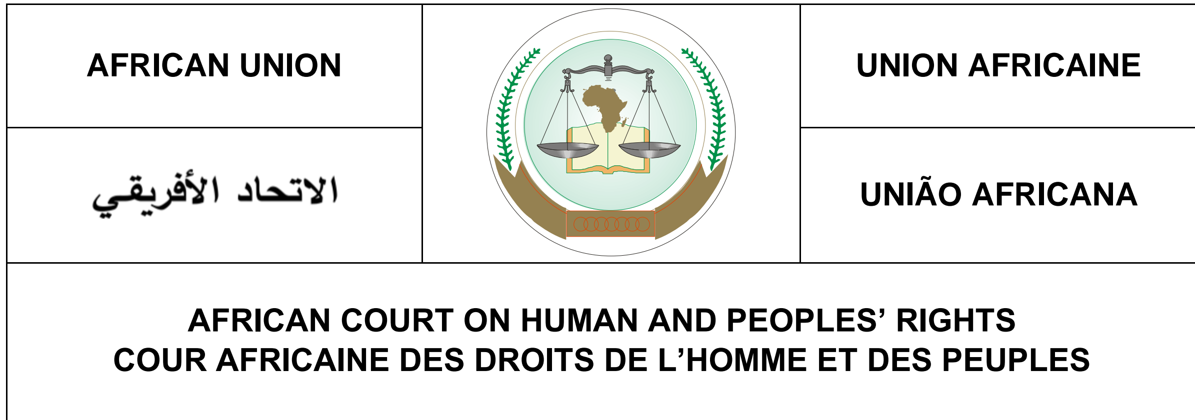

THE MATTER OF

IBRAHIM YUSUF CALIST BONGE

AND

2 OTHERS

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 036/2016

JUDGMENT

4 DECEMBER 2023

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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.

In the matter of:

Ibrahim Yusuf Calist BONGE
Rajabu Mohammed Salum MSOLONGONI
Simba Aloyce Simba HATIBU

Self-represented

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General;
ii. Ms Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General;
iii. Ms Nkasori SARAKIKYA, Assistant Director, Division of Constitutional Affairs and Human Rights and Principal State Attorney, Attorney General's Chambers;
iv. Mr Richard KILANGA, Senior State Attorney, Attorney General's Chambers;

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

v. Mr Elisha SUKU, Foreign Service Officer, Ministry of Foreign Affairs and East African Cooperation; and

vi. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Ibrahim Yusuph Calist Bonge, Rajabu Mohammed Salum Msolongoni and Simba Aloyce Simba Hatibu are Tanzanian nationals who, at the time of filing of this Application, were incarcerated at Ukonga Central Prison, Dar es Salaam, after having been tried, convicted and sentenced to death on two counts of murder. They allege a violation of their rights as a result of the manner in which their trial before the domestic courts was conducted.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. It further 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 NGOs. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no effect on pending cases and 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.[2]

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

II. SUBJECT MATTER OF THE APPLICATION

A. Facts of the matter

3. On 16 December 2012, along Nyerere Road in Dar es Salaam, a motor vehicle transporting cash belonging to Mohamed Enterprises was ambushed by robbers. During the robbery, an accountant with Mohamed Enterprises, Aliasger Saggid and a police officer, F.7091 PC Godwin, were shot dead.

4. Subsequently, the police arrested eight (8) people[3] who were charged, before the High Court sitting at Dar es Salaam, with the murder of the two (2) persons. In the course of the trial, the State entered a *nolle prosequi* with respect to three (3) of the accused persons[4] and the trial proceeded as against the remaining five (5) accused. At the end of the trial, the High Court convicted four (4) of the accused persons and acquitted one (1).[5]

5. The four (4) convicted individuals appealed to the Court of Appeal sitting at Dar es Salaam. The Court of Appeal acquitted one (1) of the appellants[6] and upheld the conviction and sentence of the three (3) appellants who are now before this Court.

B. Alleged violations

6. The Applicants allege that, due to the manner in which their trial was conducted, the Respondent State violated their Charter guaranteed rights as follows: the right to non-discrimination – Article 2; the right to equality before the law and equal protection of the law – Article 3; right to life – Article 4; the right to dignity – Article 5; the right to a fair trial – Article 7; and the

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[3] The eight were: Ibrahim Yusuph Calist Bonge, Rajabu Mohamed Salumu Msologoni, Khamis Ali Ramadhani, Abdala Shabani Ramadhani Dudi Dulla, Simba Aloyce Simba Hatibu, Ramadhani Saidi Mangu, Ally Ramadhani Kilongozi Balikulije and Shabani Ramadhani.
[4] The *nolle prosequi* (a formal withdrawal of a prosecution) was entered in respect of the following: Abdala Shabani Ramadhani Dudi Dulla, Ramadhani Saidi Mangu and Shabani Ramadhani.
[5] Khamis Ali Ramadhani was the one acquitted at the end of the High Court trial.
[6] The Court of Appeal acquitted Ally Ramadhani Kilongozi Balikulije.

right to freedom of expression – Article 9. The Applicants also allege that the Respondent State's conduct violates the general duty to uphold the Charter in Article 1 of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was filed at the Registry of the Court on 15 June 2016. It was served on the Respondent State on 27 July 2016 giving it sixty (60) days to file a Response.

8. After several extensions of time, the Respondent State filed its Response on 8 May 2018 and this was transmitted to the Applicants on 24 May 2018.

9. The Parties filed their other pleadings within the time permitted by the Court.

10. Pleadings were closed on 8 August 2023 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

11. The Applicants pray the Court to issue:

    i. A declaration that the Respondent violated their rights as guaranteed under Article 1, Article 2, Article 3, Article 4, Article 5, Article 7 and Article 9 of the Charter;
    ii. An order compelling the Respondent State to release the Applicants from detention;
    iii. An order for reparations should this Honourable court find merit in the Application and in the prayers;
    iv. An order of this Honourable Court to supervise implementation of the Court's orders by requiring the Respondent state to report to the Court every six (6) months on the implementation of the decisions that the Court may make if they go to the favour of the Applicants; and

v. Any other Order or Remedy that this Honourable Court may deem fit to grant.

