accessed 11 June 2017). The Commission also adopted Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, November 1999 <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/> (accessed 11 June 2017).

<sup>65</sup> See [http://www.tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=186&Lang=EN](http://www.tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=186&Lang=EN) (accessed 21 June 2017). These treaties are: CCPR, Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Economic, Social and Cultural Rights (CESCR), Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

<sup>66</sup> The African Charter was ratified on 05 November 1982, the African Children's Rights Charter on 16 March 2003, and the African Women's Rights Protocol on 3 March 2007.

Tanzania has domesticated fair trial norms provided in the country's Constitution as well as international instruments.

### 3 DOMESTICATED FAIR TRIAL NORMS IN TANZANIA

The constitutions of almost all countries guarantee a right to fair trial. The Constitution of Tanzania ensures the equality of all persons and respect for an individual's dignity.<sup>67</sup> Article 13(6) codifies elements that safeguard fair trial in the administration of criminal justice. Apart from the Constitution, fair trial is promulgated in other domestic legislation,<sup>68</sup> such as the Penal Code and the Criminal Procedure Act, which serve as the legal basis for the administration of criminal justice in Tanzania.

As for the judiciary, the role of the old generation High Court and Court of Appeal judges in upholding fair trial rights is acknowledged.<sup>69</sup> A few of their cases deserve mention. In *DPP v Pete*,<sup>70</sup> the first case decided by the apex of the Tanzanian judiciary, the Court of Appeal affirmed the right of the accused to bail in conformity with the presumption of innocence principle. Similarly, in *Nwanguhule v Republic*, the Court of Appeal ruled that appellant's conviction and sentencing for an offence he did not commit was a travesty of justice. In *Dibagula v Republic*,<sup>71</sup> the Court of Appeal quashed the decision and set aside a conviction of 18 months' imprisonment in favour of the appellant, after the trial District Court and later the High Court failed to observe the right to a fair hearing. The Tanzanian judiciary has also treated the issue of legal representation with much weight. In Tanzanian jurisprudence, a trial is a nullity whenever an accused is convicted without legal representation.<sup>72</sup>

Yet, despite the existence of necessary laws and the required institutions, undue legal process in criminal prosecution is a prevalent concern in Tanzania. A large number of Tanzanians have lost confidence on the country's criminal justice system, and even more on the judiciary. Whether the perception against the system is correct or not, there are serious concerns in the country's criminal justice system that need urgent intervention.

Applicants who have been claiming for fair trial rights against Tanzania before the African Court had previously attempted to free themselves before the Tanzanian national courts, faulting national laws

<sup>67</sup> Articles 12 and 13 of the Constitution of the United Republic of Tanzania of 1977.

<sup>68</sup> The Penal Code (CAP 16 RE 2001); the Criminal Procedure Act (CAP 20 RE 2002) and the newly enacted Legal Aid Act, No 1 of 2017, repealing the Legal Aid Criminal Proceedings Act (CAP 21 RE 2002).

<sup>69</sup> See *Ndyanabo v Attorney General* (Civil Appeal No 64 of 2001) CAT.

<sup>70</sup> Criminal Appeal No 28 of 1990 [1991] TZCA 1 (16 May 1991).

<sup>71</sup> *Dibagula v Republic* (Criminal Appeal No 53 of 2001) [2003] TZCA 1.

<sup>72</sup> *Laurent s/o Joseph v R*. [1981] T.L.R 352. Also see *Haruna Said v R* 1991 TLR 124 (HC).

to contravene articles 13 and 15 of the constitution. For instance, before Chacha approached African Court for his right to liberty, he contested prosecuting authorities actions of depriving his right to liberty were contrary to sections 32, 33, 50(1), 51(1), 52(1) & (2) & (3), of the Criminal Procedure Act.<sup>73</sup> Unfortunately, Chacha like most lay applicants had his constitutional applications struck out by the Tanzanian High Court, due to the procedural technicalities provided under section 5 of the Basic Rights and Duties Enforcement Act.<sup>74</sup> When attempting to reach the African Court, his application was deemed incompetent for want of exhaustion of domestic remedy requirement, a fate likely to be experienced by most applicants whose fair trial cases against Tanzania are pending before the African Court.

On a light note, fair trial rights includes rights of those in remand awaiting trials as well as convicted prisoners. Conditions of Tanzanian custodies seem to be a forgotten agenda. In a way, prison conditions have turned to be an additional punishment, which is a violation of fair trial standards. Prisoners' dignity needs to be respected and maintained. On the contrary, correction officers treat inmates harshly as additional punishment of their guilt. Accommodation, food, water, sanitation and healthcare are issues that need special engagement for improving humane prison standards.<sup>75</sup>

## 4 AFRICAN COURT NURTURING FAIR TRIAL RIGHTS IN TANZANIA

This section explores the extent to which the African Court has dealt with, and in the process nurtured fair trial norms in Tanzania. It does so by identifying eight essential elements of fair trial safeguards, and by assessing the five merits decisions (the *Abubakari*, *Jonas*, *Nganyi*, *Onyachi* and *Thomas* decisions) by the African Court against Tanzania, to determine the extent to which these eight elements feature and are used in these decisions to nurture fair trial rights in Tanzania.

### 4.1 Equality of arms

The 'equality of arms' principle is an integral part of the broader fair trial phenomenon. The principle is the bedrock for ensuring fairness in the dispensation of justice. Article 14(1) of the ICCPR expressly entitles everyone to a fair trial and a public hearing. In the process, parties must be treated equally. This principle is most applicable in the adversarial judicial system, where two parties are involved in a dispute. The rule

<sup>73</sup> *Chacha* case, para 61.

