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

MAKUNGU MISALABA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 033/2016

JUDGMENT

7 NOVEMBER 2023

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

TABLE OF CONTENTS

The Court composed of: Modibo SACKO, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Dennis D. ADJEI – 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 (hereinafter referred to as "the Rules"),[1] Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

ln the Matter of:

Makungu MISALABA

Represented by:

Advocate Fulgence MASSAWE designated by Cornel University Law School, International Human Rights Law Clinic

V.

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Mr. Gabriel P. MALATA, Solicitor General, Office of the Solicitor General
ii. Ms Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General;
iii. Ms Caroline Kitana CHIPETA, Director of Legal Unit, Ministry of Foreign Affairs and East African Cooperation;

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

iv. Ms Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers;
v. Ms Aidah KISUMO, Senior State Attorney, Attorney General's Chambers; and
vi. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Mr. Makungu Misalaba (hereinafter referred to as "the Applicant") is a Tanzanian national who, on 10 October 2013, was convicted of murder and sentenced to death, a sentence that was subsequently commuted to life imprisonment by a presidential pardon granted in May 2020. However, he maintains that his fair trial rights were violated during his trial and appellate proceedings before national courts.

2. The Respondent State is 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 the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations (hereinafter referred to as "the Declaration"). On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal did not have any effect on pending cases as well as on new cases filed

before withdrawal took effect one (1) year after its deposit,[2] in the instant case, on 22 November 2020.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the file that on 10 October 2013, the Respondent State's High Court convicted the Applicant of the offence of "double murder" for killing his wife and son at Chandulu Village, Magu District, Mwanza Region and sentenced him to death. Dissatisfied with this verdict, the Applicant, on 10 October 2013, appealed to the Court of Appeal of Tanzania against both his conviction and sentence.

4. On the 30 October 2014, the Court of Appeal dismissed his appeal. Subsequently, on 15 December 2014, the Applicant filed before the same court an application for review of the decision to dismiss his appeal, which the Applicant later withdrew.

5. The Applicant claims that in May 2020, the death sentence was commuted to life imprisonment through a Presidential pardon.

B. Alleged violations

6. The Applicant contends that the imposition of the death sentence is a violation of the Respondent State's constitution (the Constitution) and the Universal Declaration of Human Rights (UDHR). The Applicant specifically alleges that the Respondent State violated his rights; namely,

    i. The right to be tried without undue delay;

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, § 38.

ii. The right to a fair trial and due process given the fact that he was convicted on the basis of involuntary confession made without the assistance of counsel and disregarding mitigating circumstances;
iii. The right to freedom from torture as a result of him being on death row; and
iv. The right to life, contrary to Article 4 of the Charter and Article 6 of the International Covenant on Civil and Political Rights (ICCPR) by imposing a mandatory death penalty.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Applicant filed his Application on 8 June 2016 and this was served on the Respondent State on 27 July 2016.

8. The Respondent State filed its Response on 16 April 2018 to which the Applicant filed his Reply on 4 September 2018.

9. On 16 March 2018, the Court accepted the offer from Cornell University to provide the Applicant free legal representation after receiving a signed Power of Attorney from the Applicant accepting the said representation. Cornell University informed the Court that it had designated Advocate Fulgence Massawe to represent the Applicant.

10. On 23 January 2019, the Applicant requested to amend and supplement his Application to include a request for reparations, and to submit further evidence. The Court granted the Applicant's request on 4 March 2019 and the Applicant filed the said submissions on 9 May 2019, which were transmitted to the Respondent State on 20 May 2019.

11. On 14 February 2020, the Respondent State filed its Response to the Applicant's amended Application.

12. On 10 May 2020, the Applicant requested for leave to present additional evidence, which was subsequently granted. On 8 September 2020, The Applicant submitted his additional evidence, which was served on the Respondent State on 30 November 2020.

13. The Respondent State did not make any observations on the additional evidence.

14. Pleadings were closed on 8 June 2022 and Parties were duly notified.

IV. PRAYERS OF THE PARTIES

15. The Applicant prays the Court to:

    i. Order the Respondent to release him;
    ii. Grant him reparations; and
    iii. Order the Respondent state to make appropriate constitutional and legislative changes to address the systemic factors that led to the violations of the Applicant's rights.

16. The Applicant further requests the Court, in the alternative, to:

    i. Order the Respondent to conduct a resentencing hearing at which he can be present, and the court can consider individualized mitigating evidence, as mandated by international law;
    ii. Order the Respondent State to take appropriate measures to remedy the violations within a reasonable time and to inform the Court, within six months of the Judgment, of the measures taken;
    iii. Award reparations for the moral damage he suffered as a result of the violation of his rights;
    iv. Order the restoration of his liberty or, in the alternative, direct the Respondent State to vacate the death sentence and remove him from death row and commute his sentence to a term of years in prison; and
    v. Order the Respondent State to amend its law to ensure respect for life.

17. The Respondent State prays the Court to:

i. Find that the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this Application;
ii. Find that the Application does not meet the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;
iii. Find that the Application does not meet the admissibility requirements stipulated under Rule 40(6) of the Rules of Court; and
iv. Declare the Application inadmissible and duly dismiss it.

18. The Respondent State further prays that the Court to:

i. Find that the Respondent State did not violate the Applicant's rights provided under Article 3(2) of the Charter;
ii. Find that the Respondent State did not violate the Applicant's rights provided under Article 4 of the Charter;
iii. Find that the Respondent State did not violate the Applicant's rights provided under Article 5 of the Charter;
iv. Find that the Respondent State did not violate the Applicant's rights provided under Article 7(1)(d) of the Charter;
v. Dismiss the Application for lack of merit;
vi. Dismiss the Applicant's prayers;
vii. Find the Applicant continue to serve his sentence;
viii. Dismiss the Applicant's request for reparations; and
ix. Order the Applicant to bear the cost of this Application.

V. JURISDICTION

19. Pursuant to Article 3 of the Protocol:

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 instruments ratified by the States concerned.

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

20. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

21. On the basis of the above-cited provisions, the Court must ascertain its jurisdiction and dispose of objections to its jurisdiction, if any.

22. The Respondent State raises objections to the material jurisdiction of the Court. The Court will consider the said objection before examining other aspects of jurisdiction, if necessary.

A. Objections to material jurisdiction

23. The Respondent State raises an objection to the material jurisdiction of the Court based, first, on the ground that the Court lacks jurisdiction to reverse the decisions of its Court of Appeal and, secondly, that the Court is being called upon to sit as a court of first instance.

24. The Respondent State avers that the jurisdiction of the Court emanates from Article 3(1) of the Protocol and Rule 26 of the Rules of Court. According to the Respondent State, these provisions provide that "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."

25. The Respondent State contends in the first place that, the Court has no jurisdiction to assess the evidence adduced in the course of the Applicant's trial and appeal since the Applicant is requesting the Court to quash and set aside his conviction and sentence. The Respondent State argues that the Court has no jurisdiction to do so, since both the conviction and sentence were upheld by the Court of Appeal, which is its highest court. It is the

Respondent State's contention that the mandate of this Court is to make declaratory orders and not reverse the decisions of the Court of Appeal.

26. The Respondent State further submits that this Court is not a court of first instance to determine issues which were never considered by the domestic courts and are being raised by the Applicant for the first time before this Court. It follows, the Respondent State avers, that this Court should find that it lacks jurisdiction to determine them.

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27. The Applicant asserts that the material jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the state concerned. He argues that the Court exercises its jurisdiction over an application as long as the subject matter thereof involves alleged violations of rights protected by the Charter or any other international human rights instruments ratified by a Respondent State.

28. According to the Applicant, the Court's material jurisdiction is established with regard to his Application since the subject matter of the Application involves alleged violations of the rights protected by the Charter, namely, the right to equal protection, to life, to dignity and to a fair trial for which the Court has material jurisdiction.

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29. The Court notes that by virtue of 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.[3]

[3] *Kalebi Elisamehe v. United Republic of Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 265, § 18.

30. The Court reaffirms that, in line with its well-established case-law, it possesses the competence to review pertinent proceedings before domestic courts to assess their conformity with the standards outlined in the Charter or any other instrument ratified by the State concerned.[4] Such review does not entail acting as a court of first instance. Therefore, the Respondent State's objection regarding the Court potentially acting as a court of first instance is hereby dismissed.

31. The Court further recalls its established jurisprudence, "that it is not an appellate body with respect to decisions of national courts."[5] However, "... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are compatible with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[6] In doing so, this Court would not be assuming the role of an appellate court when examining the allegations presented by the Applicant. Accordingly, the Respondent State's objection in this regard is dismissed.

32. In view of the foregoing, the Court finds that it has material jurisdiction to consider the present Application.

B. Other aspects of jurisdiction

33. The Applicant argues that the Court has personal, temporal and territorial jurisdiction to consider his Application. He elaborates that the Respondent State is party to the Charter and the Protocol. Furthermore, the violations of his rights are continuous in nature as he remains convicted, subject to the death sentence and incarcerated on death row as a result of the breaches

[4] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14; *Kennedy Ivan v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 26; *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.
[5] *Mtingwi v. Malawi* (jurisdiction), *ibid,* § 14.
[6] *Ivan v. Tanzania* (merits), *ibid,* § 26*; Guehi v. Tanzania* (merits and reparations)*, supra*, § 33; *Viking and Nguza v. Tanzania* (merits), *supra,* § 35.

of his rights under the Charter. The Applicant also states that the alleged violations occurred within the Respondent State's territory.