12. On jurisdiction and admissibility, the Respondent State prays the Court to find:

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

13. On the merits, the Respondent State prays the Court to find that it did not violate the Applicants' rights under Articles 1, 2, 3, 4, 5, 7 and 9 of the Charter. It also prays that the Applicants should not be awarded reparations and that their prayers should be "dismissed in their entirety".

14. It is also the Respondent State's prayer that the "Application be dismissed for lack of merit" and that "costs be borne by the Applicants."

V. JURISDICTION

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

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

16. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[7]

17. On the basis of the above-cited provisions, the Court must, in every Application, preliminarily ascertain its jurisdiction and rule on the objections thereto, if any.

18. In the present Application, the Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will thus consider the said objection before examining other aspects of its jurisdiction, if necessary.

A. Objection to material jurisdiction

19. The Respondent State contends that the Court is not vested with jurisdiction to adjudicate on this Application. According to the Respondent State, this Application calls for the Court "… to sit as an appellate court and adjudicate on matters of law and evidence already finalised by the Court of Appeal of Tanzania in its judgment delivered in Criminal Appeal No. 204 of 2011."

*

20. The Applicants, for their part, submit that the Court can consider this Application by invoking its jurisdiction "…in conformity with Article 3 of the Protocol and Rule 26 of the Rules of Court concerning the interpretation and application of the Charter, protocol and any other relevant Human rights instrument ratified by the Respondent State."

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

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

of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[8]

22. Specifically in relation to the Respondent State's objection, the Court further recalls, in line with its jurisprudence, "that it is not an appellate body with respect to decisions of national courts."[9] 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."[10] The Court finds, therefore, that it will not be sitting as an appellate court if it examines the allegations by the Applicants. The Respondent State's objection in this regard is, therefore, dismissed.

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

B. Other aspects of jurisdiction

24. The Court notes that the Respondent State has not disputed its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,[11] it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding to consider the Application.

25. 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 its 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 as well as new

[8] *Kalebi Elisamehe v. United Republic of Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 265, § 18.
[9] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14.
[10] *Kenedy Ivan v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 48, § 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.
[11] Rule 39(1) of Rules of Court, 2 June 2010.

cases filed before 22 November 2020, the day on which the withdrawal took effect, being a period of one (1) year after its deposit.[12]

26. The instant Application having being filed on 15 June 2016, which was before the Respondent State deposited its notice of withdrawal of the Declaration, is thus not affected by the said withdrawal. The Court, therefore, concludes that it has personal jurisdiction in this matter.

27. The Court also finds that it has temporal jurisdiction insofar as the alleged violations in this 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 Applicants are currently serving their prison sentences, which they maintain were unfairly imposed and thus constitute a violation of their Charter rights.[13]

28. The Court also finds that it has territorial jurisdiction given that all the alleged violations are said to have occurred within the Respondent State's territory.

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

VI. ADMISSIBILITY

30. 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."

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[12] *Cheusi v. Tanzania* (merits and reparations), *supra,* §§ 35-39. See also *Ingabire Victoire Umuhoza v. Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

[13] *Beneficiaries of late Norbert Zongo and Others v. Burkina Faso* (jurisdiction) (21 June 2013) 1 AfCLR 197, §§ 71-77.

31. 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."

32. 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.

33. The Court notes that the Respondent State raises two objections to the admissibility of the Application.

A. Objections to admissibility

34. The Respondent State contends, first, that the Applicants did not exhaust domestic remedies and, second, that the Application was not filed within a

reasonable time. The Court will consider each of these objections before examining other conditions of admissibility, if necessary.

i. Objection based on non-exhaustion of domestic remedies

35. The Respondent State contends that the Applicants did not exhaust domestic remedies before filing their Application. According to the Respondent State, since the Applicants are alleging a violation of their rights, they could have instituted a constitutional petition before its High Court to seek redress using the mechanism under its Basic Rights and Duties Enforcement Act. Specifically in connection to the Applicants' allegations of a violation of the right to bail and legal aid, the Respondent State argues that the Applicants could have raised these alleged violations as grounds of appeal before its domestic courts. It thus submits that the Applicants' failure to exhaust domestic remedies entails that they "… have not afforded the Respondent an opportunity to redress the alleged wrong within the framework of its domestic legal system before it is dealt with at the International level."

*

36. The Applicants submit that they exhausted domestic remedies before filing this Application. In support of their submission, they point out that after their conviction and sentence they lodged an appeal with the Court of Appeal which was dismissed. They also point out that, after the Court of Appeal's decision, they filed an application for review which is still pending.

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37. The Court notes that pursuant to Rule 50(2)(e) of the Rules, any application filed before it must fulfil the requirement of exhaustion of local remedies unless local remedies are unavailable, ineffective, or the domestic procedure to pursue them is unduly prolonged.[14] This requirement seeks to

[14] *Alex Thomas v. United Republic of Tanzania* (merits), (20 November 2015) 1 AfCLR 465 § 64; *Kennedy Owino Onyachi and Charles Mwanini Njoka v. United Republic of Tanzania* (merits) (28

ensure that States, as primary duty bearers, have the opportunity to address human rights violations occurring within their jurisdiction before an international body is called upon to intervene. It also reinforces the subsidiary role of international human rights bodies in the protection of human and peoples' rights. As the Court has consistently affirmed, in order for this requirement of admissibility to be met, the remedies that should be exhausted must be ordinary judicial remedies.[15]

38. In the instant case, the Court notes, from the record, that the Court of Appeal, the highest court in the Respondent State, dismissed the Applicants' appeal on 27 March 2014. Although the Applicants claim to have lodged an application for review of this decision, the Court of Appeal's decision is the final ordinary judicial remedy that was available to them. As the Court has previously held, the review procedure, before the Respondent State's Court of Appeal, is an extraordinary remedy which an applicant is not required to pursue before seizing the Court.[16]

39. Similarly, concerning the filing of a constitutional petition before the High Court, this Court has consistently held that this remedy, as applied in the Respondent State's judicial system, is an extraordinary remedy that Applicants are not required to exhaust prior to bringing their matters to this Court.[17]

40. With regard to the Respondent State's contention that the Applicants did not raise the issue of denial of legal aid and bail during domestic proceedings, the Court holds that these alleged violations occurred in the course of the domestic judicial proceedings that led to the Applicants' conviction and sentence. The allegations, therefore, forms part of the "bundle of rights and

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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.