<sup>74</sup> The Basic Rights and Duties Enforcement Act, No 3 RE: 2002; Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014, G.N No 304.

<sup>75</sup> In *Abubakari*, police posts were alleged not to be in a favourable conditions to accommodate detainees. See para 95-99 of the case.

seeks to strike a balance between the opposing parties, demanding that they be treated with substantial and procedural equality.<sup>76</sup>

Article 7 of the African Charter affirms the equality of arms principle, by guaranteeing accused persons the right to be heard before a competent court,<sup>77</sup> the right to defence,<sup>78</sup> as well as the right to be tried before an independent and impartial court.<sup>79</sup> In a broader sense of interpreting the Charter, the equality principle overlaps with other fair trial rights. For instance, the African Charter guarantees the equality of all persons before the law,<sup>80</sup> as well as prohibiting any form of discrimination emanating from, among others, the 'fortune' or 'status' of an individual.<sup>81</sup>

Equilibrium in the opportunities afforded to parties in a criminal trial is a major test of this rule. In the cases decided by the African Court against Tanzania, applicants have managed to successfully establish a violation of the equality of arms principle. In the *Abubakari* case, particularly, there were a number of omissions that persuaded the African Court to find a violation of this principle. One of them was the failure by the prosecution to promptly avail the accused with the indictment and witness statements, causing the applicant to be in an unequal position to prepare his defence. Lack of adequate stationary was used as an excuse by the respondent state in justifying the delay, which the Court strongly condemned.<sup>82</sup> The African Court found that failure to provide the accused with indictment and witness statements, basing a convicted on a single prosecution witness, and disregarding an alibi defence contradict the principle of 'equality of arms between the parties in matters of evidence'.<sup>83</sup>

#### **4.2 Fair hearing before a competent, independent and impartial tribunal**

Accused persons are entitled to a public hearing before a competent, independent and an impartial tribunal.<sup>84</sup> In exceptional circumstances, the public may be excused from the whole or part of a trial.<sup>85</sup> These circumstances might be due to public order, morality and national security.<sup>86</sup> Also, it is established that an atmosphere in a court

<sup>76</sup> ICCPR General Comment 32 para 13.

<sup>77</sup> Article 7(1)(b) of the African Charter.

<sup>78</sup> Article 7(1)(c) of the African Charter.

<sup>79</sup> Article 7(1)(d) of the African Charter; *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998).

<sup>80</sup> Articles 3 and 19 of the African Charter.

<sup>81</sup> Article 2 of the African Charter.

<sup>82</sup> *Abubakari* case, para 159.

<sup>83</sup> As above, para 193; *Onyachi* case, paras 82–89.

<sup>84</sup> *Axen v Federal Republic of Germany* ECHR (8 December 1983) Series A 72 para 25.

<sup>85</sup> Article 6 of the European Convention; *Fischer v Austria* ECHR (26 April 1995) Series A 31 para 44.

<sup>86</sup> Article 14(1) of the ICCPR.

room is an important factor determining the fairness of a public hearing,<sup>87</sup> especially when a particular atmosphere is likely to damage the accused's defence. It is also within the scope of the right to a fair trial that a judgment should be delivered in public.<sup>88</sup> Transparency and judicial integrity are some of the reasons for having a public eye on both trials and judgments.<sup>89</sup> Other grounds might be for protecting the accused's interests, or enhancing public confidence in the criminal justice system. In the *Abubakari* case, the African Court considers a judgment to be made public when 'it is rendered in a premises or open area, provided the public is notified of the place, and the latter can have free access to the same'.<sup>90</sup>

A competent, independent and impartial tribunal is indispensable for a fair hearing. Criminal proceedings are considered to be fair when carried without any form of inducement or influence. The notion of independence and impartiality in the administration of criminal justice extends also to the prosecuting authority. Article 7 of the African Charter guarantees the right to a fair hearing before a competent, independent and impartial tribunal. Article 7(1)(d) of the Charter expressly makes mention of 'competent national organs', referring to the level of expertise of the adjudicators, as well as the legitimacy of the laws under which they adjudicate.<sup>91</sup> With respect to the phrase 'court or tribunal', the Charter reaches out to all ordinary and specialised judicial bodies.<sup>92</sup>

in the *Abubakari* case,<sup>93</sup> the applicant had gone through a criminal trial presided over by a prosecutor who allegedly had a relationship with one of the complainants. Court records revealed that the applicant had requested that the prosecutor be replaced. The African Court found Tanzania to be in breach of the accused's rights to a fair trial, due to the failure of the national courts to adequately consider the prosecutor's conflict of interest.<sup>94</sup> The African Court's finding complements the African Commission's earlier ruling which had found that the failure to enable courts to be presided over with qualified persons is a denial of the right to be tried by a competent and an impartial body.<sup>95</sup>

<sup>87</sup> See Communication 770/1997, *Gridin v Russian Federation*, UNHR Committee (18 July 2000), UN Doc CCPR/C/69/D/770/1997 (1996) para 8.2.

<sup>88</sup> Article 14(1) of the ICCPR.

<sup>89</sup> Human Rights Committee General Comment 32 para 29.

<sup>90</sup> *Abubakari* case, para 225.

<sup>91</sup> See *Amnesty International & Others v Sudan* (the *Amnesty International* case) (2000) AHRLR 297 (ACHPR 1999) para 69.

<sup>92</sup> Udombana (n 49 above) 312. Also see *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001); ICCPR General Comment No 13 para 4.

<sup>93</sup> Application 7/2013.

