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

THE MATTER OF

AMINI JUMA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 024/2016

JUDGMENT

30 SEPTEMBER 2021

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

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

In the Matter of:

Amini JUMA
represented by:
Advocate William ERNEST, Bill and Williams Advocates

Versus

UNITED REPUBLIC OF TANZANIA,
represented by:

i. Mr Gabriel P. MALATA, Solicitor General, Office of the Solicitor General
ii. Ms Sarah MWAIPOPO, Director, Division of Constitutional Affairs and Human Rights; Attorney General's Chambers
iii. Ambassador Baraka LUVANDA, Director, Legal Affairs, Ministry of Foreign Affairs East Africa and International Cooperation
iv. Ms Nkasori SARAKIKYA, Principal State Attorney; Attorney General's Chambers
v. Mr Mussa Mbura, Director, Civil Litigation, Office of the Solicitor General

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

vi. Ms Venossa MKWIZI, Principal State Attorney; Attorney General's Chambers

after deliberation,

renders the following Judgment:

I. THE PARTIES

1. Mr. Amini Juma (hereinafter referred to as "the Applicant") is a national of Tanzania, who at the time of filing of this Application was incarcerated at Butimba Prison in Mwanza, having been convicted of murder and sentenced to death by the High Court of Tanzania Sitting at Arusha.

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

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

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. The record before the Court indicates that on 15 December 2003, the Applicant was charged with murder before the High Court of Tanzania sitting at Arusha. He was convicted of the offence, on 18 September 2008 and sentenced to life imprisonment. On 22 September 2008, the Applicant appealed against the conviction and sentence to the Court of Appeal of Tanzania; likewise, on 29 September 2008, the Respondent State petitioned for review of the sentence.

4. The Applicant's appeal was dismissed on 17 October 2011 and his life imprisonment sentence was substituted with a death sentence by hanging, in respect of the Respondent State's appeal.

5. The Applicant submits that, on 1 December 2011, he filed a motion for review of the Court of Appeal's decision which was set for hearing in 2017.

B. Alleged violations

6. The The Applicant alleges that:
    i. His "conviction violated the presumption of innocence" protected under Article 7(1)(b);
    ii. The Respondent State failed to properly evaluate the prosecution evidence;
    iii. The Respondent State infringed on his right to defence;
    iv. The Respondent State failed to provide the Applicant with effective legal representation;
    v. He suffered undue delay between his arrest and trial;
    vi. His right to life was violated;
    vii. The Respondent State violated his right to dignity

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was filed on 13 April 2016 and served on the Respondent State on 31 May 2016 and on the entities listed under Rule 42(4) of the Rules[3] on 26 June 2016.

8. On 3 June 2016, the Court issued, *proprio motu,* an Order for provisional measures, having considered the situation of extreme gravity and the risk of irreparable harm associated with the death penalty. The Court ordered the Respondent State to "refrain from executing the death penalty against the Applicant pending the determination of the Application."[4]

9. On 16 May 2018, as instructed by the Court, the Registry requested for the services of Advocate William Kivuyo Ernest, who agreed to represent the Applicant on *pro bono* basis.

10. The Parties filed their pleadings within the time limits stipulated by the Court.

11. Pleadings were closed on 1 July 2021 and the Parties were notified thereof.

IV. PRAYERS OF THE PARTIES

12. The Applicant prays the Court to grant the following orders:
    a. That the Respondent has violated the Applicant's rights under Articles 4, 5, and 7 of the African Charter;
    b. That the Respondent take appropriate measures to remedy the violations of the Applicant's rights under the African Charter;
    c. That the Respondent State set aside the death penalty imposed on the Applicant and remove the Applicant from prison;
    d. That the Respondent release the Applicant from prison;

[3] Rule 35(3) of the Rules of Court, 2 June 2010.
[4] *Amini Juma v. United Republic of Tanzania* (provisional measures) (3 June 2016) 1 AfCLR 658 § 18.

e. That the Respondent pay reparations to the Applicant and his family in such amount as the Court deems fit;
f. That the Respondent amend its penal code and related legislation concerning the death sentence to render it compliant with Article 4 of the African Charter.
g. Award reparations of USD 100,000 in moral damages for the Applicant and USD 5,000 each for the Applicant's co-parent and son; USD 76,789 for material loss, USD 715 for material loss suffered by Applicant's co-parent.

13. The Respondent State prays the Court to grant the following orders:

i) That, the Honourable Court is not vested with jurisdiction to adjudicate the Application;
ii) That, the Application has not met the admissibility requirements stipulated under Rule 40(2) of the Rules of Court
iii) That, the Application has not met the admissibility requirements stipulated under Rule 40(3) of the Rules of Court;
iv) That, the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;
v) That, the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;
vi) That, the costs of the Application be borne by the Applicant;
vii) That, the Applicant's conviction and sentence be maintained;
viii) That, the Application lacks merit;
ix) That, the Applicant's prayers be dismissed;
x) That, the Application be dismissed with costs;
xi) That, the Applicant not be granted reparations.

V. JURISDICTION

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

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol

and any other relevant Human Rights instrument ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

15. In accordance with Rule 49(1) of the Rules[5], "the Court shall conduct preliminarily examination of its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

16. On the basis of the above-cited provisions, the Court must, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

17. The Respondent State raises an objection to the material jurisdiction of the Court.

A. Objection to material jurisdiction

18. The Respondent State submits that the jurisdiction of the Court has not been properly invoked by the Applicant. It submits that, contrary to Article 3 of the Protocol and Rule 26(1)(a) of the Rules[6], the Applicant "has at no point made reference to or asked for the interpretation and application of the Charter, Protocol or any other instrument ratified by the United Republic of Tanzania."

19. According to the Respondent State, Rule 26 of the Rules[7] has stipulated the ways in which the jurisdiction of the Court may be invoked, but that the Applicant has not complied with any of the provisions of its sub-Rules (a-e).

[5] Formerly Rule 39(1) of the Rules of 2 June 2010.
[6] Rule 29(1)(a) of the Rules of Court, 25 September 2020.
[7] *Ibid.*

20. The Applicant, citing the Court's decision in *Kijiji Isiaga v. Tanzania* argues that the Court exercises jurisdiction as long as the subject matter of the Application involves alleged violations of rights protected by the Charter or any other international human rights instrument ratified by the State concerned. The Applicant argues further that his Application alleges specific violations of rights protected by the Charter, namely, right to life, dignity and fair trial under Articles 4, 5, and 7 respectively.