34. The Court notes that the Respondent State does not raise objections to the personal, temporal and territorial aspects of the Court's jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,[7] the Court must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding to consider the Application.

35. With regard to personal jurisdiction, the Court recalls, as indicated in paragraph 2 of this Judgment that, on 21 November 2020, the Respondent State deposited the instrument of withdrawal of the Declaration under Article 34(6) of the Protocol. The Court has held that such withdrawal does not apply retroactively. Hence, it has no bearing on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one (1) year after its deposit.[8]

36. The instant Application having been filed before the Respondent State deposited its notice of withdrawal of the Declaration, is thus not affected by the said withdrawal. Therefore, the Court concludes that it has personal jurisdiction.

37. The Court has temporal jurisdiction insofar as the alleged violations contained in the Application were committed after the Respondent State became a party to the Charter and the Protocol. Additionally, such alleged violations are of a continuing nature, as the Applicant is currently serving a life sentence in prison, which he maintains was unfairly imposed and thus constitutes a violation of his right to a fair trial.[9]

[7] Rule 39(1) of Rules of Court, 2 June 2010.
[8] *Cheusi v. Tanzania* (judgment), *supra,* §§ 35-39. See also *Ingabire Victoire Umuhoza v. Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.
[9] *Norbert Zongo and Others v. Burkina Faso* (preliminary objection) (21 June 2013) 1 AfCLR 197, §§ 71-77.

38. The Court has territorial jurisdiction given that the alleged violations occurred within the Respondent State's territory.

39. In light the foregoing, the Court holds that it has jurisdiction to determine the present Application.

VI. ADMISSIBILITY

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

41. In line with 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."

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

> Applications filed before the Court shall comply with all of the following conditions:
>
> a. indicate their authors even though the latter requests anonymity;
> b. are compatible with the Constitutive Act of the African Union and the Charter;
> c. are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
> d. are not based exclusively on news disseminated through the mass media;
> e. are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f. are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as

being the commencement of the time limit within which it shall be seized with the matter; and

g. do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

43. The Respondent State raises objections to the admissibility of the Applications on the basis of non-exhaustion of local remedies and failure to file the Application within a reasonable time. The Court will therefore consider the said objections before examining other conditions of admissibility, if necessary.

A. Objection based on non-exhaustion of local remedies

44. The Respondent State contends that the Applicant had legal remedies available to him within its jurisdiction, which he could have pursued prior to filing his Application. It asserts that the Applicant failed to exhaust local remedies by filing a constitutional petition for enforcement of his basic rights under its Basic Rights and Duties Enforcement Act [Cap 3 REV 2002] while the said remedy was available.

45. The Respondent State further submits that the Applicant raised new allegations before this Court, which he had the opportunity to raise as grounds of appeal before the Court of Appeal, notably, his contention regarding the credibility of prosecution witnesses. Therefore, the Respondent State asserts that it was premature to bring the Application before this Court.

46. The Applicant on his part avers that Rule 50(2) of the Rules sets forth the conditions of admissibility for submitting applications to the Court, including the requirement that any given application should be filed “after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”. The Applicant avers that he exhausted all ordinary local

remedies, as he went through all the required criminal trial processes up to the Court of Appeal, which is the highest court in the Respondent State.

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47. The Court takes note that, in accordance with Rule 50(2)(e) of the Rules, any application submitted before it must fulfil the requirement of exhaustion of local remedies unless they are unavailable, ineffective, or the procedures to pursue them are unduly prolonged.[10] This requirement seeks to ensure that States have the opportunity to address human rights violations occurring within their jurisdiction before an international body is called upon to intervene. It underscores the subsidiary role of international human rights bodies in safeguarding human and peoples' rights. Throughout its established jurisprudence, the Court has consistently upheld that for this admissibility requirement to be fulfilled, the remedies to be exhausted must be ordinary judicial remedies.[11]

48. In the present case, the Court observes that the Court of Appeal, which is the highest court in the Respondent State, dismissed the Applicant's appeal on 27 October 2014. While the Applicant contends that he had lodged an application for review of this decision, the appellate procedure through which the Court of Appeal upheld the conviction and sentence is the final ordinary judicial remedy accessible to the Applicant in the Respondent State.

49. With regard to the Respondent State's contention that the Applicant did not raise any issue on the credibility of prosecution witnesses during domestic proceedings, the Court is of the view that this alleged violation occurred in the course of the domestic judicial proceedings that led to the Applicant's

[10] *Thomas v. Tanzania* (merits), *supra*, § 64; *Kennedy Owino Onyachi and Charles Mwanini Njoka v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 56; *Werema Wangoko Werema and Wasiri Wangoko Werema v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 40.
[11] *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 308, § 95.

conviction and sentence. The allegation forms part of the "bundle of rights and guarantees" relating to the right to a fair trial which was the basis of the Applicant's appeals.[12] The domestic judicial authorities had ample opportunity to address this allegation, so that it is unreasonable to require the Applicant to file a new application before the domestic courts seeking redress for this claim.[13]

50. Accordingly, the Court finds that the Applicant exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules.

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

51. The Respondent State submits that, in the event that the Court finds that the Applicant exhausted local remedies, the Application should be dismissed for not being filed within a reasonable time from the date of exhaustion of local remedies. In this regard, the Respondent State states that its Court of Appeal delivered its decision on the 27 October 2014 whereas this Application was filed before this Court on 8 June 2016, which is after a period of one (1) year and seven (7) had lapsed.

52. The Respondent State submits that although Rule 50(2)(e) of the Rules does not quantify a period of reasonable time, developments in international human rights jurisprudence have established a period of six (6) months as reasonable time. It asserts that after the six-month period has elapsed, the "[European/Inter-American] Human Rights Court and Commission do not entertain the communication." The Respondent State also contends that the instant Applicant does not mention any impediments that prevented them from lodging the Application within six (6) months, which is regarded as a reasonable time, as held in the case of *Michael Majuru v. Zimbabwe*.

[12] *Thomas v. Tanzania* (merits), *supra*, § 60; *Onyachi and Njoka v. Tanzania*, *supra*, § 68.
[13] *Thomas v. Tanzania*, *ibid*, §§ 60-65.

53. The Respondent State contends that the general maxim on admissibility applies that for an application to be considered admissible, all the conditions for admissibility prescribed in Rule 50 of the Rules of the Court have to be met. The Respondent State therefore submits that, as the instant Application does not fulfil all the conditions, it should be deemed inadmissible and be dismissed with costs.

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54. On his part, the Applicant avers that he submitted his Application within a reasonable time. He states that he applied for a review of the decision to dismiss his appeal to the Court of Appeal on 15 December 2014. He submitted his application before this Court on 8 June 2016. At the time of submitting his application before this Court, he was still to hear from the Court of Appeal with regards to his application for review. The Applicant alleges that the time he waited after submitting his application for review, which is one year and seven months, should be considered within the time frame for exhausting local remedies.

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55. The Court acknowledges that the Charter and Rules do not stipulate a specific timeframe for filing Applications after the exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules state that an application must 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." The absence of an explicit time-limit is intended to allow for flexibility, ensuring that the Court considers individual circumstances while ensuring expeditious filing of cases.

56. In this regard, the Court has established that "the reasonableness of the time frame for seizure depends on the specific circumstances of the case

and should be determined on a case-by-case basis."[14] Accordingly, the reasonableness of the timeframe for seizure depends on the specific circumstances of the case.[15]

57. Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[16] indigence, illiteracy, lack of information about the existence of the Court,[17] and the use of extra-ordinary remedies.[18]

58. This notwithstanding, the Court has held that the prerequisite to justify reasonableness does not apply in instances where the delay in filing is relatively short and thus, manifestly reasonable.[19]

59. In the instant case, the Court observes from the record that the Applicant exhausted local remedies on 27 October 2014, when the Court of Appeal upheld his conviction and sentence. Subsequently, he filed an application for review of the same decision on 30 October 2014, only to withdraw it later. The Applicant's Application before this Court was filed on 8 June 2016.

60. The issue for determination is whether the period running from 27 October 2014, when the Applicant exhausted local remedies, to 8 June 2016, when he seized this Court, that is, a period of one (1) year and seven (7) months, is reasonable in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.[20]

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[14] *Zongo v. Burkina Faso* (preliminary objection), *supra*, § 121.
[15] *Norbert Zongo and Others v. Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also *Thomas v. Tanzania* (merits), *supra*, § 73.
[16] *Thomas v. Tanzania* (merits), *supra*, § 73; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[17] *Ramadhani v. Tanzania* (merits), *supra*, § 50; *Jonas v. Tanzania*, *supra*, (merits) § 54.
[18] *Guehi v. Tanzania* (merits and reparations), *supra*, § 56; *Werema and Another v. Tanzania* (merits), *supra*, § 49; *Alfred Agbessi Woyome v. Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 83-86.
[19] *Sébastien Germain Ajavon v. Republic of Benin*, ACtHPR, Application No. 065/2019, Judgment of 29 March 2021 (merits and reparations), §§ 86, 87; *Niyonzima Augustine v. United Republic of Tanzania*, ACtHPR, Application No. 058/2016, judgment of 13 June 2023 (Merits and Reparations), § 65.
[20] In this regard, the Court has previously held that four (4) years, nine (9) months and twenty-three (23) days, four (4) years, eight (8) months and thirty (30) days, four (4) years, two (2) months and twenty-three (23) days and four (4) years and thirty-six (36) days that lay, indigent and incarcerated applicants

61. The Court notes that the Applicant is indigent and lay in matters of law and incarcerated as applicants in previous cases where the Court deemed longer delays to be reasonable under similar circumstances.[21] The Court also acknowledges that the Applicant, prior to his sentence being commuted to life imprisonment, was a convicted inmate on death row, isolated from the general population with limited access to information and restricted movements.