<sup>94</sup> *Abubakari* case, para 111. Also see *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001); para 4 of the UN Human Rights Committee General Comment No 13 (XXI/ 1984).

<sup>95</sup> The *Amnesty International* case (n 91 above) para 69.

An accused person will adequately make a defence against the charges upon being accommodated a fair and just hearing. The process of preparing a defence is time consuming.<sup>96</sup> Defence statements of an accused are issued immediately after the commencement of the prosecution process. In *Abubakari* case,<sup>97</sup> the African Court established that denying an accused to make statement while being at the police station is a violation of the right to a fair hearing under the African Charter.<sup>98</sup> Further, an accused is entitled to be represented by an attorney of personal preference.<sup>99</sup> A denial to accessing important documents necessary for the defence team, may amount to a violation of the right to a fair hearing, specifically the right to defence.<sup>100</sup>

Another aspect in connection with the right to fair hearing is a requirement not to be tried in absentia. A criminal accused must be present during the trial hearing.<sup>101</sup> The presence of an accused can be in person or through legal representation.<sup>102</sup> An accused however, may wave the right to appear only if such a waver is 'attended by minimum safeguards commensurate to its importance'.<sup>103</sup> In the *Thomas* case, the trial magistrate convicted the applicant in absentia after the applicant's non-appearance to the court in a number of occasions. The trial magistrate was however aware of the health issues that the applicant had to the extent of granting bail. The Court found Tanzania to be in violation of the applicant's right to a fair hearing which did not afford the applicant an opportunity to defend himself.<sup>104</sup>

Prosecutors are prohibited from adopting coercive and oppressive means of gathering evidence against the will of the accused. A trial will be considered a nullity if an accused is compelled to confess on the charges against him or her.<sup>105</sup> An accused is entitled to remain silent during the integration and trial proceedings. The rule intends to protect accused persons from improper prosecution. However, a court arguably may draw some adverse inferences from the silence of an accused, whenever the accused is required to provide innocent explanations in relation to the charges against.<sup>106</sup>

Moreover, in the *Abubakari* case, the African Court established that a charge that does not mention other co-accused specifically does not for that reason infringe on the right to a fair hearing under article 7 of the African Charter.<sup>107</sup> The Court also stated that discrepancies in a

<sup>96</sup> Article 14(3)(b) of the ICCPR.

<sup>97</sup> *Abubakari* case, para 119.

<sup>98</sup> *Abubakari* case, para 118.

<sup>99</sup> Article 7(1)(c) of the African Charter.

<sup>100</sup> *International Pen v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 101.

<sup>101</sup> *Ekbatani v Sweden* ECHR (26 May 1988) Series A 154, para 25.

<sup>102</sup> See *Sanchez-Reisse v Switzerland* (1986) 9 EHRR, para 71.

<sup>103</sup> See *Pelladoah v The Netherlands* ECHR (22 September 1994) Series A 297 paras 32-42.

<sup>104</sup> *Thomas* case, para 99.

<sup>105</sup> Article 14(3)(g) of the ICCPR.

<sup>106</sup> See for example, *Condron v The United Kingdom* (2 May 2000) ECHR.

<sup>107</sup> *Abubakari* case, para 105.

charge sheet, for example in the description of stolen property, may have a bearing on the accused's right to a fair hearing.<sup>108</sup>

*Non bis in idem* and prohibition of *ex post facto law* are two principles often invoked in conjunction with fair hearing concepts. While the former prohibits the possibility of an individual to be prosecuted or punished repeatedly,<sup>109</sup> the latter ensures that no one is to be punished based on the criminalising of a previously legitimate act.<sup>110</sup> In the *Onyachi* case, the African Court was clearly displeased with the tendency of the Tanzanian prosecutors of re-arresting and filling new charges against acquitted individuals based on substantially similar facts. In its decision, the African Court stated that

it is inappropriate, unjust, and thus arbitrary to re-arrest an individual and file new charges based on the same facts without justification after s/he has been acquitted of a particular crime by a court of law. The right to liberty becomes illusory and due process of law ends up being unpredictable if individuals can anytime be re-arrested and charged with new crimes after a court of law has declared their innocence.<sup>111</sup>

### 4.3 Right to free legal aid

Legal representation through free legal aid is paramount to the realisation of the right to a fair trial.<sup>112</sup> The availability of legal representation facilitates due legal process when dispensing justice.<sup>113</sup> States are urged to guarantee the right to free legal aid at the highest level possible, including in their Constitutions.<sup>114</sup> Ideally, states should ensure that all accused persons who cannot afford legal representation are provided with legal aid at each stage of the criminal justice process.<sup>115</sup> Individuals facing serious criminal charges who cannot afford the services of a lawyer are mostly granted free legal assistance. Legal aid is pivotal to any country claiming to observe the rule of law. In stressing this point, a South African Commission of Inquiry into the Structure and Functioning of the Courts remarked as follows:

Any state that prides itself on a democratic way of life should not regard legal representation of parties before its court as pure luxury or a fortuitous benefaction of the Government, but as an essential service. Indispensable to the achievement of the democratic ideal in any modern state is access to its courts for all its inhabitants

<sup>108</sup> *Thomas* case, para 131.

<sup>109</sup> Article 14(7) of the ICCPR; JAE Vervaele 'Ne bis in idem: towards a transnational constitutional principle in the EU?' (2013) 9 *Utrecht Law Review* 211; WB Van Bockel 'The ne bis in idem principle in the EU legal order: between scope and substance' (2012) 13 *Journal of the Academy of European Law* 325-347.

<sup>110</sup> See article 7(2) of the African Charter.