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21. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that, the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.

22. The Court notes that Rule 40(2) of the Rules stipulates that "the Application shall specify the alleged violation". However, the Court recounts that, "there is no insistence with regard to a formal indication of the instrument from which the provision of the alleged violation is based".[8] Therefore, it suffices that the instant Application raises allegations of human rights violations protected under Articles 4, 5 and 7 of the Charter, the consideration of which falls within the purview of its jurisdiction.

23. Consequently, the Court dismisses the objection and holds that it has material jurisdiction in the instant case.

B. Other aspects of jurisdiction

24. The Court notes, with respect to its personal jurisdiction that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29

[8] *Frank David Omary and others v. Tanzania* (admissibility) (28 March 2014) 1 AfCLR 358; Also see, *Alex Thomas v*. *Tanzania* (merits) (20 November 2015) AfCLR 465 § 45.

March 2010, it deposited the Declaration with the AUC. On 21 November 2019, it deposited, with the AUC, an instrument withdrawing the Declaration.

25. The Court recalls its jurisprudence that, the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the withdrawal of the Declaration, as is the case of the present Application. The Court has previously held that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, in this case, on 22 November 2020.[9]

26. In view of the above, the Court finds that it has personal jurisdiction.

27. With respect to its temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains incarcerated on the basis of what he considers an unfair process. Consequently, the Court holds that it has temporal jurisdiction to consider the Application.[10]

28. The Court also notes that it has territorial jurisdiction given that the alleged violations occurred in the Respondent State's territory.

29. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

[9] *Ingabire Victoire Umuhoza v. Rwanda* (juridiction) (3 June 2016) 1 AfCLR 540 § 67; *Ambrose Cheusi v Tanzania* (merits), §§ 5-39.
[10] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71 - 77.

VI. ADMISSIBILITY

30. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."

31. Pursuant to Rule 50(1) of the Rules, "the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."[11]

32. Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

> Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> b. comply with the Constitutive Act of the Union and the Charter;
> c. not contain any disparaging or insulting language;
> d. not based exclusively on news disseminated through the mass media;
> e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f. 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;
> g. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

[11] Formerly Rule 40 Rules of Court, 2 June 2010.

A. Objections to the Admissibility of the Application

33. The Respondent State submits that the Application does not comply with Rules 40(2), 40(3), 40(5) and 40(6) of the Rules[12] on non-compliance with the Constitutive Act of the African Union (hereinafter referred to as "Constitutive Act"), the language used in the Application, non-exhaustion of local remedies and on the requirement to file applications within a reasonable time after exhaustion of local remedies**,** respectively.

i. Objection based on non-compliance with the Constitutive Act of the African Union and the Charter

34. The Respondent State submits that the Application does not comply with Rule 40(2) of the Rules[13] as the Applicant has failed to cite provisions of the Charter or principles enshrined in the Constitutive Act of the African Union. Furthermore, that the Applicant has merely focused on technicalities regarding his criminal cases at the municipal courts.

35. The Applicant submits that, failure to make explicit reference to enshrined rights in the Charter does not equate to failure to raise alleged violations. He argues that the Application implicitly made reference to alleged violations of human rights.

36. The Applicant citing *Peter Joseph Chacha v Tanzania* argues that, where only national law has been cited or relied upon in an Application, the Court is still empowered to consider such Applications, if the alleged violations are protected by provisions of the Charter, or any other human rights instrument.

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[12] Rule 50(2)(b), (c), (e) and (f) of the Rules of Court.
[13] Rule 50(2)(b) of the Rules of Court.

37. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed by the Charter. It further notes that, one of the objectives of the Constitutive Act of the African Union as stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court therefore, finds that the Application is compatible with the Constitutive Act of the African Union and the Charter, and holds that it meets the requirements of Rule 50 (2)(b) of the Rules.

ii. Objection based on the nature of the language used in the Application

38. The Respondent State submits that the Application contains "disparaging and insulting language". According to the Respondent State, the Applicant's submission that: "the Justices of the Court of Appeal failed to inject common sense" is insulting and uncalled for.

39. The Applicant argues that the remark referred to by the Respondent State was a fair and objective criticism of the failure of its judges to properly evaluate the evidence adduced in its national courts.

40. The Applicant, citing the African Commission on Human and Peoples' Rights' (hereinafter referred to as "the Commission")[14], argues that the expression "…failed to inject common sense" cannot be perceived as calculated to pollute the public's mind against the judiciary.

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41. Rule 50(2)(c) of the Rules provides that an Application must not contain "any disparaging or insulting language". Article 56(3) of the Charter, further states

[14] ACHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, Communication No. 284/2003 [2009] ACHPR 97; (3 APRIL 2009).

that the language in question must not be directed against "the State concerned and its institutions or the OAU".

42. The Court recounts that in determining whether a remark is insulting or disparaging, it has to satisfy itself that the objective of the remark was to unlawfully and intentionally violate the dignity, reputation and intention of a judicial authority or body. Furthermore, the Court has to be satisfied that the language is used in a manner calculated to pollute the minds of the public or any reasonable person to cast aspersions on the administration of justice.[15]

43. In the instant case, the Court considers that the above impugned remark is intended merely to criticize the reasoning of the judges, and not to infringe their right or honour.

44. In light of the foregoing, the Court dismisses the objection relating to the nature of the language used in this Application.

iii. Objection on non- exhaustion of local remedies

45. The Respondent State, citing the decision of the Commission in *Southern African Human Rights NGO Network and others v Tanzania* submits that the exhaustion of local remedies is an essential principle in international law and that the principle requires a complainant to "utilise all legal remedies" in the domestic courts before seizing the International body like the Court.

46. Referring to the Commission's decision in *Article 19 v Eritrea*, the Respondent State submits that the onus is on the Applicant to demonstrate that he took all the steps to exhaust the domestic remedies and not merely to cast aspersions on the effectiveness of those remedies. It submits that the legal remedies

[15] *Lohe Issa Konate v. Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314 § 70. *Sebastien Germain Ajavon v. Republic of Benin*, ACtHPR, Application No. 013/2017, Judgment of 29 March 2019 (merits) § 72.

available to the Applicant which he should have exhausted were never prolonged and thus he should have pursued them.