62. In light of the circumstances, the Court concludes that the Applicant's delay of one (1) year and seven (7) months is reasonable, as defined by Article 56(6) of the Charter and Rule 50(2)(f) of the Rules. Accordingly, the Court dismisses the Respondent State's objections to the admissibility of the Applications based on failure to file the Application within a reasonable time.

C. Other conditions of admissibility

63. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 50(2)(a), (b), (c), (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 is clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules. The Court notes that the claims made by the Applicant seek to protect his rights protected under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is the promotion and protection of human and peoples' rights. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

took to file their applications was reasonable. See *Cheusi v. Tanzania* (judgment), *supra*, § 71; *Thobias Mangara Mango and Another v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 55; *Jibu Amir (Mussa) and Saidi Ally (Mangaya) v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 629, § 51; *Ivan v. Tanzania* (merits and reparations*), supra*, § 53.

[21] Ibid.

65. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, and thus meets the requirement of Rule 50(2)(c) of the Rules.

66. The Application is also not based exclusively on news disseminated through mass media as they are based on court documents from the municipal courts of the Respondent State, so that it complies with Rule 50(2)(d) of the Rules.

67. The Application does 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 as view under Rule 50(2)(g) of the Rules.

68. In view of the foregoing, the Court holds that the Application is admissible.

VII. MERITS

69. The Applicant alleges violation of the right to a fair trial due to lack of effective legal representation and conviction based on unreliable evidence; violation of the right to life as a result of imposition of mandatory death penalty without fair trial; and violation of the right to dignity/freedom form torture and inhuman treatment because of being on death row, contrary to Articles 4, 5, and 7 of the Charter, respectively and the corresponding provisions of the ICCPR. The Applicant also alleges that his right to be tried within a reasonable time was violated.

70. The Court will now address each of these allegations sequentially.

A. Alleged violation of the right to a fair trial

71. The Applicant raises multiple contentions regarding infringements upon his right to a fair trial. Specifically, he asserts that the Respondent State found him guilty based on questionable evidence and a coerced confession made without legal counsel; he endured an excessively prolonged trial period; he was denied adequate legal representation; and his trial lacked impartiality, whether in actuality or in the perception thereof. The Court will now proceed to address these allegations separately.

i. Conviction on the basis of inadmissible and inconsistent evidence

72. The Applicant alleges that he was convicted on the basis of inconsistent and non-credible evidence.

73. The Applicant submits that he was convicted on the basis of involuntary confession that he made without a lawyer. The Applicant states that when he made the confession, he was interrogated without a lawyer by the police. Furthermore, whilst he was being interrogated, he was in extreme physical and mental anguish from torture by the police and the death of his wife and son. He avers that the magistrate who took his confession, undertook a brief and superficial inquiry about his wellbeing. However, the inquiry was not sufficient to determine whether his physical pain and psychological distress impaired his ability to waive his right to remain silent. He emphasises that he was in precarious mental state and that days after committing the offence, he attempted to commit suicide in prison.

74. The Applicant further states that he was not provided with any prompt and comprehensive care after attempting to kill himself. He avers that his untreated physical injuries and mental distress created conditions for his exploitation and manipulation by his arresting officers and by the Magistrate who recorded his confession/statement.

75. According to a report by a psychologist, which was provided by the Applicant together with his amended Application, the Applicant was suffering from an acute stress reaction after committing the offence. On this basis, the Applicant avers that he was in a vulnerable situation when he was interrogated, hence he was not in a condition to waive his right to remain silent. He states that the conditions in which his confession was extracted, renders it involuntary and violate his fair trial rights.

76. The Applicant also states that during the trial within the trial, when the High Court adjudicated whether to admit his confession, it failed to make inquiry about his physical injuries, mental state, and any medical treatment he had received. In addition, the Applicant submits that the High Court did not inquire how his physical injuries and mental state contributed to his inability to understand his right to remain silent. Furthermore, he says that the High Court stated that even if the Applicant's confession was obtained through tortured before, this did not affect his confession. The Applicant states that by relying on his involuntary confession to convict and sentence him to death, the Respondent violated Articles 7 and 14 of the ICCPR and Articles 5 and 7 of the African Charter.

77. He also asserts that the absence of direct witnesses to the killings resulted in the High Court relying on unreliable hearsay evidence to convict him. In particular, the Applicant states that based on hearsay evidence, he is alleged to have quarrelled with his wife the day before he committed the offence.

78. In addition, he states that to bolster his motivation for killing his wife, the prosecution relied on further hearsay evidence of another quarrel. Furthermore, he submits that the hearsay evidence regarding the observations and opinion of Haile Cherehani (prosecution witness) further bolstered the prosecution's theory that he committed the offence.

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79. The Respondent State submits that the Court of Appeal, having considered arguments concerning the allegation that the Applicant was coerced to make a statement, came to the conclusion that the Applicant was not coerced to confess and that the Applicant understood his right to remain silent. The Respondent State further contends that the statement made by the Applicant was corroborated by prosecution witnesses.

80. With regard to the allegation that prosecution witnesses provided inconsistent facts such that their evidence is not credible, the Respondent State avers that the witnesses were credible. It contends further that the Applicant never raised this matter before the Court of Appeal. The Respondent State also submits that the Applicant does not plead, before this Court, exactly which statements made by the prosecution witnesses that are inconsistent and the evidence from the prosecution witnesses focused on different matters (facts), so it was not possible for the facts they testified on to be inconsistent.

81. With respect to the allegation that the confession statement admitted in Court was admitted despite the magistrate not following proper legal procedure, the Respondent State contends that that the magistrate followed proper legal procedure when he took down the Applicant's statement/confession. It elaborates that the Magistrate inquired whether the Applicant suffered from any assault/harm and the magistrate recorded that the Applicant only told him about the injury concerning his genitals but nothing of being assaulted.

82. Furthermore, the Respondent State also avers that the Magistrate inquired whether the Applicant understood his rights when he provided the statement. The Respondent State submits that the Court of Appeal analysed the legal procedure followed by the magistrate and concluded it was in compliance with the law. It also submits that the Applicant was accorded counsel from the pretrial stage throughout his trial.

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83. The Court observes that Article 7(1) of the Charter enshrines the fundamental principles of a right to fair trial by prescribing, *inter alia*, that, every individual has the right to have his cause heard and the right to be presumed innocent until proven guilty by a competent court or tribunal. The respect for the right to a fair trial "requires that the imposition of a sentence in a criminal offence, and in particular, a heavy prison sentence, should be based on strong and credible evidence".[22]

84. In the present case, the Applicant mainly alleges that he was convicted of murder and sentenced to the death penalty on the basis of unreliable evidence of hearsay and on the basis of involuntarily given confession, which the Respondent State disputes.

85. The Court notes, from the record, that the domestic courts convicted the Applicant relying on testimony provided by four (4) prosecution witnesses, coupled with four exhibits, including the Applicant's confession statement. It is noteworthy that the statements offered by the prosecution witnesses exhibited a degree of similarity and coherence, substantiating a consistent narrative pertaining to the commission of the crime. Although none of the witnesses were present at the material time when the crime was committed, the domestic courts found that their testimonies significantly matched the confession statement of the Applicant.

86. As regards the Applicant's contention pertaining to the involuntary nature of his confession, namely that he had been tortured before he made his confession, the High Court examined this issue through a trial within a trial and concluded that the Applicant's confession was voluntarily provided, without a threat of force or coercion, and following proper cautioning by the Justice of the Peace who recorded his statement. The caution statement included notification that his statements could be used against him during trial and that he had the right to remain silent. Importantly, the Court of

[22] *Abubakari v. Tanzania* (merits), *supra*, § 174; *Kijiji Isiaga v. United Republic of Tanzania* (merits) (2018) 2 AfCLR 218, § 67.

Appeal also upheld this verdict on appeal after a meticulous consideration of all the grounds of appeal and the intricacies relating to the case.

87. Concerning the Applicant's contention that his confession should have been discarded as it was given while he was suffering from serious physical pain and psychological distress and without a lawyer, it is pertinent to underscore that this contention essentially revolves around the voluntariness of the confession, a matter conclusively determined by the High Court.

88. As for the absence of a lawyer during the confession, the Applicant did not raise this issue before the domestic courts. In any case, the Court notes that while the Applicant had the right to be informed of the right to consult a lawyer from the moment of his arrest and detention, he has not claimed that this was not the case. The crux of the Applicant's contention is rather limited to the validity of the confession, which he claims was provided without the presence of a lawyer. In this regard, the Court wishes to emphasise that the lack of legal representation or absence of a lawyer during a confession does not automatically render the confession invalid, as long as it was given voluntarily. The Applicant's contention in this regard, therefore, lacks merit.

89. Overall, the Court does not see any manifest error or anomaly in the domestic court's assessment of the evidence relied upon to convict the Applicant, in order to warrant its intervention. In fact, the Court reiterates its established position that it is not an appellate court and as a matter of principle, it is up to national courts to decide on the probative value of a particular piece of evidence.[23] The Court cannot assume the role of the domestic courts and investigate the details and particulars of evidence used in domestic proceedings.[24]

90. In view of the above, the Court dismisses this aspect of the Applicant's allegation.

[23] *Isiaga v. Tanzania* (merits), *supra*, § 65.
[24] *Ibid*.

ii. Allegation of bias during trial

91. The Applicant alleges that his trial was not free from actual and perceived bias. He asserts that the assessors played the role of a second prosecutor, through cross-examination of witnesses, soliciting for incriminating information and stepping outside of their confined and neutral role. This, according to the Applicant, flouts the fundamental principles of a fair trial and established rules of criminal proceedings including the Respondent State's own domestic law. The Applicant insists that assessors unlawfully engaged in cross-examination in a manner which clearly showed that they took a position adverse to him and became a second prosecutor.