<sup>111</sup> *Onyachi* case, para 137. The African Court found Tanzania to be in violation of the right to liberty under article 6 of the African Charter, after re-arresting and charging the applicants with fresh crimes based on the same facts, after being acquitted by a court of law.

<sup>112</sup> A Flynn *et al* 'Legal aid and access to legal representation: redefining the right to a fair trial' (2016) 40 *Melbourne University Law Review* 215.

<sup>113</sup> As above, 209.

<sup>114</sup> UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 1, para 14.

<sup>115</sup> As above, Principle 3, para 20.

... For any person who has to appear in court without counsel ... the excellence of his country's judicial system is small comfort and any claim by the state that the courts are open to all has a hollow ring.<sup>116</sup>

The African Charter does not expressly recognise the right to free legal assistance. However, article 7(1)(c), read together with article 2 of the Charter, could be construed as guaranteeing the right to free legal assistance. Article 7(1)(c) establishes the right to defence and article 2 mandates member states to ensure the enjoyment of rights provided under the Charter without any form of discrimination based upon, among other factors, 'fortune'. The term 'fortune' in the Charter may include an individual's financial status, which is key in determining eligibility for the provision of free legal assistance. Thus, states arguably have an obligation of ensuring that the right to defence is realised regardless of one's fortune.

In the *Thomas* case, the African Court applied article 7(1)(c) of the African Charter, which does not expressly accord the right to have free legal assistance, together with article 14(3)(d) of the ICCPR, to include the right of an accused to have legal aid.<sup>117</sup> The African Court made it clear that the onus is on the judicial authority to ensure that an accused is given legal assistance by first informing that particular accused of the right.<sup>118</sup> The African Court emphasised that an accused need not to complain of the lack of legal representation or desertion of a counsel.<sup>119</sup>

As a general rule, accused persons are entitled to the legal counsel of their choice.<sup>120</sup> Whenever it is established that an accused person cannot afford legal services, such person has to be informed of the right to have free legal assistance.<sup>121</sup> The right should be practical and effective. States are not responsible for the shortcomings of a lawyer providing legal assistance. When a legal aid counsel fails to effectively represent a client, judicial authorities have to intervene for ensuring effectiveness of the right.<sup>122</sup> The Tanzanian Constitution, legislation and numerous High Court and Court of Appeal decisions have accorded for the right to have free legal assistance.<sup>123</sup>

Inadequate resources to hire a lawyer, seriousness of any possible sanction, as well as interest of justice are major factors that may lead for an accused to be given legal aid by state authorities.<sup>124</sup> In *Benham v the United Kingdom*, the European Court of Human Rights stated that 'where the deprivation of liberty is at stake, the interests of justice in

<sup>116</sup> GG Hoexter *Commission of Inquiry into the structure and functioning of the courts* (1983) 197.

<sup>117</sup> *Thomas* case, para 114.

<sup>118</sup> *Nganyi* case, para 182.

<sup>119</sup> *Nganyi* case, para 182.

<sup>120</sup> Article 14(3)(d) of the ICCPR; article 7(c) of the African Charter.

<sup>121</sup> Article 14(3)(d) of the ICCPR. Also see PM Bekker 'The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa' (2004) 37 *Comparative and International Law Journal of Southern Africa* 173.

<sup>122</sup> *Kamasinski v Austria* ECHR (19 December 1989) Series A 168, para 65.

<sup>123</sup> Arts 15(2) & 13(6) of the Tanzanian Constitution; Sec 310 of the Criminal Procedure Act.

<sup>124</sup> *Onyachi* case, para 106; *Abubakari* case, para 138-139; *Thomas* case, para 118.



principle call for legal representation”.<sup>125</sup> A mere nomination of an attorney to represent an indigenous accused is not adequate. The expected representation must be effective. When being notified of a non-committed legal aid attorney, appropriate authorities are supposed to take prompt measures to remedy the situation.

Free legal assistance is applicable in all stages of criminal proceedings, regardless whether a matter is at the pre-trial, trial or appellate stage,<sup>126</sup> ‘as long as conditions which would warrant legal assistance exist’.<sup>127</sup> When it comes to the knowledge of the authorities that an accused is unable to have legal representation on a serious criminal offence or whenever there is a likelihood of injustice, it is the obligation of the authority to provide the accused with legal assistance. In the *Jonas* case, the African Court emphasised that states should offer *proprio motu* and free of charge legal services to an indigent individual who is under criminal prosecution where the offence is serious and the law prescribes a severe punishment.<sup>128</sup>

An accused does not need to request for legal aid, when it is clear that there is inability to have legal representation.<sup>129</sup> Administrators of justice should be alert on that regard.

In an attempt to remedy the situation, Tanzania has recently enacted the Legal Aid Act.<sup>130</sup> The Act envisages regulating and coordinating the provision of legal aid services to indigent persons, as well as formalising paralegals. One of the complained issues from legal aid providers is remuneration. Looking at the new Act, it establishes a number of disjointed offices of which their coordination might be a challenge. The established board by the Act ought to be given an expansive role in administering legal aid services. The board should also have been entrusted with a fund-base for remunerating legal aid providers, a role which is still left to the judiciary, which time and then is under budgeted.

#### 4.4 Trials without an inordinate delay

Criminal trials should not be unduly prolonged.<sup>131</sup> An inordinate delay during criminal proceedings is in conflict with international human rights standards. Rendering justice through excessive delays may undermine the effectiveness and credibility of any judicial process.<sup>132</sup> Prosecutors have developed a habit of not being mindful of the time spent in dispensing with criminal matters.