47. The Applicant argues that he exhausted local remedies when he appealed to the Court of Appeal and it rendered its decision**.** He further argues that he was not required to exhaust extra-ordinary remedies such as, filing of a constitutional petition and filing of a motion for review of the Court of Appeal's decision.

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48. The Court recalls that pursuant to Article 56(5) of the Charter, whose requirements are restated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.[16]

49. The Court notes that, in so far as criminal proceedings against an Applicant have been determined by the highest appellate court, the Respondent State is deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.

50. In the instant case, the Court notes from the record that, the Applicant filed an appeal against his conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 17 October 2011, the Court of Appeal upheld the judgment of the High Court. The Respondent State thus had the opportunity to redress the alleged violations. It

[16] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94.

is therefore clear that the Applicant has exhausted the available domestic remedies.

51. Consequently, the Court dismisses the objection that the Applicant has not exhausted local remedies.

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

52. The Respondent State submits that the Applicant has not complied with the requirement under Rule 40(6) of the Rules,[17] that an application must be filed before the Court within a reasonable time after the exhaustion of local remedies. The Respondent State argues that it "…sanctioned the individual complaints mechanism in March 2010" and since the Applicant seized the Court on 13 April 2016, the seizure was done after the lapse of six (6) years.

53. Noting that Rule 40(6) of the Rules[18] does not prescribe the time limit within which individuals are required to file an application, the Respondent State draws this Court's attention to the fact that the Commission[19] has held a period of six (6) months to be the reasonable time.

54. The Respondent State argues that though the Applicant claims that he filed a motion for review of the Court of Appeal's decision, he has not indicated the date of the application nor given the reference number to assist it "to trace the said review and compute the period of reasonable time."

55. The Applicant avers that he has good reasons for filing the case, four (4) and a half years after exhaustion of local remedies. He submits that he had filed a motion for review on 1 December 2011 which was only set for hearing in 2017.

56. According to the Applicant, it is the Respondent State's delay in determining his review that led to his unintended delay to file his case before the Court.

[17] Rule 50(2)(f) of the Rules of Court.
[18] *Ibid.*
[19] ACHPR, *Michael Majuru v. Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

Furthermore, the fact that he did not have the benefit of legal representation before the filing the Application, inevitably contributed to the delay in seizure of the Court because of lack of understanding of the Court's procedure.

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57. The Court notes that Rule 50(2)(f) of the Rules which restates the contents of Article 56(6) of the Charter, requires an Application to 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."

58. In the instant Application, the Court observes, that the judgment of the Court of Appeal was delivered on 17 October 2011, while the Application was filed on 13 April 2016. The Court notes that, four (4) years, five (5) months and (27) days elapsed between the delivery of the judgment of the Court of Appeal and the filing of the Application before this Court. The issue for determination is whether the above mentioned period, constitutes a reasonable time**.**

59. The Court recalls that: "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[20]

60. Furthermore, the Court restates its jurisprudence that delay in filing of an application can be justified when the applicants demonstrate that they were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not have assistance of a lawyer in their trials at the domestic court, were illiterate and were not aware of the existence of the Court.[21] Moreover, the Court has also decided that when Applicants use

[20] *Norbert Zongo v. Burkina Faso* (merits) § 92. See also *Alex Thomas v. Tanzania* (merits) § 73**;**
[21] *Amiri Ramadhani v. Tanzania* (merits) (11 May 2018) 2 AfCLR 244 § 50; *Christopher Jonas v. Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 54.

the review procedure, they are entitled to await the determination of the review application.[22]

61. In the instant case, the Court notes that, although the Applicant claims that he attempted to use the review procedure, he has not presented any evidence of his attempt. Even so, the Court further notes that, given the Applicant has been in prison since 2008, which is prior to the Respondent State's depositing of its Declaration, and in death row subsequently; he was restricted in his movement and lacked information about the Court. These circumstances contributed to his filing the Application, four (4) years, five (5) months and twenty-seven (27) days after the exhaustion of local remedies.[23]

62. In view of the foregoing, the Court finds that the Application was filed within a reasonable time.

B. Other conditions of admissibility

63. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2)(a), (d) and (g) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.

64. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

65. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment with Rule 50(2)(d) of the Rules.

[22] *Werema Wangoko v. Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 520 § 49.
[23] See, *Godfred Anthony and another v. United Republic of Tanzania*, ACtHPR, Application No. 015/2015, Judgment of 26 September 2019 (jurisdiction and admissibility) §§ 48-49.

66. Further, the Application does not concern a case which has already been 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 in fulfilment of Rule 50(2)(g) of the Rules.

67. The Court, therefore, finds that all the admissibility conditions have been met and that this Application is admissible.

VII. MERITS

68. The Applicant alleges the violation of the right to a fair trial, right to life and right to dignity which the court will examine below.

A. Alleged violation of the right to a fair trial

69. The alleged violations of the right to a fair trial relate to:
    i. Right to be presumed innocent;
    ii. Right to defence;
    iii. Right to be tried within a reasonable time; and
    iv. Right to be tried by an impartial tribunal.

i. Alleged violation of the right to be presumed innocent

70. The Applicant argues that the Respondent State violated his right to be presumed innocent through its failure to properly assess the evidence tendered by both the prosecution and defence lawyers. Referring to the Court's jurisprudence in *Mohamed Abubakari v Tanzania*, the Applicant submits that the right to a fair trial and the presumption of innocence "requires that the imposition of a sentence, should be based on strong and credible evidence".

71. The Applicant argues that he was convicted on the basis of evidence “that is extremely weak, inconsistent and/or struck from record as unreliable”, and the prosecuting authorities failed to corroborate the identification evidence which was “general and imprecise”.

72. The Applicant further asserts, that the national courts failed to take proper account of omissions by the prosecution to disclose relevant and potentially exculpatory material. The Applicant submits that an “informant” and another witness to the crime named Saruni should have been called by the prosecution.

73. Moreover, the Applicant avers that the national courts failed to consider the presumption of innocence when they dismissed his *alibi* despite it not being challenged by the prosecution. Also, that the High Court erred by failing to explain the reasoning behind its decision to dismiss the evidence of “defence witness 5” who testified about the *alibi*.

74. On its part, the Respondent State submits that the evidence given by Prosecution Witnesses (PW 3 and PW 4) was credible as it was direct evidence. That such evidence according to the case of *Waziri Amani v Republic*, proves the case beyond reasonable doubt.