92. The Respondent State does not directly respond to this allegation. However, it maintains that the Applicant's trial was carried out in full compliance with its rules governing criminal proceedings.

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93. The Court notes that pursuant to Article 7(1)(d) of the Charter, every accused individual has the right to be tried by an impartial court. The Court observes that the concept of impartiality is an important component of the right to a fair trial. It signifies the absence of actual or perceived bias, or prejudice and requires that judicial officers "must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".[25]

94. In the present case, the Applicant's claim of bias pertains not to the judges overseeing his trial and appeal, but to the assessors involved in the proceedings.

95. The Court notes that in the Respondent State's system, assessors play a role in aiding judges to arrive at accurate factual determinations.

[25] *XYZ v. Republic of Benin* (judgment) (2020) 4 AfCLR 83, §§. 81-82

Consequently, the obligation of impartiality owed by judges also extends to these assessors. This is evidently because any appearance of bias among assessors has the potential to cast doubt on the accuracy of the judges' factual findings and the overall credibility of the courts.

96. It is further important to note that in the Respondent State's legal system, the role of assessors is limited to asking questions to obtain some clarifications and they "are not statutorily mandated to cross-examine witnesses".[26]

97. The Court notes from the record that in the present case, the Applicant's trial was conducted in the presence of three assessors, which the High Court approved as "neither the accused nor the prosecution has indicated doubt" and their duties were addressed to them.[27] It is evident from the record that the Applicant did not challenge the impartiality of the assessors at this stage or later in the course of his trial or appeals. At no moment did he particularly claim that the assessors overstepped their mandate and engaged in cross-examination.

98. In any case, the Court observes from the file and the Applicant's own admission that the questions posed by the assessors were not recorded. Rather, the file captures only the responses provided by the defence counsel on behalf of the Applicant. Given this circumstance, the Applicant has not presented any compelling evidence demonstrating that the assessors exceeded their designated roles by engaging in cross-examination, thereby jeopardizing the High Court's impartiality.

99. Consequently, the Court finds that the Respondent State has not violated the Applicant's right to be tried by an impartial tribunal as provided under Article 7(1)(d) of the Charter.

[26] *Mathayo Mwalimu and Another v. The Republic*; Criminal Appeal No. 147 of 2008 and *Yusuph Sylivester v. R*; Criminal Appeal No. 126 of 2014; *Lucia Anthony Bishengwe v. The Republic*, Criminal Appeal No. 96 of 2016.
[27] See Records of the High Court of Tanzania, Criminal Case No. 12 of 2012, p. 3

iii. Alleged failure to provide effective legal representation

100. The Applicant asserts that the Respondent State provided him with an ineffective legal aid counsel. This, according to him, violates Article 14 of the ICCPR and Article 7 of the Charter. He states that his counsel had neither the time nor facilities to prepare his defence. The Applicant states that he saw his Counsel for the first time in court on the day his trial began, nine (9) years after his arrest. He avers that his Counsel was inadequately prepared for trial, and this was compounded by the inevitable loss of evidence due to the long period between his arrest and trial. He maintains that the right to legal aid is not satisfied by the formal appointment of a lawyer, but requires that the legal assistance be effective and the state to take positive action to ensure that the Applicant effectively exercises his right to legal assistance.

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101. The Respondent State contends that the Applicant was accorded legal Counsel throughout his trial and the service rendered by the Counsel was effective and in fact if there was any sign of ineffectiveness, it would already take actions to ensure justice is rendered to both the Defence and Prosecution side.

102. Furthermore, the Respondent State asserts that while it acknowledges the entitlement of every accused individual to legal counsel in capital offenses, it asserts that fulfilling the requirements for all accused individuals may not be feasible, and, therefore, it cannot be held accountable for every deficiency on the part of a lawyer appointed for the purpose of legal aid.

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103. The Court observes that Article 7(1)(c) of the Charter provides that, “[e]very individual shall have the right to have [their] cause heard. This comprises…the right to defence, including the right to be defended by counsel of [their] choice.”

104. The Court recalls its established position that Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, guarantees for anyone charged with a serious criminal offence, the right to be automatically assigned counsel free of charge whenever the interests of justice so require.[28]

105. The Court further recalls that it has previously considered the issue of effective representation in a similar case and held that the right to free legal assistance comprises the right to be defended by counsel.[29] However, this right to choose one's own counsel is not absolute when exercised within the framework of a free legal assistance programme. The Court also emphasised that the key concern is the provision of effective legal representation, rather than the ability to select a lawyer of personal preference.[30]

106. In this regard, the Court affirms that it is the duty of the Respondent State to provide adequate representation to an accused person and intervene only when the representation is not adequate.[31] If, however, there are allegations of ineffective legal representation, it is important, that all such allegations must be backed by evidence.[32]

107. As this Court recognised in its caselaw,[33] a State cannot be held accountable for every shortcoming on the part of a lawyer appointed for legal aid purposes. The quality of the defence offered is fundamentally contingent on the rapport between the client and their representative. State intervention is warranted only when there is evident failure by the lawyer to furnish effective representation.

[28] *Thomas v. Tanzania* (merits), § 124, *Isiaga v. Tanzania* (merits), *supra,* § 72; *Onyachi and Njoka v. Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 104, *Mwita v. Tanzania* (merits), *supra*, § 121
[29] *Rutechura v. Tanzania* (merits), *supra,* § 73
[30] *Ibid*.
[31] *Ibid*, § 74, *Mwita v. Tanzania* (merits), supra, § 122.
[32] *Ibid*.
[33] *Henerico v. Tanzania* (merits and reparations), §§ 108-109, *Mwita v. Tanzania* (merits), *supra*, § 123.

108. Nonetheless, the Court underscores that in the context of ensuring effective legal representation through a free legal assistance scheme, it is insufficient for a State solely to appoint legal counsel. The State must also guarantee that those rendering legal aid within the framework of such a scheme are granted ample time and resources to prepare and offer a proper defence at all phases of the legal proceedings.

109. In the instant Application, the question that arises is whether the Respondent State discharged its obligation to provide the Applicant with effective free legal assistance, and ensured that Counsel had adequate time and facilities to enable the preparation of the Applicant's defence.

110. The Court observes, from the record, that the Respondent State furnished the Applicant with Counsel at its own expense throughout the proceedings before both the High Court and the Court of Appeal. It is noteworthy that during the preliminary hearing and the subsequent trial at the High Court, the Applicant was represented by Advocates Nasimire and Mushobozi. Additionally, at the Court of Appeal, the Applicant was provided the legal services of Mr. Deya Outa, a learned advocate who was also assigned by the Respondent State.

111. The Court also observes that there is no evidence on record indicating that the Respondent State obstructed the counsel's access to the Applicant for consultation and defence preparation, nor is there any record of the Respondent State denying the Applicant's counsel the necessary time and resources required for a comprehensive defence preparation.

112. Furthermore, the Court ascertains that there is no information to suggest that the Applicant notified the High Court or the Court of Appeal about any deficiencies in his counsel's handling of his defence. The Applicant had the freedom to raise any concerns regarding his legal representation with the domestic courts but there is nothing on record showing that he did.

113. In view of all the above, the Court finds that the Respondent State did not violate the Applicant's right to effective representation and, therefore, did not violate Article 7(1)(c) of the Charter.

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

114. The Applicant avers that he suffered an unreasonably long delay before he was convicted and sentenced, considering that the Respondent State kept him in pretrial detention for over ten (10) years. The Applicant states that the pre-trial period far exceeds periods that have been found to be "unreasonable" in cases decided by the Court such as *Alex Thomas v Tanzania*.

115. The Applicant asserts that the delay is not justified as the case was not a complex one requiring extensive investigation. He states it involved an allegation of murder, based on the evidence of witnesses and his confession and no complex or advanced evidence was adduced such as DNA samples. The Applicant contends that the Respondent State has not provided an explanation as to why he was arrested on 30 April 2003 and his trial opened only on 26 September 2013 when the Prosecution called its first witness. He asserts that by this period, only the complexity of the case increased with the long passage of time and the key witnesses had moved away.

116. The Applicant also argues that the delay was not attributed to him as neither he nor his attorney delayed the proceedings. He states that the first documented court action took place only on 14 September 2012, when he was formally informed of the charges against him and served with the information. The Applicant recalls that a preliminary hearing was held on 21 November 2012 and the High Court later remarked on the delay that his case was "longstanding" and required immediate action. Notwithstanding this, according to the Applicant, it took another ten (10) months before trial began on 26 September 2013.

117. The Applicant asserts that the domestic authorities were responsible for the delay. He submits that the exorbitant delay was not justified by any explanation and it can only be attributed to the inertia, inefficiency or negligence of the judicial authorities.

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118. The Respondent State did not make any submissions with respect to the Applicant's allegation of undue delay in conducting his trial.

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119. The Court notes that Article 7(1)(d) of the Charter guarantees "the right to be tried within a reasonable time by an impartial court or tribunal." This provision embodies one of the fundamental tenets of a fair trial the essence of which is perfectly encapsulated in the old legal adage "justice delayed is justice denied".