<sup>125</sup> *Benham v UK* (1996) EHRR 293.

<sup>126</sup> *Nganyi* case, para 181.

<sup>127</sup> *Onyachi* case, para 106.

<sup>128</sup> *Jonas* case, para 78.

<sup>129</sup> *Nganyi* case, para 182.

<sup>130</sup> Legal Aid Act No. 1 of 2017.

<sup>131</sup> Article 14(2)(c) of the ICCPR.

<sup>132</sup> *Stögmüller v Austria* ECHR (10 November 1969) Ser A 9 para 5.

Under article 7(1)(d), the African Charter expressly affirms for the right to be tried within a reasonable time. However, the Charter does not contain elements for determining the reasonableness of time. Nevertheless, there is flexibility when considering a reasonable time in disposing of criminal matters.<sup>133</sup> Computation of time commences as soon as a charge is issued against the accused,<sup>134</sup> and ends when the execution of a judgment from the highest body is successful.<sup>135</sup> Various human rights bodies have established the following factors that a court can use to determine the reasonableness of time: ‘complexity of the case, the conduct of the applicant, the conduct of the judicial and administrative authorities of the State, and what is at stake for the applicant’ are.<sup>136</sup> The African Court is of the view that many accused persons in one criminal charge does not necessarily render a matter complex.<sup>137</sup>

In the *Nganyi* case,<sup>138</sup> the African Court held that ‘the lack of due diligence by the national judicial authorities’, leading to the prolonging of a matter, is a violation of article 7(1)(d) of the African Charter.<sup>139</sup> Highlighting the importance of the speedy determination of criminal matters, the African Court stressed that ‘the deterrence of criminal law will only be effective if society sees that perpetrators are tried, and if found guilty, sentenced within a reasonable time’.<sup>140</sup> Innocent suspects, in particular, have a huge interest in the speedy determination of their innocence.<sup>141</sup>

In the *Thomas* case, the applicant claimed that his fair trial rights were infringed after delays in appellate and review proceedings in the national courts, when battling to quash a 30 years’ sentence of imprisonment.<sup>142</sup> The applicant spent a great deal of time struggling to properly lodge an appeal to the Tanzanian Court of Appeal: It took him eight years to process an appeal of a decision of the High Court to the Court of Appeal.<sup>143</sup> During the hearing before the African Court, counsel for the state responded to the allegations by shifting the blame to the applicant’s technical inability to file the required document.<sup>144</sup> When determining the matter, the African Court found that there were inordinate delays in processing the applicant’s appeal contrary to the letter and spirit of the African Charter. In its judgment, the Court observed as follows:

<sup>133</sup> As above, para 135.

<sup>134</sup> *Scopelliti v Italy* ECHR (23 November 1993) Ser A 278, para 18.

<sup>135</sup> As above, para 18; *Proszak v Poland* (16 December 1997) ECHR paras 30-31.

<sup>136</sup> *Buchholz v the Federal Republic of Germany* ECHR (6 May 1981) Ser A 42 para 49.

<sup>137</sup> *Nganyi* case, para 144.

<sup>138</sup> Application 6/2013.

<sup>139</sup> *Nganyi* case, para 155.

<sup>140</sup> As above, para 127.

<sup>141</sup> As above.

<sup>142</sup> *Thomas* case, paras 100-110.

<sup>143</sup> *Thomas* case, paras 105-110.

<sup>144</sup> *Thomas* case, para 101.

It was the responsibility of the courts of the respondent to provide the applicant with the court record he required to pursue his appeal. Failure to do so and then maintain that the delay in the hearing of the applicant's appeal was the applicant's fault is unacceptable. The applicant's case was not a complex one, the applicant made several attempts to obtain the relevant records of proceedings but the judicial authorities unduly delayed in providing him with these records.<sup>145</sup>

The African Court faulted the way Tanzanian domestic courts handled the applicant's matter, finding that the Tanzanian courts violated Alex Thomas's fair trial rights. Thomas had done more than enough to ensure his appeal and review proceedings were not prolonged. Thus, it is submitted that it is at the court of law where justice is dispensed. Courts are noble institutions of which their acts should reflect that nobility. The *Thomas* case has exposed a chronic problem within the Tanzanian judiciary, with delays having become a normal occurrence.

#### 4.5 Presumption of innocence

The presumption of innocence is a cardinal principle in criminal law. An accused is presumed innocent until found guilty.<sup>146</sup> The guilt must be determined through fair and just proceedings, as well as established law. The responsibility is vested upon the prosecuting authority to prove the charge against an accused beyond reasonable doubt. This principle not to condemn an accused when not yet proven guilty extends to the general public and the press.<sup>147</sup> Importantly, public officials should refrain from making statements which will or are likely to prejudice the rights of an accused.<sup>148</sup>

Article 7(1)(b) of the African Charter recognises the presumption of innocence principle as fundamental in the realisation of the right to a fair trial.<sup>149</sup> Prosecution must prove a criminal charge without leaving any doubt about the accused's guilt. Failure to do so will grant the accused the 'benefit of doubt', as a result of the 'burden of proof' resting on the prosecution.<sup>150</sup> Thus, it is tantamount for judicial officers presiding in a criminal trial to strictly adhere to the principle.

There are incidences in which Tanzanian courts had failed to adhere to the principle, until the African Court was granted the opportunity to enforce its application to the benefit of the victims. In the *Abubakari* case,<sup>151</sup> it was discovered that the evidence relied upon to convict and sentence the applicant in the national courts was based

<sup>145</sup> *Thomas* case, para 106. Also see *Onyachi* case, para 120.