[15] *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 308, § 95.

[16] *Thomas v. Tanzania* (merits), *supra*, § 64; *Onyachi and Njoka v. Tanzania* (merits), *supra*, § 56; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44.

[17] *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 72; *Onyachi and Njoka v. Tanzania* (merits), *supra*, § 56.

guarantees" relating to the right to a fair trial which was the basis of the Applicants' appeals.[18] The domestic judicial authorities thus had ample opportunity to address the allegations even without the Applicants having raised them explicitly. It would, therefore, be unreasonable to require the Applicants to file a new application before the domestic courts to seek redress for this claim.[19]

41. The Court finds, therefore, that the Applicants have exhausted local remedies since the Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had upheld their conviction and sentence.

42. Accordingly, the Court finds that the Applicants have exhausted local remedies, as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules. The Respondent State's objection is thus dismissed.

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

43. The Respondent State argues that the Applicants did not file their Application within a reasonable time as provided by Article 56(6) of the Charter. According to the Respondent State, the judgment of the Court of Appeal, concerning the Applicants, was delivered on 27 March 2014 but the Applicants only filed their Application on 15 June 2016. The Respondent State points out that it took two (2) years and two (2) months and eighteen (18) days, after the Court of Appeal's judgment, for the Applicants to file their Application.

44. According to the Respondent State, although the Rules do not "quantify a period of reasonable time, there are developments in international human rights jurisprudence which have established that a period of six (6) months is considered reasonable time." In support of its position, the Respondent State cites the decision of the African Commission on Human and Peoples'

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

Rights in *Majuru v. Zimbabwe*. The Respondent State thus prays that the Application be dismissed for not being filed within a reasonable time.

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45. The Applicants submissions did not specifically address the reasonableness of time for filing their Application.

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46. The Court notes that pursuant to Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, in order to be admissible, all applications must be filed within a reasonable time.

47. The Court reiterates that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provides that Applications must be filed "… within 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".

48. As the Court has consistently held "… the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[20] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[21] indigence, illiteracy, and the use of extra-ordinary remedies.[22] In all instances, however, it is incumbent on an

[20] *Norbert Zongo and Others v. Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also *Thomas v. Tanzania* (merits), *supra*, § 73.
[21] *Jonas v. Tanzania* (merits), *supra*, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[22] *Guehi v. Tanzania* (merits and reparations), *supra*, § 56; *Werema and Werema v. Tanzania* (merits), *supra*, § 49; *Alfred Agbessi Woyome v. Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 83-86.

applicant to prove the particular circumstances that affected the pace at which his/her application was filed.

49. In the instant case, the Applicants exhausted local remedies on 27 March 2014 when the Court of Appeal dismissed their appeal against their conviction and sentence. The Applicants subsequently filed their Application on 15 June 2016 which means they approached the Court two (2) years, two (2) months, and nineteen (19) days after the date of exhaustion of local remedies. On the basis of its jurisprudence,[23] and employing the case by case approach, the Court holds that period of two (2) years, two (2) months and nineteen (19) days is reasonable, within the meaning of Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules. The Respondent State's objection is thus dismissed.

B. Other conditions of admissibility

50. The Court notes that none of the Parties is contesting the Application's compliance with the conditions set out in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules. Nevertheless, it must satisfy itself that these conditions have been satisfied before proceeding with the determination of the Application.

51. From the record, the Court confirms that the Applicants have been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

52. The Court also notes that the Applicants' claims seek to protect their rights guaranteed under the Charter in conformity with one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, which is the promotion and protection of human and peoples' rights. Furthermore, the Application does not contain any claim or prayer that is incompatible

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[23] *Jonas v. Tanzania* (merits), *supra*, § 55 - five (5) years, one (1) month and twelve (12) days; *Ramadhani v. Tanzania* (merits), *supra,* § 49 - five (5) years, one (1) month and thirteen (13) days; *Cheusi v. Tanzania* (merits and reparations), *supra*, § 71 - four (4) years, nine (9) months and twenty-three (23) days; *Thobias Mangara Mango and Shukurani Masegenya Mango v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 55 - four (4) years, eight (8) months and thirty (30) days.

with a provision of the said Act. The Court considers, therefore, that the Application is compatible with the Constitutive Act of the African Union and the Charter and holds that the requirements of Rule 50(2)(b) of the Rules are met.

53. The Court also finds that the language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

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

55. Further, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.

56. The Court finds, therefore, that the instant Application meets all the admissibility conditions under Article 56 of the Charter, as restated in Rule 50(2) of the Rules, and declares it admissible.

VII. MERITS

57. The Applicants allege a violation of the right to non-discrimination – Article 2; the right to equality before the law and equal protection of the law – Article 3; the right to life – Article 4; the right to dignity – Article 5; the right to a fair trial – Article 7; the right to freedom of expression – Article 9; and the general duty to uphold the Charter – Article 1. The Court will now individually assess the alleged violations under each of the cited provisions of the Charter.

A. Alleged violation of the right to non-discrimination

58. The Applicants submit that the Respondent State violated their right to non-discrimination under Article 2 of the Charter but they did not provide any specifics outlining how the Respondent State perpetrated the alleged violation.

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59. According to the Respondent State, the Applicants were arrested, prosecuted and convicted in line with its laws and they were "not discriminated in any way by any person or authority in the Respondent State."

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60. The Charter, in Article 2, provides as follows:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

61. The Court recalls that in *APDH v. Republic of Côte d'Ivoire*, it held that discrimination is "a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria."[24] As the Court pointed out in *Jebra Kambole v. United Republic of Tanzania*, however, this understanding of discrimination is what is often referred to as direct discrimination.[25] In cases where the discrimination is indirect, the key indicator is not necessarily different treatment based on visible or unlawful criteria but the disparate effect on groups or individuals as a result of specified measures or actions.[26]

[24] *Actions pour la Protection des Droits de l'Homme (APDH) v. Republic of Cote d'Ivoire* (Merits) (18 November 2016) 1 AfCLR 668, §§146-147.
[25] *Jebra Kambole v. United Republic of Tanzania* (merits and reparations) (15 July 2020) 4 AfCLR 460, § 68.
[26] *Ibid.*

62. As the Court has previously emphasised, the essence of Article 2 of the Charter is to proscribe differential treatment of individuals found in the same situation on the basis of unjustified grounds.[27] However, whenever there is an allegation of differential treatment on grounds proscribed by the Charter, the person making the allegation bears the duty of substantiating the allegation. In the instant Application, however, the Applicants make a general allegation that they were discriminated against without offering any evidence in support of their allegation.