120. The Court observes that a timely trial is crucial for a variety of reasons, including protecting the accused from enduring protracted periods of uncertainty and pretrial detention, which can inflict physical, emotional, and psychological distress. Additionally, expeditious proceedings play a pivotal role in maintaining the integrity of evidence and the recollection of witnesses, thereby facilitating a more precise depiction of events and augmenting the overall credibility of the judicial proceedings.

121. Nevertheless, the Court acknowledges that the determination of a reasonable timeframe for conducting a trial does not have a specific template, as it hinges on the unique characteristics of each individual case. In accordance with its jurisprudence, the Court reiterates that the evaluation of whether justice has been administered within a reasonable time under the purview of Article 7(1)(d) of the Charter takes into account a range of factors. Among these considerations are the complexity of the case, the conduct exhibited by the involved parties, and the actions of the judicial

authorities, who bear a responsibility of unwavering diligence, especially when significant penalties are at stake.[34]

122. In the instant case, the Court notes from the record that the Applicant was arrested on 30 April 2003 and subsequently interrogated by the police, leading to a confession on 2 May 2003. It was only nine (9) years later that he was formally informed of the charges against him on 19 September 2012. The Applicant's preliminary hearing was held on 21 November 2012 and his trial began nine (9) months later on 26 September 2013 and the conviction verdict was delivered on 10 October 2013.

123. The Court observes that the protracted timeline of events saw an excessive lapse of time from the moment of arrest to the initiation of the trial, during which the Applicant was in pre-trial detention, amounting to ten (10) years, four (4) months, and twenty-seven (27) days. Regrettably, the Respondent State did not furnish any justification for this delay, nor do the circumstances of the case offer any discernible explanations for this inordinate delay.

124. The Court notes, from the trial court proceedings, that during the trial commenced some witnesses were unable to recollect some of the details surrounding the criminal incident as the incident occurred long time ago.[35] Undoubtedly, this situation significantly influenced the accuracy and reliability of the evidence presented by the witnesses, leading to a certain degree of erosion in the trial's integrity. It is important to note that the emotional distress endured by the Applicant during the prolonged period of uncertainty awaiting his trial further added to the gravity of the situation.

125. Based on the aforementioned considerations, the Court concludes that the delay of more ten (10) years in beginning the trial was undeniably

[34] *Guehi v. Tanzania* (Merits and Reparations), *supra*, §§122-124; See also *Thomas v. Tanzania* (merits), *supra*, § 104; Wilfred Onyango Nganyi and Others v. United Republic of Tanzania (merits) (2016) 1 AfCLR 507, § 155; and *Zongo and Others v. Burkina Faso* (merits), *supra*, §§ 92-97, 152; *Henerico v. Tanzania* (merits), *supra,* § 82.
[35] See for example, PW 2 statement, High Court Proceedings, p. 13.

unreasonable, thereby constituting a violation of his right to a timely trial as guaranteed by Article 7(1)(d) of the Charter.

B. Alleged violation of the right to life

126. The Applicant contends that the Respondent State has infringed his right to life, as guaranteed in Article 4 of the Charter. According to the Applicant, the violation is in two-fold: Firstly, that he was convicted and sentenced to death without taking into account his mental health condition at the time of commission of the crime; and secondly, that the sentencing process did not adequately consider factors that could mitigate his culpability, including his mental health and good character. The Court will consider these two allegations separately below.

i. Imposition of the death penalty without considering the Applicant's mental health

127. The Applicant avers that the African Commission on Human and Peoples' Rights has emphasised that "if, for any reason, the criminal justice system of a state does not, at the time of trial or conviction, meet the criteria for Article 7 of the African Charter or if the particular proceedings in which the penalty is imposed have not stringently met the highest standards of fairness, then the subsequent Application of the death penalty will be considered a violation of the right to life".[36] The Applicant submits that there have been several breaches of his right to a fair trial, which in turn have resulted in the imposition of the death sentence on the Applicant, consequently violating his right to life.

128. The Applicant states that he was sentenced to death after proceedings that failed to comport with the basic standards of right to a fair trial.

[36] General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), p. 10.

129. He avers that he believes in witchcraft and that before committing the relevant crimes he went to two traditional healers who confirmed that he had been bewitched/cursed. He was informed that his former-in-laws had cursed him and that the curse could lead to his death. When he found out that he was cursed, he began to live with an irrational fear which affected his mental state.

130. The Applicant further states that when he committed the offence, he was experiencing a mental crisis, he felt fear and was panicking at the thought that his family was acting in complicity with his former in-laws, who are well known witches, to kill him.

131. In support of his allegation of mental illness, the Applicant swore an affidavit and also filed expert declarations from two experts, a Medical Doctor and a Clinical Psychologist and an affidavit by one, Sylvester Francisco, who explained the culture of belief in witchcraft in the Sukuma community, to which the Applicant belonged. The experts' professional declarations suggest that the symptoms the Applicant experienced were consistent with his community's belief in witchcraft and his attempt to take his life after the incident showed that he was suffering from an acute stress, that is, "a set of emotive, cognitive and behavioural symptoms that occur following exposure to traumatic event".

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132. The Respondent State did not specifically respond to the issue of mental illness raised by the Applicant, rather it responded cumulatively and in general terms. It avers that the "Court of Appeal did not breach Article 13(6)(a) of its Constitution and Article 7(1)(c) of the Charter, the first Applicant was represented by Counsel both in the High Court and in the Court of Appeal hence there were no violation of the right of a fair trial and the Judgment is in accordance to the national laws."

133. The Respondent State cites Article 27 of the Charter and contends that by killing the deceased, the Applicant instead neglected his duty to respect the right to life and dignity of the deceased. According to the Respondent State, the Applicant brutally terminated the life of the deceased, therefore it is he who failed to recognise the rights and duties enshrined in the Charter. Finally, the Respondent State argues that, in any case, the Applicant has not demonstrated how his right to be treated with respect and dignity was violated.

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134. The Court observes that the imposition of the death penalty must be treated as an exceptional measure, warranting a thorough examination of all available aggravating and mitigating circumstances. The sanctity of the right to life demands that the death penalty, should not be considered as a default option among criminal punishments.[37] However, if it is to be considered, it must be strictly limited to cases involving the most serious crimes, and all doubts regarding the culpability of the accused must be rigorously addressed and ruled out. This ensures that the gravity of the death penalty is commensurate with the gravity of the crime and that individuals who lack the volitive or cognitive power are not subjected to it.

135. In this context, the Court notes that if an accused person raises concerns about his mental health or if there are circumstances that cast doubt on the mental capacity of the accused, it is essential for national courts to thoroughly assess this matter before proceeding with the trial, conviction, or sentencing. The proper evaluation of an individual's mental health is crucial at the appropriate stage of the legal proceedings, depending on when the issue comes to the attention of the courts. This guarantees that justice is served fairly and that individuals with potential mental health challenges are

[37] *Ghati Mwita v. United Republic of Tanzania*, Application No. 012/2019, Judgment of 1 December 2022 (merits), § 66.

provided with the necessary support to safeguard their rights throughout the legal process.[38]

136. In the instant case, the Court notes that there is nothing on record indicating that the Applicant or his Counsel raised his mental health status, at the preliminary hearing, during the trial proceedings or as a ground of appeal before the Court of Appeal. It is also clear that in the domestic proceedings, the Applicant did not specifically contend that he committed the crime out of superstitious belief as he has claimed before this Court.

137. The Court also notes that the Applicant did not explicitly assert that his mental incompetence, at the time of the crime or during the trial, was apparent to the trial court. While the report of the Applicant cutting off his private parts right after the incident may indicate some mental distress, it does not conclusively suggest that he committed the crime due to mental illness.

138. The Court has given due consideration to the affidavits and expert opinions submitted by the Applicant. However, the Court has not found any evidence to warrant faulting the domestic courts regarding the lack of consideration of the Applicant's alleged mental health at the time of trial, conviction and sentence.[39]

139. The Court, therefore, concludes that the Respondent State did not violate Article 4 of the Charter with regard to the Applicant's contention of his conviction without considering his mental health issues.

ii. Imposition of the mandatory death penalty

140. The Applicant contends that Article 4 of the Charter and Article 6 of the ICCPR establish the inviolability of human beings, affirming the entitlement

[38] *Marthine Christian Msuguri v. United Republic of Tanzania*, Application No. 052/2016, Judgment of 1 December 2022 (merits), §§ 72-77.
[39] *Mwita v. Tanzania* (merits), *supra*, § 85.

of every individual to have their life and personal integrity respected. Additionally, he argues that these provisions strictly prohibit any arbitrary deprivation of this fundamental right.

141. The Applicant asserts that the Respondent State's mandatory death penalty violates Article 6 of the ICCPR and Article 4 of the Charter as well as the UDHR. He contends that the mandatory death penalty erases the presumption in favour of life, erases the distinction between the categories of murder and violates the right to an individualised sentencing process. He further submits that had there not been the mandatory death sentence, the High Court would have taken into consideration mitigating circumstances in sentencing him.

142. In this regard, the Applicant refers to the Court's decision in *Ally Rajabu and Others v. Tanzania*, which established that the mandatory death penalty is a violation of Articles 4 and 7 of the Charter. It is his contention that the High Court, like in *Rajabu*, was unable to consider significant mitigating evidence that would have kept their human dignity and proved their rehabilitation potential.

143. In this vein, the Applicant contends that the national courts could have considered his law-abiding nature, youth and good character, his deeply-held belief in witchcraft, his remorse, and good behaviour in prison. He asserts that this would have provided crucial context on his state of mind when he committed the killings and attempted to commit suicide. He is of the view that had the High Court taken his mitigating circumstances into consideration he would not have received the death sentence.