<sup>146</sup> Article 14(2) of the ICCPR.

<sup>147</sup> Human Rights Committee (n 89 above) para 30.

<sup>148</sup> *Ribemont v France* (1995) EHRR 557.

<sup>149</sup> Also see *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998); *Communication 301/05, Haregewoin Gabre Selassie and IHRDA (on behalf of former Dergue Officials) v Ethiopia*, 50th Ordinary Session.

<sup>150</sup> *Barberá, Messegué and Jabardo v Spain* ECHR (6 December 1988) Ser A 46 para 77.

<sup>151</sup> Application 7/2013.

on the testimony of a single witness; the evidence was riddled with inconsistencies and no attempt was made to obtain corroboration.<sup>152</sup> Such an oversight was held to be against the presumption of innocence principle. Another anomaly from the same matter relates to an alibi defence. The applicant unsuccessfully invoked the defence of alibi before the national courts. Before the African Court, the applicant argued that he was admitted at the hospital during the dates stated in the charge sheet, a fact that was ignored by the national courts.<sup>153</sup> A perusal of national court records by the African Court revealed that a discharge sheet from the hospital and a bus ticket from Dar es Salaam to Moshi was tendered during trial as evidence before the national courts, which was unfortunately treated by a trial magistrate as an 'afterthought'.<sup>154</sup> In fact, the applicant started to raise the defence of alibi at the time of the police investigation. In its decision, finding that the applicant's fair trial rights had been violated, the Court observed that judicial authorities and the prosecution ought to seriously consider any alibi defence, since it is key when determining the guilt of the accused.<sup>155</sup>

Further, the African Court had established that the mere fact that the accused was charged alone, while witness testimony points to multiple suspects, does not render a violation of fair trial rights against the charged accused person.<sup>156</sup> It further established that the failure to find weapons that an accused person is alleged to have used to commit an armed robbery does not amount to a violation of a fair trial under article 7 of the African Charter. The Court stressed that an armed robbery could be proved by other factors with high probative value – not necessarily by physical evidence.<sup>157</sup>

#### 4.6 Right to appeal or review

Any person who disagrees with a court's judgment has the right to an appeal or review before a higher body.<sup>158</sup> Article 14(5) of the ICCPR does not explicitly mention 'appeal' as a right, but the phrase 'according to the law' in the provision acknowledges the modalities established by domestic laws under which a review or an appeal is exercised.<sup>159</sup> In instances where review by a higher body is possible after several appeals, an accused is entitled to have access to each stage without restrictions.<sup>160</sup>

<sup>152</sup> *Abubakari* case, paras 162-185.

<sup>153</sup> *Abubakari* case, para 186.

<sup>154</sup> *Abubakari* case, para 186.

<sup>155</sup> *Abubakari* case, para 190.

<sup>156</sup> *Abubakari* case, para 105.

<sup>157</sup> *Abubakari* case, paras 195-199.

<sup>158</sup> Article 14(5) of the ICCPR.

<sup>159</sup> ICCPR General Comment No 32 para 45.

<sup>160</sup> As above, citing Communication No. 230/1987, *Henry v Jamaica*, UNHR Committee (1 November 1991) UN Doc CCPR/C/43/D/230/1987 (1987) para 8.4.

Article 7 of the African Charter identifies the right to appeal as the first safeguard in ensuring one's cause to be heard.<sup>161</sup> However, article 7(1)(a) of the African Charter does not expressly recognise the right to appeal against a criminal conviction, unlike article 14(5) of the ICCPR.<sup>162</sup> Further, article 7(1)(d) of the Charter requires trials to be conducted within a 'reasonable time',<sup>163</sup> which should also be considered when determining an appeal or review.

The right to have a conviction appealed or reviewed is effective and efficient upon the availability of all the required documents.<sup>164</sup> Such documents have to be obtained without inordinate delays. In the *Thomas* case, as already indicated above, it took the applicant a period of eight years and three months to be able to file an appeal before the Court of Appeal of Tanzania, and a couple of years to beg for a review of his appeal decision.<sup>165</sup> The applicant spent most of the time struggling to get the record of the court proceedings necessary for determining an appeal, which he consistently demanded, but was not availed with on time.<sup>166</sup> The African Court found that the applicant's right to appeal and review had been contravened following inordinate delays in the processing of the record of the court proceedings by the officers of the court.<sup>167</sup>

#### 4.7 Right to be informed of the charges

Understanding the charges and court proceedings is essential in ensuring that an accused person has a fair and equal trial. An accused needs to be promptly informed of the nature and context of the charges in a language he or she understands. States are encouraged to provide an interpreter, when the language in use before courts is not familiar to the accused.<sup>168</sup>

Although the African Charter does not expressly recognise the right of an accused person to be informed of the charges against him or her, this right is integral to the right to defence provided for under article 7(1)(c) of the Charter.

In the *Abubakari* case, records presented to the African Court could not reveal any efforts from the national courts in tracing a police report detailing the information concerning the applicant's rights while being held in custody. Consequently, the African Court held that Tanzania

<sup>161</sup> Article 7(1)(a) of the African Charter; *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 334/06, 20th Annual Activity Report.

<sup>162</sup> Udombana (n 49 above) 321. Also see *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999).

<sup>163</sup> Article 6(1) of the European Convention.

<sup>164</sup> Namakula (n 4 above) 192.

<sup>165</sup> *Thomas* case, para 28-33.

<sup>166</sup> *Thomas* case, para 107-108.

<sup>167</sup> *Thomas* case, para 106.