63. In the circumstances, the Court finds the Applicants' allegations unfounded and, accordingly, dismisses them.

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

64. The Applicants submit that the Respondent State violated their rights because the police officers who investigated their case were the same officers who arrested them and recorded their caution statements thereby making their conduct partial "as it violated and denied the Applicants their rights to equality before the law and the entitlement to equal protection of the law."

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65. In response to the Applicant's averments, the Respondent State argues that "police officers are empowered by law to conduct investigation of crimes including arresting a suspect, interviewing them and taking down their statements." It also contends that the Applicants' arrest and investigation were conducted in line with section 10(1) and 10(3) of the Criminal Procedure Act which permit police officers to conduct investigations, arrest suspects and record statements.[28] It also points out that the caution

[27] *Ibid*, § 95.

[28] The Criminal Procedure Act provides as follows: Section 10(1) Where, from the information received or in any other way, a police officer has reason to suspect the commission of an offence or to apprehend a breach of the peace he shall, where necessary, proceed in person to the place to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender where the offence is one for which he may arrest without warrant and Section 10(3) Any police officer making an investigation may, subject to other provisions of this Part, examine

statements obtained from the Applicants were not only in compliance with the Criminal Procedure Act but they were also admitted in evidence before the High Court without any objection from the Applicants or their counsel.

66. The Respondent State submits, therefore, that the Applicants were convicted for their criminal acts and there has been no violation of their rights under Article 3 of the Charter. It thus prays the Court to find that the Applicants' "allegations are misconceived, lack merit and should be duly dismissed."

***

67. The Court recalls that Article 3 of the Charter provides as follows:

> 1. Every individual shall be equal before the law.
> 2. Every individual shall be entitled to equal protection of the law.

68. In *Alex Thomas v. United Republic of Tanzania,* the Court emphasised that, in respect of allegations of a violation of the right to equality and equal protection before the law, general allegations do not suffice.[29] It behoves the party making the allegations to substantiate the same.

69. In the present Application, the Applicants fault the impartiality of the police officers who arrested them because the officers who arrested them were also involved in recording caution statements from them. In this regard, the Court has had regard to section 10 of the Respondent State's Criminal Procedure Act and confirms that, within the Respondent State, it is legally permissible for a police officer to participate in both the arrest and recording of a caution statement from a suspect. Notably, no argument has been made by the Applicants to demonstrate that the procedure under section 10 of the Criminal Procedure Act contravenes the Charter. Given that the burden of proving an alleged violation always lies with him/her that asserts,

orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

[29] *Thomas v. Tanzania*, *supra*, § 140.

the Court finds that the Applicants have failed to prove any illegality in the manner in which the police officers conducted themselves when arresting them and recording their statements. Additionally, the Court finds that the Applicants have not established how the Respondent State treated them in a manner contrary to the guarantees in Article 3 of the Charter.

70. In the circumstances, the Court holds that the Applicants have failed to prove a violation of Article 3 of the Charter and, accordingly, dismisses their allegations.

C. Alleged violation of the right to life

71. Apart from indicating, in their Application, that their right to life was violated, the Applicants did not make any submissions highlighting how their right to life was violated.

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72. The Respondent State submits that the Court of Appeal upheld the High Court's decision convicting and sentencing the Applicants to suffer death because the Applicants arbitrarily deprived Aliasger Saggid and F7091 PC Godwin of their right to life and that under Tanzanian law the death penalty is a permissible punishment. In support of its submissions, the Respondent State has referred the Court to Article 6 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") and submitted that the "ICCPR show that the death penalty has not been completely prohibited."

73. The Respondent State also points out that "the Applicants were convicted of murder which is a serious crime, they were convicted by a competent court, they appealed to the Court of Appeal of Tanzania, the highest Court within the justice system which upheld their conviction." It thus submits that there has been no violation of the Applicants' rights under Article 4 of the Charter.

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74. The Court recalls that Article 4 of the Charter provides as follows:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

75. There is no doubt that Article 4 guarantees everyone the right to life and integrity of his/her person. As the Court has held the "right to life is the cornerstone on which the realisation of all other rights and freedoms depend. The deprivation of someone's life amounts to eliminating the very holder of these rights and freedoms. It is in recognition of this that Article 4 of the Charter prohibits the arbitrary deprivation of life."[30]

76. In its jurisprudence, the Court has taken cognisance of global trends towards the abolition of the death penalty, represented, in part, by the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[31] The Court has also noted that notwithstanding the developments at the global and regional level, the death penalty remains on the statute books of some states and that no treaty on the abolition of the death penalty has gained universal ratification.[32] In respect of the Second Optional Protocol to the ICCPR, the Court notes that this has ninety (90) State Parties out of the one hundred-seventy three (173) State Parties to the ICCPR.

77. Specifically in relation to Africa, the Court takes cognisance of the continent-wide developments in relation to the death penalty. By way of illustration, in 1990, only one country, Cape Verde, had abolished the death penalty. Over the years, however, the number of African countries that have abolished the

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[30] *African Commission on Human and Peoples' Rights v. Kenya* (26 May 2017) 2 AfCLR 9 § 152

[31] *Amini Juma v. United Republic of Tanzania*, ACtHPR, Application No.024/2016, Judgment of 30 September 2021 (merits and reparations), § 122 and *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, § 96. Notably, the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

[32] For a comprehensive statement on developments in relation to the death penalty, see, United Nations General Assembly *Moratorium on the use of the death penalty – Report of the Secretary General* 8 August 2022.

death penalty has steadily increased as has the number of those with long-term moratoriums on executions.

78. Given the framing of Article 4 of the Charter, and the broader developments in international law in relation to the death penalty, the Court reiterates its position that this type of punishment should, exceptionally, be reserved only for the most heinous of offences committed in seriously aggravating circumstances. However, since the circumstances for which the death penalty may be appropriate, cannot be categorised with exactitude, the determination of incidents of crimes warranting the imposition of the death penalty must be left to domestic courts to decide on a case-by-case basis.