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144. On its part, the Respondent State disputes the Applicant's submission that the death penalty violates the Constitution and the right to life enshrined in the UDHR and the ICCPR. It asserts that the death penalty is compatible with its Constitution, the UDHR and the ICCPR. It is the Respondent State's

contention that its Court of Appeal has ruled that the death penalty is consistent with its Constitution. Furthermore, the Respondent State emphasises that Article 6 of the ICCPR does not abolish the death penalty and, therefore, the imposition of that sentence for serious crimes as murder is lawful.

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145. The Court notes that the right to life holds an unparalleled status as the most sacred and fundamental of all rights, as it serves as the bedrock of human dignity and the essence of existence.[40] Deprived of this right, all other rights lose their significance and feasibility.[41] It provides the very foundation upon which individuals can cherish their freedoms, exercise their liberties, and pursue their dreams and aspirations. Recognizing the paramount importance of this right, major international and regional human rights conventions safeguard the sanctity of life by explicitly prohibiting its arbitrary deprivation.[42] Article 4 of the Charter similarly intertwines the right to life with the inviolability of human beings, strictly proscribing any arbitrary deprivation of life.

146. In the present Application, the Applicant raises several grounds to support his allegation of the violation of Article 4 of the Charter and its corresponding provision in the ICCPR. The central argument, however, is that the mandatory death penalty leads to an arbitrary deprivation of the right to life, primarily due to its restriction on the trial court's discretionary power. The Applicant's specific grounds pertain to the contention that the domestic courts should have imposed an individuated sentence considering their case.

147. In assessing the arbitrariness of the Applicant's death sentence, the Court relies on its well-established jurisprudence concerning the criteria for such

[40] *Ally Rajabu and Others v. Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §112.
[41] *African Commission on Human and Peoples' Rights v. Kenya* (merits) (2017) 2 AfCLR 9, § 152.
[42] See Article 6 of the ICCPR, Article 2 of the European Human Rights Convention (1950), Article 4 of the American Convention on Human Rights (1969) and Article 7 of the Arab Charter on Human Rights (2004).

assessment.[43] These criteria include determining whether there exists a legal basis for the death sentence, whether the death sentence was pronounced by a competent court, and whether due process was observed throughout the proceedings that resulted in the imposition of the death sentence.[44]

148. With regard to the first criterion, the Court notes that the death sentence is provided for in Section 197 of the Penal Code of the Respondent State. This requirement is, therefore, met.

149. Regarding the second criterion, the Court notes that the Applicant's contention is not centred on the lack of jurisdiction of the courts in the Respondent State to hear the case that resulted in the death sentence. Instead, the Applicant argues that the High Court could only impose the death penalty as it is the sole punishment prescribed by law for murder, thereby depriving the judge of any discretionary power to consider alternative sentences.[45]

150. From the record, and this has not been contested by the Applicant, it is clear that the domestic courts did not act beyond their jurisdiction or exceed their authority in handling the case against the Applicant. The Court, therefore, concludes that the death sentence was imposed by a competent court.

151. Regarding compliance with due process, the Court observes that the mandatory nature of the death penalty, as outlined in Section 197 of the Respondent State's Penal Code, significantly restricts the sentencing

[43] *Mwita v. Tanzania* (merits), *supra*, § 75.
[44] ACHPR, *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria*, Communications 137/94 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), §§ 1-10 and, § 103; *Forum of Conscience v. Sierra Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), § 20.; See, Article 6(2), ICCPR; and *Eversley Thompson v. St. Vincent & the Grenadines*, Comm. No. 806/1998, U.N. Doc. CCPR/C70IO/806/1998 (2000) (U.N.H.C.R.), 8.2; See also *Rajabu and Others v. Tanzania* (judgment), *supra*, § 104.
[45] *Rajabu and Others v. Tanzania*, *supra*, § 106; *Gozbert Henerico v. United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 10 January 2022, § 147.

discretion of national courts, leaving them with no choice but to automatically impose a death sentence upon conviction.[46]

152. The mandatory death sentence removes the judge's discretionary power to consider proportionality and the personal circumstances of the convicted individual when determining the sentence, which is essential for ensuring due process in criminal proceedings. By taking away the discretionary power of a judge to impose a sentence on the basis of proportionality and the personal situation of a convicted person, the mandatory death sentence does not comply with the requirements of due process in criminal proceedings.[47]

153. The Court considers that if the domestic courts of the Respondent State were vested with discretion to determine the sentencing of persons found culpable of murder, the High Court, for instance, could have legitimately considered all the factors that the Applicant has raised before this Court in possible mitigation of his sentence.

154. In the circumstances, the Court holds that the mandatory death sentence, as prescribed by section 197 of the Respondent State's Penal Code, does not meet the third criterion for assessing arbitrariness of the sentence.

155. It, therefore, holds, in line with its established jurisprudence, that the mandatory death penalty is contrary to the right to life, including the prohibition against the arbitrary deprivation of human life.[48]

156. The Court recalls that the Applicant's death penalty was later commuted to a life sentence through a Presidential pardon in May 2020, but this reprieve came after the Applicant had endured six (6) years on death row. It is imperative to emphasise that this commutation to life imprisonment does

[46] *Juma v. Tanzania* (merits and reparations), *supra*, § 130; *Rajabu and Others v. Tanzania*, *ibid*, § 109; *Henerico v. Tanzania* (judgment), *ibid*, § 148
[47] *Ibid*.
[48] *Rajabu and Others v. Tanzania*, *supra*, § 114.

not remove the violation of the Applicant's right to life as a result of the mandatory death penalty which was originally imposed on the Applicant and continued to be in effect at the time the Application was filed before this Court. The Court maintains that mandatory death penalty, which removes the discretionary power of the judges is fundamentally incompatible with the fundamental right to life, regardless of any subsequent act of clemency.

157. The Court, therefore, finds that the Respondent State has violated Article 4 of the Charter and Article 6 of the ICCPR, by subjecting the Applicant to a mandatory death penalty.

C. Alleged violation of the right to dignity

158. The Applicant contends that the Respondent State has violated his right to be free from torture, cruel, inhumane and degrading treatment by placing him on death row. The death row phenomenon, he asserts, is the term used to describe the anxiety, dread, fear and psychological anguish that often accompanies long term incarceration on death row. He states that the death row phenomenon is a form of torture.

159. He also avers that the prison conditions he endures in Butimba Prison amount to torture contrary to Article 5 of the Charter. In this regard, he mentions that the prison is overcrowded, and prisoners on death row can only interact with other death row prisoners, they are not allowed to take part in sports, classes, training or receive newspapers.

160. Moreover, the Applicant claims that the Respondent State failed to provide him with the necessary medical treatment for his injuries despite the fact that it was obvious that he needed medical help. He avers that the denial to provide him prompt and comprehensive care violated the Charter's prohibition on cruel and inhumane treatment.

161. The Applicant further states that a sentence of life imprisonment as an alternative to death sentence is not acceptable as it amounts to cruel,

inhumane and degrading treatment. Life imprisonment, he emphasises violates the inherent right to dignity protected under Article 5 of the Charter and Article 10 of the ICCPR. Thus, he argues that the Court should order the Respondent State not to impose the sentence of life imprisonment as an alternative remedy to the violations to which he has endured.

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162. The Respondent State does not exhaustively respond to these allegations, rather it generally points out that throughout the trial, it recognised and respected the dignity of the Applicant, who was treated in accordance with the law during his trials in the High Court and before the Court of Appeal. The Respondent State also emphasised that the punishment imposed on the Applicant was justified in view of the seriousness of the crime of which he was convicted.

163. As regards the Applicant's assertion of withholding of medical treatment for his injuries, the Respondent State raises objections and insists that the claim must be substantiated through concrete evidence. According to the Respondent State, the Applicant was never subjected to any form of mistreatment by the police and that his physical injuries were self-inflicted as he attempted suicide subsequent to committing the crime. In addition, the Respondent State claims that during pretrial, the Applicant was accorded with Police Medical Examination Form (PF 3) for his treatments on the alleged serious injuries. However, the Applicant did not reveal his injuries to the Justice of Peace or indicate that he needed medical treatment.

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164. The Court notes that Article 5 of the Charter provides as follows:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of [their] legal status. All forms of exploitation and degradation of [human beings], particularly

slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

165. The Court observes that the concept of human dignity holds a profound significance in the realm of individual rights. It serves as an essential foundation upon which the edifice of human rights is constructed The right to dignity captures the very essence of the inherent worth and value that resides within every individual, irrespective of their circumstances, background, or choices. At its core, it embodies and upholds the principle of respect for the intrinsic humanity of each person and forms the bedrock of what it means to be truly human. It is in this sense that Article 5 absolutely prohibits *all* forms of treatment that undermines the inherent dignity of an individual.

166. In the present case, the Applicant contends that the Respondent State has infringed upon his right to dignity through a series of actions; firstly, by subjecting him to death row; secondly, by confining him in inhumane prison conditions; thirdly, by imposing life imprisonment without the possibility of parole and fourthly, by not providing the Applicant medical treatment for the physical injuries he sustained, which he claims, in the hands of the police.

167. Regarding the first contention, the Court recalls its established position that death row can induce significant psychological distress, particularly when the wait for execution is prolonged.[49] The Court affirms that detention on death row fundamentally disregards the principles of humanity and infringes upon the dignity of individuals. This Court acknowledges that the distress experienced during detention on death row emanates from the inherent fear of impending death that convicts must grapple with. The perpetual uncertainty surrounding the potential execution of the death penalty that those on death row face diminishes the core of their humanity.