75. According to the Respondent State, Prosecution Witness (PW 1) clearly saw the Applicant committing the crime as the offence took place in broad daylight and there was no suggestion that his line of vision was obstructed.

76. Furthermore, the Respondent State refutes the allegations related to the location where the crime took place and the make of the motorcycle produced as evidence and puts the Applicant to strict proof.

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77. Article 7(1)(b) of the Charter provides: "[e]very individual shall have the right to have his cause heard. This comprises: … b) [t]he right to be presumed innocent until proved guilty by a competent court or tribunal".

78. The Court notes that, the Applicant's contention relates to the assessment of evidence in the Respondent State's Court of Appeal, which he argues, was flawed. The Applicant asserts that the Court of Appeal did not evaluate the evidence tendered before it in a fair manner resulting in what he considers an unfair conviction and sentencing.

79. The Court notes that, a fair trial requires that the imposition of sentence in a criminal offence and especially a heavy prison sentence, should be based on strong and credible evidence.[24]

80. The Court notes from the record that the Court of Appeal in its judgment considered the identification of the Applicants as the main issue for determination. The Court of Appeal then undertook a thorough examination of the issue based on the facts and applicable Tanzanian case-law on identification.

81. The Court observes that the Court of Appeal examined the nature and quality of evidence on record. In that respect, the Court of Appeal indicated that the post-mortem report was wrongly admitted but indicated that the cause of death of the deceased could also be proved by PW1 and PW3 who provided direct evidence as they witnessed the killing. The Court of Appeal further held that the witnesses described the motorcycle that was used in the course of the murder and indicated that the inconsistency between PW1 and PW2 as to the make of the motorcycle was negligible. Finally, it found that the defence of *alibi* was considered and rightfully rejected. Therefore, the Court of Appeal arrived

[24] *Mohamed Abubakari v. Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 174; *Kijiji Isiaga v. Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 67.

at the conclusion that the Applicant was convicted on the basis of credible evidence and that the prosecution proved its case beyond a reasonable doubt.

82. The Court considers that the manner in which the domestic courts, particularly the Court of Appeal, assessed the evidence does not reveal any manifest error, which occasioned a miscarriage of justice to the Applicant requiring its intervention.

83. As a consequence of the above, the Court holds that the Respondent State has not violated the Applicant's right to a fair trial protected under Article 7(1)(b) of the Charter.

ii. Alleged violation of the right to defence

84. The Applicant argues that the right to legal representation has to be "practical and effective" as opposed to being abstract or theoretical. Citing *Artico v. Italy*[25], he submits that the appointment of a legal aid lawyer in itself does not satisfy the requirement of effective representation. Furthermore, he contends that Article 14 of the ICCPR and Article 7 of the Charter establishes the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."

85. Citing the Human Rights Committee's Communication in the matter of *Kelly v Jamaica*[26], the Applicant argues that, when deciding what constitutes effective representation, the Court should consider, "the complexity of the case, the defendant's access to evidence, length of time provided by rules of procedure prior to particular proceedings and prejudice to the defendant." Also, that it is critical for the accused to have legal representation at all stages of the proceedings including the pre-trial stage.

[25] ECHR, *Artico v. Italy*, ECtHR, Judgment of 13 May 1980, Application No. 6694/74.
[26] HRC, *Kelly v. Jamaica*, Communication No. 537/1993, U.N.Doc. A/51/40, Vol II at 98 (HRC, 1996).

86. The Applicant submits that the Respondent State failed to provide him with an experienced advocate as the advocate he was assigned had only been in practice for one (1) year. Also, the Applicant argues that the advocate he was assigned was required to represent him and his co-accused thereby raising issues of conflict of interest.

87. The Applicant also avers that his advocate failed to properly prepare and articulate a defence according to his instructions. The Applicant especially contends that his advocate failed to mention the *alibi* defence in his closing statement.

88. Furthermore, the Applicant submits that his advocate failed to adduce evidence of his good character and failed to object to tainted and prejudicial evidence, which evidence was subsequently expunged off the record by the Court of Appeal. In relation to his appellate advocate, the Applicant avers that, his lawyer failed to undertake adequate preparation and refused to take instructions from him.

89. The Respondent State did not respond to this submission.

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90. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR)[27], and determined that the right to defence includes the right to be provided with free legal assistance.[28]

[27] The Respondent State became a State Party to ICCPR on on 11 June 1976.
[28] *Alex Thomas v. Tanzania* (merits) *op.cit* § 114; *Isiaga v. Tanzania* (merits) § 72; *Kennedy Onyachi and Njoka v. Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 104.

91. The Court notes that the right to be defended by counsel of one's choice requires that the accused is not only granted a lawyer of their choice but also that legal representation is effective.

92. The Principles and Guidelines on the Right to a Fair Trial and Legal assistance in Africa provide that a legal aid lawyer should:

    1. be qualified to represent and defend the accused or a party to a civil case;
    2. have the necessary training and experience corresponding to the nature and seriousness of the matter;
    3. be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body;
    4. advocate in favour of the accused or party to a civil case; and
    5. be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective representation.[29]

93. Principle 7 of the United Nations' Guidelines and Principles on access to legal aid in Criminal Justice Systems[30] establishes the components of legal aid being effective, as: unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence. It should also be prompt and available at all stages of the criminal justice process.

94. The Court notes that in the instant case, the Applicant did not argue that the legal aid advocate was unduly influenced by the state or not sufficiently compensated or that he did not advocate in his favour. Rather, the Applicant firstly, challenges the experience and competence of the legal aid lawyer that

[29] African Commission on Human and Peoples' Rights' Principles and Guidelines on the Right to a Fair Trial and Legal assistance in Africa (2003) H (e)(1-5).
[30] United Nations' Guidelines and Principles on access to legal aid in Criminal Justice Systems, New York 2013. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf (accessed on 30 March 2021)

represented him in the High Court. The Court observes though, that the Applicant did not raise this point on appeal in the Court of Appeal even though he was represented by another advocate in his appeal. Even so, the Applicant only refers to the advocate's years in practice, claiming that the advocate was inexperienced but did not demonstrate how this impeded the advocate in representing him. From the record, the Applicant's advocate actually pointed out some of the inconsistencies in the evidence adduced that the Applicant seeks to rely on before this Court and he supported his submissions with case law.