79. On the facts of the present Application, especially given the concurrent findings of the High Court and Court of Appeal, which the Applicants have not impeached, the Court, therefore, does not find any basis for interfering with the final sentence meted on the Applicants.

80. The above notwithstanding, the Court notes that the Applicants were sentenced to death under the mandatory regime for the imposition of the death penalty which is still in force in the Respondent State. As per the Court's jurisprudence, this mandatory regime for the death penalty, is an affront to the Charter [33]

81. In the circumstances, the Court finds that the Respondent State violated the Applicants' right to life by reason of the imposition of the mandatory death penalty since this amounts to an arbitrary deprivation of the right to life.

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[33] *Ghati Mwita v. United Republic of Tanzania*, ACtHPR, Application No.12/2019, Judgment of 1 December 2022 (merits and reparations), § 122; *Juma v. Tanzania* (merits and reparations), *supra*; *Rajabu and Others v. Tanzania* (merits and reparations), *supra*.

D. Alleged violation of the right to dignity

82. The Applicants submit that the Respondent State violated the First Applicant's rights "… and subjected him to torture when his caution statement was taken out of mandatory time of 4 hours."

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83. The Respondent State submits that "… at no time during the investigation, prosecution, trial or appeal were the Applicants subject to cruel, inhuman or degrading punishment or treatment." As for the death penalty, it reiterates that the Applicants were sentenced to the death penalty in accordance with "… national and international restrictions placed on human rights which does not render them absolute."

84. It is also the Respondent State's argument that the "Applicants were never handled in an undignified manner but underwent the procedures of the justice system for the offence of murder as all other persons accused and convicted for the offence of murder." As for the allegations of torture, the Respondent State contends that the Applicants, who were represented by counsel during all domestic proceedings, never raised this allegation before the High Court or Court of Appeal. It thus submits that there has been no violation of the Applicants' rights under Article 5 of the Charter.

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85. 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.

86. The Court reiterates its jurisprudence, that in determining whether the right to dignity has been violated, three main factors must be considered. First, Article 5 has no limitation clause. The prohibition of indignity manifested in cruel, inhuman and degrading treatment is thus absolute. Second, the prohibition must be interpreted to extend to the widest possible protection against abuse, whether physical or mental. Finally, personal suffering and indignity can take various forms the assessment of which will depend on the circumstances of each case.[34]

87. The Court notes, from the record, that the question of the alleged violation of the First Applicant's right to dignity due to the taking of his statement outside of a four (4) hour period, arises because sections 50 and 51 of the Respondent State's Criminal Procedure Act prescribe periods within which detained persons should be interviewed.[35]

88. From the record, the Court observes that this matter was considered by both the High Court and the Court of Appeal. Specifically, the Court of Appeal

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[34] *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 88.

[35] For example, section 50 provides as follows:

(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-
  (a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;
  (b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-
  (a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;
  (b) for the purpose of-
    (i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;
    (ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;
    (iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate; or
    (iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;
  (c) while awaiting the arrival of a person referred to in subparagraph (iv) of paragraph (b); or
  (d) while the person under restraint is consulting with a lawyer.

confirmed that under the Respondent State's criminal procedure law, discretion is vested in a trial court to determine the admissibility of any evidence supposedly illegally obtained. In further interrogating the matter, the Court of Appeal found that the High Court had exercised proper judicial discretion in admitting the evidence. It thus refused to interfere with the findings of the High Court.

89. Before this Court, the First Applicant has simply restated the same argument that he made before the Court of Appeal. No attempt has been made to demonstrate why or how both the High Court and the Court of Appeal erred in admitting the evidence allegedly illegally obtained. The Applicant has, therefore, simply made a general allegation which has not been substantiated. In the circumstances, the Court dismisses the First Applicant's allegations of a violation of his right to dignity by reason of the time it took to record his caution statement.

90. The above notwithstanding, the Court takes judicial notice of the fact that all the Applicants were sentenced to suffer the death penalty by hanging. The Court, in the circumstances, reiterates its established jurisprudence that hanging, as method for implementing the death penalty amounts to a violation of the right to dignity under Article 5 of the Charter.[36]

91. The Court, therefore, finds that the Respondent State violated Article 5 of the Charter by prescribing hanging as a method of implementing the death penalty.

E. Alleged violation of the right to a fair trial

92. The Court notes that the Applicants have made a number of allegations falling under the rubric of the right to a fair trial.

[36] *Rajabu and Others v. Tanzania*, *ibid*, §§ 119-120; *Henerico v. Tanzania, ibid*, §§ 169-170; *Juma v. Tanzania, ibid*, §§ 135-136.

93. The Court recalls that Article 7(1)(c) of the Charter, in so far as is material, provides that "[e]very individual shall have the right to have his cause heard …". As the Court has held,[37] this Article may be interpreted in light of the provisions of Article 14(1) of the ICCPR which provides that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law …". A combined reading of the two provisions confirms that everyone has a right to a fair trial.

94. Before individually assessing the specific allegations made by the Applicants, the Court wishes to reiterate its approach to considering allegations that question the manner in which domestic courts dealt with questions that arose during trial or appellate processes, especially evidential matters. As pointed out in *Alex Thomas v. United Republic of Tanzania*:[38]

> Though this Court is not an appellate body with respect to decisions of national courts, this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instrument ratified by the State concerned. With regard to manifest errors in proceedings at national courts, this Court will examine whether the national courts applied appropriate principles and international standards in resolving the errors. This is the approach that has been adopted by similar international courts.

95. The above approach has been consistently confirmed by the Court.[39] For example, in *Kijiji Isiaga v. United Republic of Tanzania*, the Court restated its approach as follows:[40]

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[37] *Jonas v. Tanzania, supra*, §§ 64-65.
[38] *Thomas v. Tanzania, supra*, § 130.
[39] See, for example, *Jonas v. Tanzania, supra*, § 69.
[40] (merits) (21 March 2018) 2 AfCLR 218, §§ 65-66.

> The Court underscores that domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings. However, the fact that an allegation raises questions relating to the manner in which evidence was examined by domestic courts does not preclude the Court from determining whether the domestic procedures fulfilled international human rights standards.