[49] *Mwita v. Tanzania* (merits), *supra*, § 87

168. As indicated earlier, the instant Applicant endured the harrowing uncertainty of impending execution for an extended period of nearly six (6) years. It was only upon the granting of a Presidential Pardon that his death sentence was eventually commuted to life imprisonment. While the immediate execution of those sentenced to the death penalty is generally not encouraged due to its potential for causing an irreversible situation, the Court acknowledges that the prolonged state of being on death row inflicted considerable distress upon the Applicant. This situation has inevitably infringed upon his fundamental right to human dignity. The Court, consequently, finds that the Respondent State has violated the Applicant's right to human dignity.

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169. Concerning the second contention, the Court notes that the Applicant's claim of violation of his right to dignity arises from what he calls "deplorable" prison conditions, including overcrowded cells, lack of proper food and seclusion from the general population, and not being able to participate in sports, classes, training or receive newspapers.

170. The Court observes that depending on the nature of the crime and their personal circumstances such as age, sex, and crime record, convicted prisoners may be subjected to distinct conditions of imprisonment.

171. Nonetheless, under all circumstances, these conditions must not be inhumane or degrading. It is imperative that conditions of imprisonment avoid exacerbating the anguish already resulting from the deprivation of liberty, while also preserving the prisoners' self-worth and sense of personal accountability. Overcrowding of cells should be minimized whenever feasible. Adequate sanitation, appropriate nourishment, medical attention, physical engagement, educational opportunities, and the ability to maintain and cultivate connections with family and the outside world are vital.[50] It is

[50] See Kampala Declaration on Prison Conditions in Africa of 1996; The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa of 2002 (The Robben Island Guidelines), the Ouagadougou Declaration and Plan of Action on

crucial to underscore that even individuals facing the death penalty do not lose or forfeit their humanity and, as such, are entitled to the basic humane conditions of prison.

172. In the present case, the Applicant makes serious allegations of inhumane prison conditions. However, the Applicant has not adduced any evidence to substantiate his claim. In accordance with the well-established legal principle that the burden of proof lies with the party making an assertion, the Court has consistently maintained that "[g]eneral statements to the effect that [a] right has been violated are not enough. More substantiation is required."[51] Accordingly, the Court dismisses the Applicant's allegation of being subjected to inhumane prison conditions. It thus, finds that the Respondent State has not violated his right to dignity in this regard.

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173. Regarding that the Applicant's third contention, the Court wishes to underscore that the imposition of life imprisonment for the most serious offences, on its own, may not necessarily constitute inhumane or degrading treatment, especially where there is a possibility of parole.

174. In the present case, the Court notes that the Applicant's original sentence was death, which was subsequently commuted to life imprisonment through a presidential pardon. This commutation was carried out in accordance with the authority granted to the President of the Respondent State under Article 45(1) of the Constitution.[52] The Applicant's argument revolves around the

Accelerating Prison and Penal Reform in Africa of 2003; the Guidelines on Conditions of Arrest, Police Custody and Pre-trial Detention in Africa of 2014; and the United Nations Standard Minimum Rules for the Treatment of Prisoners (*the Nelson Mandela Rules*) of 2015; African Commission on Human and Peoples' Rights, Resolution on Prisons and Conditions of Detention in Africa - ACHPR/Res.466(LXVII) 2020.

[51] *George Maili Kemboge v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 369, § 51.

[52] Article 45(1) declares that "Subject to the other provisions contained in this Article, the President may do any of the following:

(a) grant a pardon to any person convicted by a court of law of any offence, and he may subject to law grant such pardon unconditionally or on conditions;

(b) grant any person a respite, either indefinitely or for a specified period, of the execution of any punishment imposed on that person for any offence;

fact that the commuted sentence of life imprisonment offers no possibility of parole, thereby leaving no avenue for potential release upon successful rehabilitation and reform. However, the Court observes from the said provision of the Respondent State's Constitution that the President has the authority to pardon *any convicted person*, grant respite from the execution of *any punishment,* substitute less severe penalties for *any offence*, and remit all or part of imposed punishments.[53]

175. In these circumstances, there is nothing on record to suggest that Applicant cannot obtain further parole, and thus, the Applicant's claim that he has no potential for release is unfounded. As a result, the Court concludes that the life sentence imposed on him as a commutation from the death penalty does not violate his right to dignity.

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176. In regard to the fourth claim put forth by the Applicant, asserting that the Respondent State neglected to offer him adequate medical care, the Court's review of the record reveals that the physical injury sustained by the Applicant to his reproductive organ was a consequence of his own actions. Following the tragic event of his wife and son's murder, the Applicant attempted to end his own life, leading to the self-inflicted injury. Despite this, it was incumbent on the Respondent State to provide essential medical aid to the Applicant, particularly once it became aware of his need for treatment.

177. It is evident from the record that the Justice of Peace, the official responsible for recording the Applicant's confession, documented in his report that he conducted an examination of the Applicant and observed wounds on his private parts. However, during the course of the matter, the High Court chose to dismiss this aspect of the Officer's report, contending that had the

(c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; and

(d) remit the whole or part of any punishment imposed on any person for any offence, or remit the whole or part of any penalty of fine or forfeiture of property belonging to a convicted person which would otherwise be due to the Government of the United Republic on account of any offence"

[53] Ibid.

Applicant genuinely suffered from pains necessitating treatment, he would have communicated this to a medical professional to seek necessary assistance.

178. As the Court has previously acknowledged domestic courts are better positioned to evaluate the factual intricacies surrounding a case. In the absence of any glaring errors or miscarriage of justice, the Court does not deem it imperative to supplant its own assessment and arrive at a different factual determination. Moreover, there is no indication on record to suggest that the Applicant was denied medical aid after having requested it. In fact, in his affidavits, the Applicant concedes that a few days later after he arrived at the prison, he "was taken back" to the hospital to repair the catheter for his wounds.[54] In any event, the said denial of the medical treatment for the Applicant's injury is not of such level of severity to constitute a cruel and inhumane treatment as alleged by the Applicant.[55] In view of this, the Court dismisses this aspect of the Applicant's allegation.

179. In light of the preceding assessment, the Court finds that the Respondent State violated the Applicant's right to dignity, as safeguarded under Article 5 of the Charter, by the Applicant's lengthy placement on death row.

VIII. REPARATIONS

180. The Court notes that Article 27(1) of the Protocol stipulates that "[If] the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

181. The Court consistently held that, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful

[54] Exhibit A, Affidavit from Makungu Misalaba, signed on 25 October 2019, para. 29
[55] See for e.g., *Ireland v. United Kingdom* (1978), ECHR, § 162; *Öcalan v. Turkey* (2005), ECHR, §§. 180-181.

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 damage suffered.

182. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers, particularly for material damages.[56] With regard to moral damages, the Court has held that the requirement of proof is not strict,[57] since it is presumed that there is prejudice caused when violations are established.[58]

183. The Court also restates that the measures that a State must take to remedy a violation of human rights includes restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.[59]

184. In the instant case, the Court has established that the Respondent State has violated the Applicant's right to life under Article 4 of the Charter by imposing a mandatory death penalty, his right to dignity under Article 5 of the Charter by placing him on death row. Additionally, the Court found that the Respondent State has violated the Applicant's right to a fair trial by unreasonably delaying his trial contrary to Article 7(1)(d) of the Charter.

[56] *Kennedy Gihana and Others v. Republic of Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139; See also *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (reparations), § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, § 15(d); and *Kalebi Elisamehe v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 265, § 97.
[57] *Norbert Zongo and Others v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 258, § 55. See also *Elisamehe v. Tanzania* (judgment), *ibid*, § 97.
[58] *Rajabu and Others v. Tanzania*, *supra*, § 136; *Guehi v. Tanzania* (merits and reparations), *supra*, § 55; *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119; *Zongo and Others v. Burkina Faso*, *ibid*, § 55; and *Elisamehe v. Tanzania* (judgment), *ibid*, § 97.
[59] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also *Elisamehe v. Tanzania* (judgment), *ibid*, § 96.

A. Pecuniary reparations

i. Material prejudice

185. The Court recalls that for it to grant reparations for material prejudice, there must be a causal link between the violation established by the Court and the prejudice caused and there should be a specification of the nature of the prejudice and proof thereof.[60]

186. In the instant case, the Applicant simply prayed the Court to grant him reparations in accordance with Article 27 of the Protocol, without specifying the nature of the pecuniary reparations sought. He has not indicated the nature of the material prejudice he suffered and how this is linked with the violation of his rights, particularly, his right to life, right to dignity and the right to a fair trial protected under Articles 4, 5 and 7(1)(d) of the Charter.

187. In the circumstances, the Court therefore does not grant reparations for material prejudice.

ii. Moral prejudice

188. The Applicant requests the Court to grant reparations for moral prejudice. The Applicant prays the Court to presume a causal link between the established violations of the Applicant's rights and any moral harm suffered without additional affirmative evidence.

189. The Respondent State maintains that the Applicant's conviction and subsequent sentencing were a direct result of his own culpable actions, thereby asserting that he should not be entitled to any form of reparations.

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[60] *Kijiji Isiaga v. United Republic of Tanzania*, AfCtHPR, Application no. 011/2015, judgment of 25 June 2021 (reparations), § 20.