95. Regarding the Applicant's contention on conflict of interest, the Court notes that, joint representation of co-accused, does not automatically result in conflict of interest. Rather, the Applicant is required to either object to the joint representation or demonstrate subsequently, that the conflict of interest actually existed and it affected his own representation.[31] In the instant case, there is nothing on record to show that the Applicant challenged the joint representation during his trial. Also, the Applicant has not demonstrated the existence of actual conflict of interest which affected his advocate's performance during trial. Therefore, the Court rejects this submission in relation to ineffective representation.

96. Concerning the Applicant's submission that his trial advocate did not follow his instruction regarding the defence of *alibi*; contrary to the Applicant's assertion, it is evident from the record, that the advocate indicated to the High Court that he would be relying on the defence of *alibi*. Furthermore, the Applicant relied on his *alibi* and gave an in-depth account of it when he testified and Defence Witness 5 testified on his behalf in relation to the *alibi*. Accordingly, the Court dismisses the Applicant's contention in this regard.

[31] *Holloway v. Arkansas* 435 U.S. 475 (1978).

97. According to the Applicant, his advocate did not present good character evidence before the High Court nor did he object to “tainted and prejudicial” evidence. The Court notes, that although, the Court of Appeal expunged the “tainted and prejudicial” evidence referred to by the Applicant; it still found that the direct evidence adduced by Prosecution Witnesses 1 and 3 was sufficient to prove the prosecution’s case beyond a reasonable doubt.

98. In light of the foregoing, the Court holds that the Respondent State did not violate the Applicant’s right to defence.

iii. Alleged violation of the right to be tried within a reasonable time

99. The Applicant argues that he was held in remand for approximately five (5) years from his arrest before being tried and convicted; and that he had to wait for a further three (3) years for his appeal to be concluded. He argues that this delay was unreasonable and resulted in denial of a fair trial.

100. In this regard, the Applicant states that police investigation was completed in a matter of days after the offence occurred. He relies on the statement of the judge that “the investigator and the police in general acted fairly fast”. The Applicant also argues that the delay is attributable to the Respondent State as it did not provide any explanation for the delay. Also, that the delay was not attributable to himself as he had fully cooperated with the police and his counsel, “…did not make applications to the Court and only called one witness.”

101. Citing *Prett and Morgan v Jamaica*[32], the Applicant alleges that the unjustified delay resulted in his deprivation of liberty, loss of his business, separation from his family and losing contact with his “essential alibi witness”.

[32] Privy Council, *Prett and Morgan v. Jamaica*, Privy Council Appeal No. 10 of 1993, 3 WLR 995.

102. The Respondent State did not respond to this claim.

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103. Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or tribunal".

104. The Court recalls that, as it has held in its earlier judgments, various factors are considered when assessing whether justice was dispensed within a reasonable time in the meaning of Article 7(1)(d) of the Charter. These factors include the complexity of the matter, the behaviour of the parties, and that of the judicial authorities who bear a duty of due diligence in circumstances where severe penalties apply.[33]

105. The Court notes the period of delay complained about is from 8 December 2003 when the Applicant was charged to 18 September 2008, the date of his sentencing. This amounts to a period of four (4) years, nine (9) months and ten (10) days. With respect to the complexity of the case, the Court notes that the trial period of this case was from 17 June 2008 to 18 September 2008, when the Applicant was sentenced. This amounts to a trial period of three (3) months. During the trial, the prosecution called five (5) witnesses and the defence also called five (5) witnesses. Nevertheless, the witnesses were heard from 17 June 2008 to 19 June 2008, that is, a period of two days. The final submissions by the defence and the prosecution was on 24 June 2008. This means that from the start of the prosecution case to the close of the case, there was a lapse of only one week. Therefore, it is clear that the matter was not complex.

[33] See *Armand Guehi v. Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 §§ 122-124. See also *Alex Thomas v. Tanzania* (merits) § 104; *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 155; and *Norbert Zongo and Others v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, §§ 92-97, 152.

106. As regards whether the Applicant contributed to the delay; the Court notes that, nothing on the record shows that he did and the Respondent State did not challenge this either. The Applicant did not file any motions or seek any adjournments and the presentation of his defence was concluded within a day. It is thus clear that the Applicant did not contribute to the delay.

107. As to whether the delay was attributable to the Respondent State, the Court notes that the Respondent State did not advance any argument as to why it took close to five (5) years for the Applicant's case to be completed. The Respondent State did not explain what happened between 8 December 2003 when the Applicant was charged and 17 June 2008 when the trial commenced, a period of four (4) years, seven (7) months and nine (9) days. In light of the foregoing, the Court notes that the time taken to complete the Applicant's trial after he was charged, a period of almost five (5) years is unreasonable because of lack of due diligence on the part of the national authorities.[34]

108. The Court thus finds that the Respondent State violated Article 7(1)(d) of the Charter herein.

iv. Alleged violation of the right to be tried by an impartial tribunal

109. The Applicant avers that the assessors who were aiding the magistrate in the District Court challenged the veracity of his testimony and also questioned his witness, which he argues is conduct that is proscribed in an adversarial system. Citing the case of the Tanzania Court of Appeal, *Mapuji Mtogwashinge v. the Republic*, the Applicant argues that the duty of the assessors is to ask the witnesses questions for clarification purposes rather than cross-examining them. He argues therefore that the cross-examination resulted in "actual or perceived bias".

[34] *Wilfred Onyango Nganyi v. Tanzania* (merits) § 155.

110. The Applicant argues that as a result of the above mentioned "actual or perceived bias", the Respondent State violated his right under Article 7 of the Charter by failing to try him by an impartial tribunal.

111. The Respondent State did not respond to this claim.

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112. Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or tribunal".

113. The Court notes that, to ensure impartiality, any court must offer sufficient guarantees to exclude any legitimate doubt.[35] However, the Court observes that the impartiality of a judicial authority is presumed and undisputable evidence is required to refute this presumption. In this regard, the Court shares the view that "the presumption of impartiality carries considerable weight, and the law should not carelessly invoke the possibility of bias in a judge"[36] and that "whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question. The Court must, therefore, consider the matter very carefully before making a finding"[37]

114. The Applicant alleges that the assessors cross-examined him during his trial resulting in bias. Nevertheless, the Applicant has not demonstrated clearly with evidence that the assessors did in fact cross-examine him, as opposed to

[35] *Alfred Agbesi Woyome v. Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits) § 128; *Findlay v UK* (1997) 24 EHRR 221 § 73. See also Nsongurua J Udombana, 'The African Commission on Human and Peoples' Right and the development of fair trial norms in Africa' 2006 *African Human Rights Law Journal* Vol 6/2.