<sup>168</sup> Article 14(3)(f) of the ICCPR; Communication 135/94, *Márques de Morais v Angola*, UNHR Committee (29 March 2005), UN Doc CCPR/C/83/D/1128/2002, para 5.4.

had violated the African Charter due to the failure to inform the applicant of his fundamental rights while being held in remand. The Court went on to rule that the failure of the police and judicial authorities to diligently and promptly communicate to the applicant all the elements of the charge, amounted to a violation of the applicant's right to a defence.<sup>169</sup> The African Court recognised that the right of the accused to be promptly informed of the charges against him or her is a 'corollary of the right to defence' provided by article 7(1)(c) of the African Charter.<sup>170</sup>

#### 4.8 Right to an effective remedy

Remedies remain a subject of a general discussion under international law.<sup>171</sup> International bodies grant remedies in favour of a litigant whose rights have been found to be violated.<sup>172</sup> Appropriate remedies are mostly granted following a reasoned judgment. It is then up to states to comply with decisions of international bodies. The obligation to provide for an effective and appropriate remedy lies in the hands of every court of law. Human rights victims are entitled to benefit from appropriate remedies and reparations granted by a human rights institution.<sup>173</sup> A successful party in a judicial dispute has a right to have an appropriate remedy, capable of redressing the prejudice suffered by the complainant.<sup>174</sup>

Although the African Charter does not explicitly accord the right to an effective remedy, article 1 provides a basis for enforcing rights provided by the Charter at the domestic level. Through the African Charter, the right to an effective remedy is implicitly established under article 3(2). An individual is to have effective remedies through the equal protection of the law, which article 3(2) of the Charter guarantees. The Court Protocol unequivocally states that the Court may make 'appropriate orders to remedy the violation', whenever it finds that there is a violation of human and peoples' rights.<sup>175</sup> The African Court is also required to deliver a reasoned judgment.<sup>176</sup>

In the *Thomas* case, the African Court found that Tanzania violated the applicant's fair trial rights, but left it to the imagination of the

<sup>169</sup> *Abubakari* case, para 161.

<sup>170</sup> *Abubakari* case, para 158.

<sup>171</sup> GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 445.

<sup>172</sup> Article 13 of the European Convention; article 47 of the European Union Charter of Fundamental Rights of 2000.

<sup>173</sup> See General Assembly, Resolution 60/147 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted 16 December 2005 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (accessed on 12 July 2015).

<sup>174</sup> *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>175</sup> Article 27(1) of the Court Protocol.

<sup>176</sup> Article 28(6) of the Court Protocol.

respondent state to remedy the situation. In determining the matter, the Court observed that an order for release can be granted upon the existence of 'specific and/or compelling circumstances'.<sup>177</sup> In the African Court's opinion, the applicant did not substantiate any 'specific or compelling' circumstances that would persuade it to grant such an order. In deliberating the matter, the Court held as follows:

The Court recalls that it has already found violations of various aspects of the applicant's rights to a fair trial contrary to article 7(1)(a),(c), and (d) of the Charter and article 14(3)(d) of the ICCPR. The appropriate recourse in the circumstances would have been to avail the applicant an opportunity to reopening of the defence case or a retrial. However, considering the length of the sentence he has served so far, being about twenty (20) years out of thirty (30) years, both remedies would result in prejudice and occasion a miscarriage of justice.<sup>178</sup>

The Court then instructed Tanzania to take all the appropriate measures to remedy the situation, taking into account the above stated concerns.<sup>179</sup> Under similar circumstances, in the *Abubakari* case, the Court observed that reopening local procedures could jeopardise the applicant's rights, given the fact that the applicant had already served a half of the 30 years' imprisonment sentence.<sup>180</sup>

The Court's reasoning in the above two decisions is problematic due to its lack of clarity. It seems, on the one hand, to find 'special and compelling circumstances' that could have triggered an order for release. On the other hand, it refrains from directly making such an order, thus relinquishing its autonomous powers to order the release of the applicants after finding that their fair trial rights had been violated. The question is: What would amount an appropriate remedy, apart from release, where a convict, tried unfairly, had already served a great deal of his wrongfully imposed term of imprisonment? Apart from creating a distinct impression of a Court too lenient towards the state, the ambiguity of the orders in the two stated cases has already caused legal uncertainty, which is in itself contrary to the principle of the rule of law. While the Court is trying to be deferential in its approach, it should be cautious that it does not lose relevance.

The ambiguity on the issued orders in the *Abubakari* and *Thomas* cases caused Tanzania to seek clarification from the African Court on the implementation of the two decisions, in accordance with article 28(4) of the Court Protocol and Rule 66(1) of the Court Rules.<sup>181</sup> In clarifying the phrase 'all necessary measures' found in the two judgments, the African Court claimed to have offered Tanzania a 'room for evaluation' to enable it to correct all the effects caused by the violations as decided by the Court.<sup>182</sup> In what looks like an effort to

<sup>177</sup> *Abubakari* case, para 234.

<sup>178</sup> *Thomas* case, para 158.

<sup>179</sup> *Thomas* case, para 159.

<sup>180</sup> *Abubakari* case, para 235.

<sup>181</sup> *Interpretation of Judgment of Alex Thomas v Tanzania*, Application 1/2017; *Interpretation of Judgment of Mohamed Abubakari v Tanzania*, Application 2/2017. The two applications along with the application on the *Interpretation of the Judgment of Actions pour la protection des droits de l'homme v Côte D'Ivoire*, Application 3/2017, is a worrying sign that the African Court judgments lack clarity.