96. The essence of the above approach is that the Court will, generally, be slow to interfere with factual and evidential findings made by domestic courts except where there is manifest irregularity resulting in a miscarriage of justice. In the present matter, the Applicants make several allegations the crux of which is that their right to a fair trial was compromised due to the manner in which the proceedings before the High Court and the Court of Appeal were conducted. The Court will, below, address each of the allegations made by the Applicants.

i. Lack of corroboration for the Applicants' caution statements

97. The Applicants submit that both the High Court and the Court of Appeal "erred in law and fact when they failed to consider that the alleged applicants caution statements were never corroborated despite having relied on them as basis for convicting and upholding the applicants' convictions."

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98. The Respondent State submits that the Applicants' allegations lack merit and should be dismissed. In support of its submissions, it points out that Exhibit P10 "was admitted without any objection at the trial court as noted by the Court of Appeal at page 7 of its judgment. The trial court found that that the makers of the confession statement were speaking nothing but the

truth at page 53 of the High Court judgment and page 16 of the Court of Appeal Judgment."

99. The Respondent State also submits that it was clear from the caution statement of the Second Applicant that he knew about the crime that was about to be committed but took no steps to prevent the same and even after the crime was committed, he took no steps to report the same thereby confirming his common intention with the other perpetrators. The Respondent State also points out that the caution statement of the Third Applicant explained in detail his participation in the crime including his admission as to how he shot the deceased. The Respondent State submits, therefore, that "Exhibits P7, P9 and P10 reflected nothing but the truth hence there was no need for corroboration" and that the Applicants were properly convicted on the basis of the evidence on record.

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100. The Court observes, from the record, that both the High Court and the Court of Appeal demonstrated an awareness of the necessity of confirming the reliability of the caution statements before relying on them. This is manifest from, for example, page 57 of the High Court's judgment where the court warned itself of the danger of relying on statements by co-accused to justify a conviction and also pages 16 to 21 of the Court of Appeal's judgment. It is clear that both the High Court and the Court of Appeal confirmed, on the evidence before them, that the Applicants had a common intention when they committed the robbery.

101. In this Application, the Court has not been able to establish any manifest irregularity necessitating its intervention to set aside the findings of either the High Court or Court of Appeal. As a matter of fact, the Applicants themselves, save for complaining about the application of the requirement of corroboration – which was dealt with by the domestic courts – have not demonstrated and proved any manifest anomalies that the domestic courts committed in relying on the caution statements.

102. In the circumstances, therefore, the Court finds that the Respondent State did not violate the Applicants' right to a fair trial by reason of relying on the caution statements.

ii. Allegations relating to admission of illegally obtained caution statements

103. The Applicants contend that both the High Court and the Court of Appeal erred in considering section 169 of the Criminal Procedure Act[41] in isolation when deciding to admit their caution statements. The Applicants further contend that they were not given an opportunity to be heard or to comment on the caution statements before the same were admitted.

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104. The Respondent State contends that "the allegation is misconceived and baseless as the cautioned statement Exhibit 7 was admitted and acted upon in accordance with the law." It is also the Respondent State's contention that section 169 of the Criminal Procedure Act was inapplicable since the

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[41] Section 169.(1) Where, in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.
(2) The matters that a court may have regard to in deciding whether, in proceedings in respect of any offence, it is satisfied as required by subsection (1) include-

(a) the seriousness of the offence in the course of the investigation of which the provision was contravened, or was not complied with, the urgency and difficulty of detecting the offender and the urgency or the need to preserve evidence of the fact;
(b) the nature and seriousness of the contravention or failure;
(c) the extent to which the evidence that was obtained in contravention of in consequence of the contravention of or in consequence of the failure to comply with the provision of any law, might have been lawfully obtained; and
(d) all the circumstances of the offence, including the circumstances in which the evidence was obtained.

(3) The burden of satisfying the court that evidence obtained in contravention of, in consequence of the contravention of, or in consequence of the failure to comply with a provision of this Act should be admitted in proceedings lies on the party who seeks to have the evidence admitted.
(4) The court shall, prior to exclusion of any evidence in accordance with subsection (1), be satisfied that the failure or breach was significant and substantial and that its exclusion is necessary for the fairness of the proceed ings.
(5) Where the court excludes evidence on the basis of this provision it shall explain the reasons for such decision.
(6) This section is in addition to, and not in derogation of, any other law or rule under which a court may refuse to admit evidence in proceedings.

evidence at issue was not illegally obtained while section 169 only applies when what is at issue is illegally obtained evidence. The Respondent State also points out that the judgment of the Court of Appeal, at page 12, dealt with the applicability of section 169 of the Criminal Procedure Act and found no fault with the approach adopted by the High Court.

105. The Respondent State submits that the caution statements of the 2nd and 3rd Applicant were not admitted unprocedurally. In support of its submission, it argues that "the law allows for conviction to be based solely on the accused's cautioned statement if the Court believes there was compliance with the laws dictating how such statement was taken and if it find the information contained in the statement to be true."

106. In respect of the 2nd Applicant, the Respondent State submits that he admitted, in his caution statement, that he was aware of the conspiracy to rob the vehicle carrying money from Mohamed Enterprises and also that he signed the caution statement and did not dispute his signature during trial. As for the 3rd Applicant, the Respondent State submits that he admitted to shooting the victims during the robbery, as the judgment of the Court of Appeal indicates at page 20.

107. It accordingly submits that Exhibits P7, P9 and P10 were all obtained in compliance with laid down procedure and that both the High Court and the Court of Appeal were justified "in convicting the Applicants based on the statements after being satisfied … of the prosecution case."

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108. From the record, the Court observes that the admissibility of the Applicants' caution statements was dealt with at length by both the High Court and the Court of Appeal. This is clear from pages 52 to 53 of the judgment of the High Court. Additionally, from pages 55 to 56 of the High Court's judgment, the trial judge went at length to expound the legal basis on which he was admitting the Applicants' caution statements.