[36] *Woyome v. Ghana* (merits) ibid; *Wewaykum Indian Band v Canada* 2003 231 DLR (4th) 1 (Wewaykum).

[37] *Woyome v. Ghana* (merits); Okpaluba and Juma "The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa" PELJ 2011 (14) 7 at 261.

seeking for clarification. In any case, from the record, the assessors were involved in questioning both the prosecution witnesses as well as the defence witnesses in order to solicit for more information. Thus, the Court does not find any manifest error in their conduct to require its intervention.

115. Consequently, the Court finds that the Respondent State did not violate Article 7(1)(d) herein.

B. Alleged violation of the right to life

116. The Applicant submits that the mandatory death sentence does not respect the right to life rather creates presumption in favour of death. He further argues that, the Respondent State would not have sentenced the Applicant to death if it had considered his circumstances.

117. According to the Applicant, the death penalty is a reserve for the most heinous crimes. The Applicant does not believe that killing of one individual falls under the category of “most heinous crimes”. Finally, the Applicant submits that the Respondent State’s response to this allegation is not satisfactory.

118. The Respondent State argues that the death sentence was the right sentence for the offence of murder according to its laws and the established jurisprudence of its Court of Appeal. Thus, it was rightfully meted out by the Court of Appeal.

119. According to the Respondent State, the imposition of the death penalty has not been abolished by international law. It argues that the ICCPR provides that life should not be arbitrarily deprived but that the death penalty should be imposed for the most serious crimes.

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120. The Court notes that the right to life alleged to have been violated as a result of the mandatory death sentence, is protected under Article 4 of the Charter**.**

121. Article 4 of the Charter provides that "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

122. The Court observes that, despite a global trend towards the abolition of the death penalty, including the adoption of the Second Option Protocol to the International Covenant on Civil and Political Rights, the death penalty is still present in the legal system of many states.

123. As regards the substitution of the life sentence for the death penalty by the Court of Appeal, the Court notes that the Court of Appeal made reference to Section 197 of the Respondent State's Penal Code and its own jurisprudence to decide to "set aside the illegal sentence, and impose the appropriate sentence of death." The Court therefore infers that it is the mandatory nature of the death penalty in the Respondent State's books that led to the substitution of the punishment by the Court of Appeal.

124. The Court recalls its jurisprudence:

> a system of mandatory capital punishment deprives the complainant of the most fundamental right, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her cause.[38]

125. The Court restates that, the mandatory imposition of the death penalty as provided for in Section 197 of the Penal Code of Tanzania does not permit a

[38] *Ally Rajabu v. Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations) § 102.

convicted person to present mitigating evidence and therefore applies to all convicts without regard to the circumstances in which the offence was committed.

126. Moreover, in all cases of murder, the trial court is left with no other option but to impose the death sentence. The court is thus deprived of the discretion, which is inherent in every independent tribunal to consider both the facts and the applicability of the law, especially how proportionality should apply between the facts and the penalty to be imposed. In the same vein, the trial court lacks discretion to take into account specific and crucial circumstances such as the degree of participation of each individual offender in the crime.[39]

127. The Court further notes that, the arbitrariness of the mandatory imposition of the death penalty and breach of fair trial rights, is affirmed by relevant international case-law.[40] The Privy council held[41]:

> In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.

128. Furthermore, domestic courts in some African countries, have adopted the same interpretation in finding the mandatory imposition of the death penalty

[39] *Ibid*, § 109.
[40] See *Ally Rajabu and others v. Tanzania* (merits and reparations) § 110; *Thompson*, *op. cit.*; *Kennedy v. Trinidad & Tobago*, Comm. No. 845/1999, U.N. Doc. CCPR/C/67/D/845/1999 (2002) (U.N.H.C.R.), 7.3; *Chan v. Guyana*, Comm. No. 913/2000, U.N. Doc. CCPR/C/85/D/913/2000 (2006) (U.N.H.C.R.), 6.5; *Baptiste*, *op. cit.*; *McKenzie*, *op. cit.*, *Hilaire and Others*, *op. cit.*; *Boyce and Another*, *op. cit*.
[41] Privy Council, *Hughes v the Queen* (Spence & Hughes) (unreported, 2 April 2001).

arbitrary and in violation of due process.[42] To this end, the Supreme Court of Kenya held[43]:

> Therefore … it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavours such as when the appeal is placed before another body for clemency.

129. Furthermore, that[44]:

> Section 204 of the (Kenyan) Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

130. The Court notes that, the mandatory nature of the death penalty as provided for under Section 197 of the Penal Code, leaves the national courts with no choice but to sentence a convict to death, resulting in arbitrary deprivation of life. Therefore, Section 197 of the Penal Code contravenes the right to life.

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[42] See *Francis Karioko Muruatetu & Another v. Republic* [2017] eKLR; *Mutiso v. Republic*, Crim. App. No. 17 of 2008 at 8, 24, 35 (July 30, 2010) (Kenya Ct. App.); *Kafantayeni v. Attorney General*, [2007] MWHC 1 (Malawi High Ct.) and *Attorney General v. Kigula* (SC), [2009] UGSC 6 at 37-45 (Uganda Sup. Ct.).
[43] *Francis Karioko Muruatetu & Another v. Republic* [2017] eKLR § 43.
[44] *Ibid* § 48.

131. In light of the foregoing, the Court therefore finds that the Respondent State violated Article 4 of the Charter.

C. Alleged violation of the right to dignity

132. The Applicant argues that the Respondent State violated Article 5 of the Charter by executing the death penalty through a brutal way, that is, by hanging. Relying on the Commission's case of *Interights and Ditshwanelo v The Republic of Botswana*[45], the Applicant submits that the death penalty should be carried out in a manner that will cause the least amount of physical and mental suffering.