190. In line with established case-law that moral prejudice is presumed in cases of human rights violations, the Court notes that the quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.[61]

191. The Court has established that the Applicant's right to life, right to dignity and the right to a fair trial protected under Articles 4, 5 and 7(1)(d) of the Charter have been violated. The Applicant is therefore entitled to moral damages as there is a presumption that he has suffered some form of moral prejudice as a result of the said violations.[62]

192. The Court recalls that the High Court sentenced the Applicant to death on 10 October 2013, a sentence which was subsequently upheld by the Court of Appeal on 30 October 2014. It is evident that the Applicant experienced considerable moral harm and detriment during his time on death row, spanning from the moment of his conviction to the eventual commutation of his death sentence to life imprisonment in May 2020. The uncertainty surrounding the outcome of his appeal, coupled with the looming possibility of execution, has notably added to the psychological distress endured by the Applicant. Moreover, this prejudice has been exacerbated by the extensive delay he faced prior to the initiation of his trial. In the circumstances, it is beyond doubt that the Applicant has suffered considerable trauma.

193. In view of the above, the Court finds that the Applicant has endured moral and psychological suffering and decides to grant him moral damages in the sum of Tanzanian Shillings Five Hundred Thousand (TZS 500,000).

[61] *Zongo and Others v. Burkina Faso* (reparations), *supra,* § 55; *Umuhoza v. Rwanda* (reparations), *supra,* § 59; *Christopher Jonas v. Republic of Tanzania* (reparations) (25 September 2020) 4 AfCLR 545, § 23.
[62] *Cheusi v. Tanzania* (judgment), *supra*, § 151.

B. Non-Pecuniary Reparations

i. Guarantees of non-repetition

194. The Applicant prays the Court to order the Respondent State to amend its laws to ensure the protection of the right to life under Article 4 of the Charter, by removing the mandatory death sentence for the offence of murder.

195. The Respondent State insists that the death penalty is a lawful form of punishment and its law providing for the death penalty is compatible with the ICCPR, which allows imposition of the death penalty for serious crimes as murder.

196. The Court recalls that, in previous Judgments dealing with the mandatory death penalty involving the same Respondent State, it had ordered that the provisions in its Penal Code providing for the mandatory death penalty be removed to align with the country's international obligations.[63] The Court takes judicial notice of the fact that almost four (4) years after the first such Judgment was issued, the Respondent State has not, as at the date of the present Judgment, implemented the said order. Importantly, identical orders were also issued in two other Judgments delivered in 2021 and 2022, none of which has been implemented thus far.

197. The result of the Respondent State's non-compliance with the Court's earlier decisions is that persons in a similar position to the Applicant before his sentence was commuted to life imprisonment remain at the risk of being executed if convicted or facing the mandatory death sentence if tried.

198. In order to guarantee the non-repetition of the established violations, the Court therefore orders the Respondent State to undertake all necessary

[63] *Rajabu and Others v. Tanzania* (merits), *supra,* § 163; *Henerico v. Tanzania* (merits), *supra,* § 207; *Juma v. Tanzania* (merits), *supra,* § 170.

measures to repeal the provision for the mandatory death penalty in its Penal Code.

ii. Restoration of liberty

199. The Applicant prays the Court to quash his conviction and sentence and restore his liberty. He prays the Court to set aside the death sentence imposed on them and order his release from prison.

200. The Applicant submits that the restoration of liberty is the most feasible way in which adequate reparations could be said to have been granted, given the harrowing circumstances of imprisonment he has faced.

201. Alternatively, as a measure of restitution, he prays that the Court order the Respondent State to reopen resentencing hearings and consider mitigating circumstances with respect to the Applicant.

202. The Respondent State prays that the Court to dismiss the Applicant's prayer for release as he was serving a lawful sentence imposed on him in accordance with its laws. It also maintains that that ordering the release of the Applicant is not within the mandate of the Court.

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203. Regarding the Applicant's prayer to quash his conviction, set aside death sentence, and order his release, the Court recalls that it is not an appellate body in relation to decisions of national courts,[64] but this does not preclude it from examining proceedings of the said courts to determine whether they were conducted in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned.[65]

[64] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14.
[65] *Mtingwi v. Malawi*, *ibid*; *Kennedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Armand Guehi v. Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

204. In the instant case, the Court has not found that the violations established in this Judgment had any bearing on the Applicant's conviction. As such, it dismisses the Applicant's request to quash his conviction.

205. Furthermore, the Court recalls that the death penalty has already been commuted to a life sentence. As a result, this particular prayer has been overtaken by events, rendering it moot.

206. In the same vein, the Court holds that the Applicant's request for an order requiring the Respondent State to conduct resentencing hearings and consider mitigating circumstances does not stand. Therefore, it also dismisses this prayer.

iii. Publication

207. None of the parties made any submissions in respect of the publication of this Judgment.

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208. The Court considers, however, that for reasons now firmly established in its practice, and in the peculiar circumstances of this case, publication of this Judgment is necessary. Given the current state of law in the Respondent State, threats to life and dignity associated with the mandatory death penalty persist in the Respondent State. There is also no indication as to whether measures are being taken for the laws in this regard to be amended and aligned with the Respondent State's international human rights obligations, with the result that the guarantees provided in the Charter are still not certain for rights-holders. The Court thus finds it appropriate to order publication of this Judgment.

iv. Implementation and reporting

209. Both Parties, apart from making a generic prayer that the Court should grant other reliefs as it deems fit, did not make specific prayers in respect of implementation and reporting.

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210. The justification provided earlier in respect of the Court's decision to order publication of the Judgment notwithstanding the absence of express prayers by the Parties is equally applicable in respect of implementation and reporting. Specifically in relation to implementation, the Court notes that in its previous judgments issuing the order to repeal the provision on the mandatory death penalty, the Respondent State was directed to implement the decisions within one (1) year of issuance of the same.[66]

211. Given the noncompliance demonstrated earlier in this Judgment, the Court considers that restating the same timeframe in the present Application would undermine the urgency of having the impugned provision removed from the Respondent State's Penal Code. In the circumstances, the Court decides to set the time for implementation at six (6) months from the date of the present Judgment with respect to legislative measure that the Respondent State should take to repeal mandatory death penalty from its Penal code.

212. As regards reporting, the Court considers that this is required as a matter of judicial practice. With particular emphasis on timeframe, the Court notes that time allocated in judgments pending implementation have cumulatively reached three (3) years. For the same reasons as expounded while examining the orders for both publication and implementation, a report should be provided within a period that is shorter than that set out in individual judgments. The Court considers that the appropriate time should, therefore, be six (6) months in the circumstances.

[66] *Rajabu and Others v. Tanzania*, *ibid*, § 171, xv, xvi; *Henerico v. Tanzania*, *ibid*, § 203.

IX. COSTS

213. The Applicant prays the Court to order the Respondent State bear the costs.

214. The Respondent State submits that the costs associated with the instant Application should be borne by the Applicant.

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215. Rule 32(2) of the Rules of Court stipulate that, "[u]nless otherwise decided by the Court, each party shall bear its own costs, if any".[67]

216. The Court reiterates its jurisprudence that reparations may include legal costs and other costs incurred in the international proceedings. Further, it is up to the Applicant to provide justifications and proof any cost incurred**.** In the instant case, the Applicant has not done so.

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

X. OPERATIVE PART

218. For these reasons:

THE COURT,

Unanimously,

On jurisdiction

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

i. *Dismisses* the objection to its material jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* objection to admissibility;
iv. *Declares* that the Application is admissible.

On merits

v. *Finds* that the Respondent State did not violate the Applicant's right to dignity contrary to Article 5 of the Charter by allegedly not providing him medical treatment for his self-inflicted physical injury;
vi. *Finds* that the Respondent State did not violate the Applicant's right to a fair trial under Article 7 of the Charter by allegedly convicting him based on unreliable evidence and involuntary confession;

By a majority of eight (8) for, and two (2) against, Justices Blaise TCHIKAYA and Dumisa B. NTSEBEZA dissenting

vii. *Finds* that the Respondent State did not violate the Applicant's right to dignity under Article 5 of the Charter allegedly by placing him in inhumane prison conditions and on death row;
viii. *Finds* that the Respondent State violated the Applicant's right to life protected by Article 4 of the Charter by imposing a mandatory death penalty, regardless of the subsequent act of clemency commuting the sentence to life imprisonment*;*

Unanimously

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

On reparations

Pecuniary reparations

x. *Grants* the Applicant's prayer for reparations for the moral prejudice and awards him the sum of Tanzanian Shillings Five Hundred Thousand (TZS 500 000);

xi. *Orders* the Respondent State to pay the amount set out under (x) above, tax free, as fair compensation, within six (6) months from the date of notification of Judgment, failing which, it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment until the accrued amount is fully paid.

On non-pecuniary reparations

xii. *Dismisses* the Applicant's prayer for quashing his conviction, and secure his release from prison;

xiii. *Declares* that the Applicant's prayer for nullification of his death sentence is moot;

xiv. *Orders*, nevertheless, the Respondent State to take all necessary measures upon notification of this Judgment, within six (6) months, to remove the mandatory death penalty from its laws;

xv. *Orders* the Respondent State to publish this Judgment, within a period of three (3) months from the date of notification, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the Judgment is accessible for at least one (1) year after the date of publication;

xvi. *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 orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xvii. *Orders* that each Party shall bear its own costs.

Signed:

Modibo SACKO, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 70(1) and (3) of the Rules, the Dissenting Opinion of Judge Blaise TCHIKAYA and the Declaration of Judge Dumisa B. NTSEBEZA are appended to this Judgment.

Done at Algiers, this Seventh Day of November in the year Two Thousand and Twenty-Three in English and French, the English text being authoritative.