109. The record also confirms that the Court of Appeal considered the legal propriety of admitting the Applicants' caution statements, as manifested in the discussion on pages 10 to 12 of its judgment. In its assessment, the Court of Appeal confirmed that under section 169 of the Criminal Procedure Act any evidence obtained in violation of the provisions of the Criminal Procedure Act or any law can be challenged but that a trial court has absolute discretion to admit or exclude such evidence. Given the latitude offered by section 169, to admit or not admit evidence, the Court of Appeal held that its role was to determine whether the trial court properly exercised its discretion in dealing with such evidence.

110. In the Court's assessment, both the High Court and the Court of Appeal, demonstrated sufficient awareness of the possible dangers of simplistically admitting the Applicants' caution statements but in the exercise of discretion vested in them by law decided to admit the statements. The Court finds, therefore, that the record does not establish that the domestic courts abused their discretion in admitting the statements.

111. Given the above, the Court finds that the Applicants' have failed to prove their allegations and, accordingly, dismisses their claim that their right to fair trial was violated by reason of the admission of their caution statements into evidence.

F. Alleged violation of the freedom of expression

112. Apart from indicating that their right to freedom of expression was violated, the Applicants did not make any submissions outlining how their rights were violated.

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113. The Respondent State submits that "this allegation is baseless as there is no explanation as to how the Applicants' right to receive information to express and disseminate their opinions within the law has been violated." It further submits that "the Applicants have not stated what information they

were denied to receive and curtailed from expressing. There is no information as to the nature of the information or who prevented them from exercising this right." The Respondent State thus submits that there has been no violation of Article 9 of the Charter.

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114. Article 9 of the Charter provides as follows:

> 1. Every individual shall have the right to receive information.
> 2. Every individual shall have the right to express and disseminate his opinions within the law.

115. In the present Application, the Court finds that the Applicants have simply made a general allegation of a violation of Article 9 of the Charter without offering any substantiation. In the circumstances, the Court finds the Applicants' allegation without merit and accordingly dismisses it.

G. Alleged violation of Article 1 of the Charter

116. No submissions were made by the Applicants detailing how Article 1 of the Charter was violated.

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117. The Respondent submits that it "recognises the rights, duties and freedoms enshrined in the Charter and has undertaken legislative measures to ensure their realisation." In support of its submissions, it points out that its Constitution recognises the presumption of innocence and that its evidence Act requires proof beyond reasonable doubt in all criminal matters. It further points out that under its Criminal Procedure Act all "accused persons have the right to a defence and to cross-examine witnesses." In conclusion, the Respondent State submits that "there has been no violation of Article 1 of the African Charter on Human and Peoples' Rights as the Respondent has

not violated any of the Applicants' rights provided by the African Charter on Human and Peoples' Rights."

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118. Article 1 of the Charter provides as follows:

> The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

119. The Court recalls that in instances where an allegation of violation of Article 1 of the Charter has been raised, it has held that "when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated."[42]

120. In the present Application, the Court has established that the mandatory nature of the death penalty in the Respondent State is a violation of Article 4 of the Charter. Resultantly, the Court also finds that the Respondent State has violated Article 1 of the Charter.

VIII. REPARATIONS

121. The Applicants pray the Court for a declaration that the Respondent State has violated their rights under Articles 1, 2, 3, 4, 5, 7 and 9 of and for an "order for reparations." The Applicants also pray the Court for any other order or remedy as it may deem fit.

122. The Respondent State prays that "the Applicants' prayers not be granted and be dismissed in their entirety."

[42] *Nguza Viking v. Tanzania* (merits), *supra*, § 135.

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123. Article 27(1) of the Protocol provides that:

> If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

124. The Court has consistently held that, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and when granted, reparation should cover the full damage suffered.

125. The Court reiterates that the onus is always on the Applicant to provide evidence to justify his prayers, particularly for material damages.[43] With regard to moral damages, the Court has held that the requirement of proof is not strict,[44] since it is presumed that there is prejudice caused when violations are established.[45]

126. The Court also restates that the measures that a State must take to remedy a violation of human rights include 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.[46]

127. In the instant case, the Court has established that the Respondent State has violated Articles 1, 4 and 5 of the Charter by maintaining the mandatory

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[43] *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) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016), 1 AfCLR 346, § 15(d); and *Elisamehe v. Tanzania* (merits and reparations), § 97.

[44] *Norbert Zongo and Others v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 258, § 55. See also *Elisamehe v. Tanzania* (merits and reparations), *supra*, § 97.

[45] *Rajabu and Others v. Tanzania* (merits and reparations), *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* (merits and reparations), *ibid*, § 97.

[46] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also *Elisamehe v. Tanzania, ibid*, § 96.

death penalty in its penal law as well as by prescribing hanging as a method for implementing the death penalty. It is in respect of these violations that reparations must be determined since all other allegations by the Applicants have been dismissed.

A. Pecuniary reparations

i. Material prejudice

128. 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.[47]

129. In the instant case, the Court recalls that the Applicants never specifically provided any proof of the material prejudice that they suffered as a result of the violation established by the Court.

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

ii. Moral prejudice

131. The Applicants did not make any prayers specifically seeking reparations for the moral prejudice that they may have suffered. The Court recalls, however, that moral prejudice is presumed in cases of human rights violations and can be awarded by the Court acting under its equitable jurisdiction.[48]

132. In the present application, the Court has established that the Respondent State violated Articles 1, 4 and 5 of the Charter, it is thus to be presumed

[47] *Isiaga v. Tanzania*, *supra*, § 20.
[48] *Zongo and Others v. Burkina Faso* (reparations), *supra,* § 55; *Umuhoza v. Rwanda* (reparations), *supra,* § 59; *Jonas v. Tanzania* (reparations), *supra*, § 23.

that the Applicants suffered some moral prejudice. On the facts of this case, and in the exercise of its equitable jurisdiction, the Court awards each of the Applicants the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300 000) as reparations for moral prejudice.

B. Non-pecuniary reparations

133. The Applicants pray the Court to redress all the wrongs caused to them by the Respondent State.

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134. The Respondent State prays that the Applicants' prayers be "not granted and be dismissed in their entirety."

i. Guarantees of non-repetition

135. In light of the violations that the Court has established, 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 and hanging as a method of execution, be amended to align with the country's international obligations.[49] The Court takes judicial notice of the fact that four (4) years have passed since the first such judgment was issued, but that the Respondent State has not, as at the date of the present Judgment, communicated to the Court any steps that it has taken to comply with the said judgments.