133. The Respondent State did not respond to this allegation.

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134. Article 5 of the Charter provides:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

135. The Court notes that, in the instant case, the Applicant challenges the execution of the death penalty by hanging. The Court observes that many methods used to implement the death penalty may amount to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto.[46] In line with the very rationale for prohibiting methods of execution that

[45] ACHPR, Communication 319/06, *Interrights & Ditshwanelo v. Botswana* (ACHPR).
[46] See *Ally Rajabu v. Tanzania* (merits and reparations) § 118; *Jabari v. Turkey*, Judgment, merits, App No 40035/98, ECHR 2000-VIII (deporting a woman who risked death by stoning to Iran would violate the prohibition of torture).

amount to torture or cruel, inhuman and degrading treatment, the prescription should therefore be that, in cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible.[47]

136. The Court observes that hanging a person is one of such methods and it is therefore inherently degrading. Furthermore, having found that the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature, this Court finds the method of implementation of that sentence, that is, hanging, inevitably encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment. [48]

137. As a consequence of the above, the Court finds that the Respondent State has violated Article 5 of the Charter.

VIII. REPARATIONS

138. The Applicant prays the Court to:

a. Award reparations of USD 100,000 in moral damages for the Applicant and USD 5,000 each for the Applicant's co-parent and son; USD 76,789 for material loss, USD 715 for material loss suffered by Applicant's co-parent;
b. Order the release of the Applicant;
c. Order that the Respondent State amend its Penal Code and related legislation concerning the death sentence to render it complaint with Article 4 of the African Charter.

139. The Respondent State prays the Court to reject the prayer of the Applicant for reparations.

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[47] See *Ally Rajabu v. Tanzania* (merits and reparations) *ibid*; *Chitat Ng*, *op. cit.*, 16.2.
[48] *Ally Rajabu v. Tanzania* (merits and reparations) § 119.

140. 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."

141. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full prejudice suffered. Finally, the Applicant bears the onus to justify the claims made.[49]

142. As this Court has earlier found, the Respondent State violated the Applicants' rights to a fair trial, life and dignity guaranteed under Articles 7, 4 and 5 of the Charter respectively. Based on these findings, the Respondent State's responsibility has been established. The prayers for reparation are therefore being examined against these findings.

143. As stated earlier, applicants must provide evidence to support their claims for material prejudice. The Court has also held previously that the purpose of reparations is to place the victim in the situation prior to the violation.[50]

144. The Court has further held, with respect to moral prejudice, it exercises judicial discretion in equity.[51] In such instances, the Court has adopted the practice of awarding lump sums.[52]

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[49] See *Armand Guehi v. Tanzania* (merits and reparations) § 157. See also, *Norbert Zongo and Others v. Burkina Faso* ((reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346 §§ 52-59; and *Reverend Christopher R. Mtikila v. Tanzania* (reparations) §§ 27-29.

[50] See *Norbert Zongo and Others v. Burkina Faso* (reparations) §§ 57-62.

[51] See *Armand Guehi v. Tanzania* (merits and reparations) § 181; and *Lucien Ikili Rashidi v. Tanzania*, ACtHPR, Application no. 009/2015, Judgment of 28 March 2019 (merits and reparations) § 119.

[52] See *Armand Guehi v. Tanzania* (merits and reparations) § 177; *Norbert Zongo and Others v. Burkina Faso* (reparations) § 62.

A. Pecuniary reparations

i. Material Prejudice suffered by the Applicant

145. The Applicant submits that he suffered financial loss due to his incarceration. He claims that he was running a successful auto-mechanic business earning Tanzanian Shillings Twelve million (TZS 12,000,000) annually. Thus, the Applicant is claiming an amount of Tanzanian Shillings One Hundred and Eighty million (TZS 180,000,000) as compensation for the fifteen year period that he has spent in prison.

146. The Respondent State submits that the Court should reject this claim.

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147. The Court recalls that in order for a claim for material prejudice to be granted, the Applicant must show a causal link between the violation found and the loss suffered, as well as demonstrate the loss suffered with evidence.[53]

148. In the instant case, the Court notes that the Applicant has failed to show the link between the violations found and the material prejudice which he claims to have suffered. Furthermore, the Court observes that, the Applicant filed an affidavit that failed to disclose any evidence of the business he claimed to have been running. Also, he did not provide documentary evidence such as a business licence or registration with the revenue authorities as proof of the existence of business he claimed to have been running before his arrest and conviction. Consequently, the Court rejects this claim.

[53] *Supra note* 53.

ii. Material Prejudice suffered by Indirect Victims

149. The Applicant submits that his former fiancée, Ms. Abigael Mcharol suffered financial loss due to his incarceration. He claims that she incurred expenses in handling their son's expenses and also by visiting him in prison. Thus, the Applicant is claiming an amount of Tanzanian Shillings One Million, Six Hundred and Seventy Five Thousand (TZS 1,675,000) as compensation for the material prejudice that his former fiancée suffered.

150. The Respondent State submits that the Court should reject this claim.

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151. Likewise, the Court notes that the Applicant has failed to show the causal link between the violation found and the alleged prejudice suffered herein. Also, he has neither provided documentary evidence to show filiation such as birth certificates for children, attestation of paternity or maternity for parents, and marriage certificates for spouses or any equivalent proof, nor has he provided evidence of the material prejudice claimed, such as receipts. The Court thus dismisses the prayer of the Applicant herein.

iii. Moral Prejudice suffered by the Applicant

152. The Applicant submits that he suffered mental anguish having been on death row for at least seven (7) years. He further submits that his life plan was disrupted through his incarceration. The Applicant did not make a specific claim in this regard.

153. The Respondent State argues that the Applicant's prayer herein should be dismissed.

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154. The Court notes that the disruption of life plan is related to the Applicant's incarceration. The Court, having not found that the Applicant's incarceration was unlawful, dismisses this claim.

155. The Court however notes that it has found the mandatory imposition of the death penalty in violation of Articles 4 and 5 of the Charter. The Court recalls its earlier cited case-law to the effect that, in respect of human rights violations, moral prejudice is awarded in equity on the basis of the court's discretion.

156. In the instant case, the Court is cognisant of the fact that the mandatory nature of the death sentence results in the gravest psychological suffering as convicted persons have no opportunity to argue for a lesser punishment than death.

157. The Court notes that it also found that the Applicant's right to be tried within a reasonable time was violated and finds that the Applicant suffered emotional distress due to the prolonged pre-trial detention.[54]

158. In view of the above, the Court finds that the Applicant endured psychological suffering due to the violations suffered and awards himmoral damages to the tune of Tanzanian Shillings Four Million (TZS 4,000,000).

iv. Moral Prejudice suffered by the Indirect Victims

159. The Applicant submits that his former fiancée, Ms. Abigael Mcharol suffered mental anguish out of concern for the Applicant, the father of her child in relation to his incarceration. He also submits that his son, Baraka and his elder brother Nuhu Juma Shoo, also suffered emotional distress in relation to his imprisonment and incarceration.