<sup>182</sup> Application 1/2017, para 35.

correct its position of reluctance to give effective remedies to the applicants in the two referred cases, the African Court stated that it did not reject the applicants' request of being set free; rather, it could have made such an order directly only if the applicants established special and compelling circumstances.<sup>183</sup> Then, the African Court went on to clarify that the expression 'all necessary measures' includes the release of the applicants and any other remedy which would assist in correcting the effects of violations pronounced by the Court and re-establish the rights of the applicants.<sup>184</sup>

While the above clarification gives the applicants an opportunity to have effective remedies, in my view the clarification itself contradicts the African Court's own decisions in the respective two cases. In both the *Abubakari and Thomas* cases there were dissenting opinions ruling unequivocally in favour of the release of the applicants, thus implying that the phrase 'all reasonable measures' in the majority judgment did not specify release of the applicants. Also, there seems to be no good reason to explain why the African Court failed to initially clarify in the two cases that the phrase 'all reasonable measures' means release of the applicants, as it has subsequently done in the *Onyachi* case.<sup>185</sup> Perhaps the African Court felt the need to make such a clarification in the more recent decision after realising that the previous two related decisions caused legal uncertainty. Still, the release order in the *Onyachi* judgment is not compelling. The African Court simply directs Tanzania to take all necessary measures which 'could' include the release of the applicants. The apprehension remains that, by giving a respondent state 'room' to digest what an appropriate remedy is, the African Court gives an opportunity to that state to provide the least effective of a range of possible remedies, contrary to the expectations of the applicant and even the African Court itself.

## 5 CONCLUSION

Recent trends in the African Court give an impression that the administration of criminal justice in Tanzania is not functioning optimally. The African Court had become overwhelmed with identical allegations alleging that Tanzania has violated fair trial rights. This article has shown the extent to which the African Court has dealt with some of these matters. The nurturing of fair trial rights in Tanzania by the African Court is commendable. However, the Court should not shy away from ordering concrete remedial measures such as the release of the applicant, whenever the respondent state is found to have violated some fundamental fair trial norms, such as the right to legal representation. The Judges of the African Court should be aware of the importance of their decisions on the continent; particularly at this early stage when the Court is still establishing its own authority. If the Court does not order effective and efficient remedies, Africans will lose faith

<sup>183</sup> Application 1/2017, para 36.

<sup>184</sup> Application 1/2017, para 39.

<sup>185</sup> Application 3/2015, para 169(vii).



in the Court, and as a result, the whole purpose of establishing it will be called into question.

Tanzania is under constitutional and international obligations to ensure that fair trial rights are realised in theory as well as in practice. Article 26 of the African Charter instructs states to improve appropriate institutions responsible for dispensing human rights. The anomalies revealed by the African Court necessitate some major reforms in running the country's criminal justice system. The injection of adequate financial resource is a starting point for the reformation process. Even more, this article calls upon judges, magistrates, prosecutors and all those dealing with the administration of criminal justice to strictly and diligently abide by fair trial standards. As Blackstone wrote, the demand of a fair trial should be informed by the notion that fairness overrides pragmatic justifications: 'it is better that ten guilty persons escape than that one innocent suffer'.<sup>186</sup>

Article 7 of the African Charter might not be as expansive as article 14 of the ICCPR; however, its broad interpretation and a supplement of other Charter provisions should be 'neem' for guaranteeing fair trial rights in Africa. The African Commission is enriched with fair trial jurisprudence, which as for now should provide guidance to other human rights institutions in Africa, including the African Court. Still, notwithstanding the Commission's potential role in guiding fair trial standards, there will be circumstances which there would not be precedence from the Commission to rely upon. Notably, the current trend in the African Court of large number of cases of a similar nature from one country is quite a new experience. It is from such experience that the Court should discern itself from the rest and take an authoritative lead. There are genuine concerns over the Court's failure to provide adequate remedies to victims whose human rights have been violated as indicated in the above cases, which might diminish the Court's authority in the Continent. In essence, the Court in these early stages of its authority should do whatever it can to ensure the level of its legitimacy is not undermined.

As of June 2017, there is yet to be any compliance by Tanzania to the decisions rendered by the African Court.<sup>187</sup> As if that is not worrying enough, Tanzania has also in no uncertain terms reported that it is unable to implement some of the orders on provisional measure pronounced by the Court.<sup>188</sup> If the Court would condone noncompliance at this early stage, the African Court risks losing its relevance, and, thus, also its legitimacy.

<sup>186</sup> William Blackstone's *Commentaries on the laws of England* (1765) at 352, cited in A Volokh 'n guilty men' (1997) 146 *University of Pennsylvania Law Review* 173 174.

<sup>187</sup> See AU Executive Council, Report on the activities of the African Court on Human and Peoples Rights, adopted January 2017 <http://en.african-court.org/index.php/publications/activity-reports/994-executive-council-thirtieth-ordinary-session-22-27-january-2017-addis-ababa-ethiopia-report-on-the-activities-of-the-african-court-on-human-and-peoples-rights> (accessed 20 June 2017).

<sup>188</sup> See the response of Tanzania in the provisional measures in *Ally Rajabu v Tanzania*, Application 7/2015.

As this article concludes, the record should be set straight: it is not its intention to tarnish the image of Tanzania's criminal justice system. Rather, it is a gentle reminder to all those involved in the administration of justice in Tanzania to be mindful of fair trial rights. The following words from the Constitutional Court of South Africa, in *Key v Attorney General*, capture the spirit behind this article:

In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial.<sup>189</sup>

<sup>189</sup> *Key v AG* 1996 4 SA 187 (CC) para 13.