136. As a result of the Respondent State's position, on the Court's earlier decisions, persons in a similar position to the Applicants remain at the risk of being tried and sentenced under the mandatory regime and also to suffer hanging as a means of executing the death penalty.

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[49] *Gozbert Henerico v. United Republic of Tanzania*, ACtHPR, Application No.056/2016, Judgment of 10 January 2022 (merits and reparations), § 207; *Juma v. Tanzania*, *supra*, § 170.

137. In order to guarantee the non-repetition of the violations at issue herein, therefore, the Court orders the Respondent State to immediately, and in any event within six (6) months from the date of notification of this judgment, undertake all necessary measures to repeal the provision for the mandatory death penalty in its Penal Code as well as the prescription for hanging as a method of execution.

ii. Release from prison

138. The Applicants pray the Court for an order "compelling the Respondent State to release the Applicants from detention."

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139. The Respondent State prays that the Applicants should not be awarded reparations and that their prayers should be dismissed in their entirety.

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140. Regarding the Applicants' prayer to be released, the Court recalls that it can only make such an order in compelling circumstances. In the present Application, the Court notes that its findings only pertain to the sentencing and do not, therefore, affect the conviction of the Applicants. The prayer for release is thus not warranted. The Court, therefore, dismisses the Applicants' prayer for release from prison.

141. The Court considers, however, that while the Applicants' prayer for release is not warranted, the Applicants were sentenced to death under a regime which did not accord the domestic courts discretion on the sentence. Given that the Court has found the mandatory sentencing regime to be inconsistent with the Charter, it is necessary for the Court to make an order dealing with this sentencing regime.

142. In the circumstances, the Court orders the Respondent State to take all necessary measures within one (1) year of the notification of this Judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death sentence and upholds the discretion of the judicial officer.

iii. Implementation and reporting

143. The Court notes that the Respondent State has not provided any information on the implementation of its judgments in any of the earlier cases where it was ordered to repeal the mandatory death penalty. The Court holds, therefore, that the Respondent State is under an obligation to report on the steps taken to implement this judgment within six (6) months from the date of notification of this judgment.

iv. Publication

144. None of the parties made any submissions in respect of the publication of this judgment.

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145. 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. The Court also notes that it has not received any indication that necessary measures have been taken for the law to be amended and aligned with the Respondent State's international human rights obligations. The Court thus finds it appropriate to order publication of this judgment within a period of three (3) months from the date of notification.

IX. COSTS

146. The Applicants did not make any prayers as to costs while the Respondent State prayed that the Applicants be ordered to bear the costs of the proceedings.

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

148. In the instant case, the Court does not find any reason for departing from its established practice and thus orders that each Party will bear its own costs.

X. OPERATIVE PART

149. For these reasons:

THE COURT

Unanimously

On jurisdiction

i. *Dismisses* the objection to its jurisdiction raised by the Respondent State;
ii. *Declares* that it has jurisdiction.

On admissibility

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

On merits

v. *Holds* that the Respondent State has not violated the Applicants' right to non-discrimination under Article 2 of the Charter;
vi. *Holds* that the Respondent State has not violated the Applicants' right to equality before the law and equal protection of the law under Article 3 of the Charter;
vii. *Holds* that the Respondent State has not violated the Applicants' right to a fair trial under Article 7 of the Charter;
viii. *Holds* that the Respondent State has not violated the Applicants' right to express and disseminate opinions under Article 9 of the Charter;

By a majority of eight (8) Judges for; and two (2) Judges against;

ix. *Holds* that the Respondent State has violated the Applicants' right to life under Article 4 of the Charter in relation to the provision for the mandatory death penalty in its Penal Code;
x. *Holds* that the Respondent State has violated the Applicants' right to dignity under Article 5 of the Charter by prescribing hanging as a method of implementing the death penalty;
xi. *Holds* that the Respondent State has violated Article 1 of the Charter by reason of its failure to undertake legislative and other measures to recognise and give effect to the rights in the Charter.

Unanimously

On reparations

Pecuniary reparations

xii. *Dismisses* the Applicants' prayer for damages for material prejudice;

xiii. *Grants* each of the Applicants Tanzanian Shillings Three Hundred Thousand (TZS 300,000) for moral damage;

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

Non-pecuniary reparations

xv. *Dismisses* the Applicants' prayer for release from prison;

xvi. O*rders* the Respondent State to take all necessary constitutional and legislative measures, within six (6) months of notification of this Judgment to ensure that the provisions of its Penal Code are amended and aligned with the provisions of the Charter so as to eliminate the violations identified herein;

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

xviii. *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.

On implementation and reporting

xix. *Orders* the Respondent State to submit to it, within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter,

every six (6) months until the Court considers that there has been full implementation thereof.

On costs

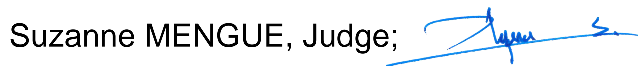
xx. *Orders* that each Party shall bear its own costs.

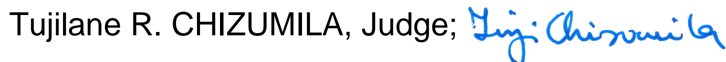
Signed:

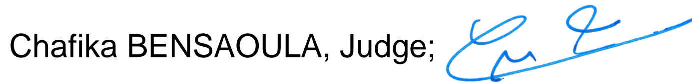
Modibo SACKO, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge; 

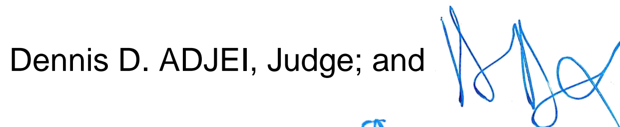
Tujilane R. CHIZUMILA, Judge; 

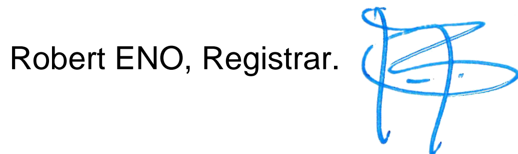
Chafika BENSAOULA, Judge; 

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(3), the Declarations of Judge Blaise TCHIKAYA and Judge Dumisa B. NTSEBEZA are appended to this Judgment.

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