[54] See *Armand Guehi v. Tanzania* (merits and reparations) § 181.

160. The Respondent State submits that the Court should reject the Applicant's prayer herein.

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161. The Court considers that as it has held in its earlier judgments[55], indirect victims must prove their filiation to the Applicant to be entitled to pecuniary reparations. Documents required include birth certificates for children, attestation of paternity or maternity for parents, and marriage certificates for spouses or any equivalent proof.[56] The Court notes that, in the present case, while the Applicant filed an affidavit to indicate his relations to the indirect victims, he has not provided proof of filiation through a marriage certificate, birth certificate or attestation of paternity.

162. In any event, the alleged prejudice to the Applicants' family members were as a result of his incarceration, which this Court did not find unlawful. The prayers are therefore dismissed.

B. Non-pecuniary reparations

i. Restitution

163. The Applicant prays the Court to order his release.

164. The Respondent State prays the Court to reject the Applicant's prayer for release.

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[55] See *Alex Thomas v. Tanzania*, ACtHPR, Application no 005/2013, Judgment of 4 June 2019 (reparations) §§. 49-60; *Mohamed Abubakari v. Tanzania*, ACtHPR, Application no 007/2013, Judgment of 4 June 2019 (reparations) §§. 59-64.
[56] See *Alex Thomas v. Tanzania* (reparations) §. 51; *Mohamed Abubakari v. Tanzania* (reparations) §. 61.

165. With regard to the Applicant's release, the Court has established that it would make such an order, "if an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice"[57].

166. In the instant case, the Court finds that the circumstances to order the release of the Applicant, have not been fulfilled and thus dismisses the Applicant's prayer.

ii. Guarantees of Non-Repetition

167. The Applicant prays the Court to Order the Respondent State to amend its Penal Code and related legislation concerning the death sentence to render it complaint with Article 4 of the Charter.

168. The Respondent State did not respond to this prayer.

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169. The Court considers that guarantees of non-repetition are generally aimed at addressing violations that are systemic and structural in nature rather than to remedy individual harm.[58] The Court has however, also held that non-

[57] *Jibu Amir Mussa and Another v. Tanzania*, ACtHPR, Application no. 014/2015, judgment of 28 November 2019 (merits) §§ 96 and 97; *Minani Evarist v Tanzania* (merits) § 82; and *Mgosi Mwita Makungu v Tanzania* (merits) § 84. See also *Del Rio Prada v. Spain*, European Court of Human Rights, Judgment of 10/07/2012, § 139; *Assanidze v Georgia* (GC) - 71503/01, Judgment of 8/04/2004, § 204; *Loayza-Tamayo v. Peru, Inter-American Court of Human Rights*, Judgment of 17/09/1987, § 84.

[58] See *Lucien Ikili Rashidi v. Tanzania, op. cit.*, §§, 146-149. See also, *Armand Guehi v. Tanzania*, *op. cit.*, § 191; and *Norbert Zongo and Others v. Burkina Faso* (reparations), §§ 103-106.

repetition could apply in individual cases where there is a likelihood of continued or repeated violations.[59]

170. In the instant case, the Court found that the Respondent State violated Article 4 of the Charter by providing for the mandatory imposition of the death penalty in its Penal Code, and Article 5 by providing for its execution by hanging. The Court orders that the Applicant should be sentenced afresh. The Court also orders the Respondent State to undertake all necessary measures to repeal from its laws the provision for the mandatory imposition of the death sentence.

IX. COSTS

171. The Respondent State prays the Court to order Applicant to bear the costs. The Applicant did not make any prayer as regards costs.

172. Pursuant to Rule 32(2) of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

173. In light of the foregoing, the Court rules that each party shall bear its own costs.

X. OPERATIVE PART

174. For these reasons:

The COURT

Unanimously,

[59] See *Lucien Ikili Rashidi v. Tanzania, op. cit.*; See also *Armand Guehi v. Tanzania*, *op. cit.*; and *Reverend Christopher R. Mtikila v. Tanzania* (reparations) § 43.

On jurisdiction

i. *Dismisses* the objection to its jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections to the admissibility of the Application;

iv. *Declares* the Application, admissible.

On merits

v. *Finds* that the Respondent State has not violated the right to be presumed innocent under Article 7(1)(b) of the Charter;

vi. *Finds* that the Respondent State has not violated the right to defence under Article 7(1)(c) of the Charter;

vii. *Finds* that the Respondent State has not violated the Applicant's right to be tried by an impartial tribunal under Article 7(1)(d) of the Charter;

viii. *Finds* that the Respondent State violated the right to be tried within a reasonable time protected under Article 7(1)(d) of the Charter.

ix. *Finds* that the Respondent State violated the right to life under Article 4 of the Charter in relation to the mandatory imposition of the death penalty;

x. *Finds* that the Respondent State has violated the right to dignity under Article 5 of the Charter in relation to method of the execution of the death penalty.

On reparations

Pecuniary reparations

xi. *Rejects* the Applicant's prayer for reparations for material prejudice;

xii. *Rejects* the prayer for reparations for moral prejudice suffered by the indirect victims;

xiii. *Grants* Tanzanian Shillings Four Million (TZS 4,000,000) for moral prejudice suffered;

xiv. *Orders* the Respondent State to pay the amount indicated under sub-paragraph (xiii) free from taxes within six (6) months, effective from the notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

xv. *Dismisses* the prayer for release;

xvi. *Orders* the Respondent State to take all necessary measures, within one (1) year from the notification of this Judgment, to remove the mandatory imposition of the death penalty from its laws;

xvii. *Orders* the Respondent State to take all necessary measures, through its internal processes and within one (1) year of the notification of this Judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death sentence and upholds the discretion of the judicial officer;

On Implementation and reporting

xviii. Orders the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

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

Signed:

Blaise TCHIKAYA, Vice President;

Ben KIOKO, judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. Ntsebeza, Judge;

Modibo SACKO, judge;

and Robert ENO, Registrar.

Done at Arusha, this Thirtieth Day of September, in the Year two Thousand and Twenty One in English and French, the English text being authoritative.