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

THE MATTER OF

DOMINICK DAMIAN

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 048/2016

JUDGMENT

4 JUNE 2024

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.

In the Matter of:

Dominick DAMIAN

Represented by:

Advocate Jebra KAMBOLE
Law Guard Advocates

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr Boniface Nalija LUHENDE, 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. Mr. Mark MULWAMBO, Senior State Attorney, Attorney General's Chambers;
vi. Mr Baraka LUVANDA, Ambassador, Head of Legal Unit, Ministry of Foreign Affairs and International Cooperation;
vii. Ms Aidah KISUMO, Senior State Attorney, Attorney General's Chambers;
viii. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation; and
ix. Mr Elisha SUKU, Foreign Service Officer, Ministry of Foreign Affairs and East African Cooperation.

After deliberations,

Renders this Judgment:

I. THE PARTIES

1. Dominick Damian (hereinafter referred to as "the Applicant") is a Tanzanian national who at the time of filing this Application was awaiting the execution of the death sentence at Butimba Central Prison, Mwanza, following his conviction for murder. The Applicant alleges violations of his rights in relation to proceedings before domestic courts.

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 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 new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that, on 27 August 2007, the Applicant and his brother Daniel – who is not a party to the present Application – assaulted their mother, Astella Damian, with sticks at Kitwechenkula village, in Karagwe District, Kagera Region in Tanzania. Upon arrival of her husband at the scene, Astella Damian told him that Dominick and Daniel, her children assaulted her and also tried to set her on fire. The victim subsequently died due to the assault.

4. The Applicant was arrested on the same day at his home after the Village Executive Officer reported the incident to the police. On 14 December 2012, he was convicted of the murder of Astella Damian and sentenced to death by hanging by the High Court sitting at Bukoba in Criminal Case 61 of 2008.

5. Dissatisfied with the said decision, the Applicant appealed to the Court of Appeal of Tanzania sitting at Bukoba in Criminal Appeal No. 154 of 2013, which was dismissed in its entirety for lack of merit on 17 March 2014. On 2 April 2014, he filed a notice of motion for review of the Court of Appeal's decision which, he claims, was pending by the time he filed his Application before this Court.

B. Alleged violations

6. The Applicant alleges that:

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

i. The Respondent State violated his right to a fair trial under Article 7 of the Charter by depriving him of his right to defence, the right to be presumed innocent until proven guilty by a competent court or tribunal and the right to be tried within a reasonable time;
ii. The Respondent State violated his right to life under Article 4 of the Charter by imposing a mandatory death sentence upon a finding of guilt; and
iii. The Respondent State violated his right to dignity under Article 5 of the Charter by sentencing him to death by hanging.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Applicant filed his Application on 1 September 2016 and the same was served on the Respondent State on 15 November 2016.

8. The Respondent State filed its Response to the Application on 23 April 2018.

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

10. On 9 February 2022, pleadings were closed and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

11. The Applicant prays the Court to grant him the following orders and declarations:
    i. That the Respondent State violated his rights under Articles 4, 5, and 7 of the Charter;
    ii. That the Respondent State take appropriate measures to remedy the violations of his rights under the Charter;

iii. That the Respondent State set aside the death sentence imposed on him and remove him from death row;
iv. That the Respondent State amend its Penal Code and related legislation concerning the death sentence to make it compliant with Article 4 of the Charter;
v. That the Respondent State release him from prison; and
vi. That the Respondent State pay reparations in such an amount as the Court deems fit.

12. The Respondent State prays the Court to find:

i. That the Court is not vested with jurisdiction to adjudicate over the Application;
ii. That the Applicant has no locus to file the Application before the Court and hence should be denied access to the Court as per Article 5(3) and 34(6) of the Protocol;
iii. That the Application be dismissed as it does not meet the admissibility requirements stipulated under Rule 40(5) of the Rules;[3]
iv. That the Application be dismissed as it does not meet the admissibility requirements stipulated under Rule 40(6) of the Rules;[4] and
v. That the Application be dismissed.

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

i. That the Respondent State did not violate Article 2 of the Charter;
ii. That the Respondent State did not violate Article 3(1) and (2) of the Charter;
iii. That the Applicant's request for re-evaluation of the evidence be denied and that the Court declare that it lacks jurisdiction to do so;
iv. That the Respondent State did not violate accepted principles of human rights and international law;
v. That the Respondent State did not violate Articles 13(1)(2), (3), (4), (5), (6)(a) and 107A and 107B of the Constitution of the United Republic of Tanzania (the Constitution);

[3] Rule 50(2)(e) of the Rules of 25 September 2020.
[4] Rule 50(2)(f) of the Rules of 25 September 2020.

vi. That the Applicant continue to serve his sentence;
vii. That the Application be dismissed in its entirety; and
viii. That all the reliefs sought by the Applicant be denied.

V. JURISDICTION

14. The Court recalls 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 instruments ratified by the States concerned.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

15. The Court further recalls 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."[5]

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

17. In the instant Application, the Court observes that the Respondent State raises an objection challenging the Court's material jurisdiction. The Court will thus, preliminarily, address the said objections before considering other aspects of jurisdiction, if necessary.

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

A. Objections to material jurisdiction

18. The Respondent State avers that by raising evidential issues previously resolved by domestic courts, the Applicant is asking this Court to exercise appellate jurisdiction on matters already concluded and finalised by its Court of Appeal, which is the highest court. It is the Respondent State's contention that, pursuant to Article 3(1) of the Protocol and Rule 26 of the Rules,[6] this Court does not have jurisdiction to consider a matter after the Court of Appeal has decisively concluded on the same.

19. The Respondent State further argues that the Court does not have jurisdiction to set aside the sentence meted against the Applicant, remove him from death row, and set him free as he prays.

20. The Applicant disputes the Respondent State's submissions and contends that the Court has jurisdiction pursuant to Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules[7] since his Application involves alleged violations of human rights protected by the Charter.

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

22. Regarding the contention that the Court would be exercising appellate jurisdiction by examining certain claims which have already been determined by the Respondent State's domestic courts, this Court reiterates

[6] Rule 29, Rules of Court, 2020.
[7] Rule 29(1)(a), Rules of Court, 2020.
[8] *Matoke Mwita and Masero Mkami v. United Republic of Tanzania,* ACtHPR, Application No. 007/2016, Judgment of 13 June 2023 (judgment), § 24; *Marthine Christian Msuguri v. United Republic of Tanzania*, ACtHPR, Application No. 052/2016, Judgment of 1 December 2022 (merits and reparations), §§ 23-27 and *Kalebi Elisamehe v. Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 265, § 18.

its position that it does not exercise appellate jurisdiction with respect to the decisions of domestic courts.[9] However, the Court retains the power to examine the procedures of national courts in order to determine whether they are in conformity with the standards set out in the Charter or in any other human rights instrument ratified by the State concerned, and this does not make it an appellate court.[10]

23. In the present Application, the Court notes that the Applicant alleges the violation of rights guaranteed under Articles 4, 5 and 7 of the Charter which it is empowered to interpret and apply pursuant to Article 3(1) of the Protocol. The Court therefore considers that it has jurisdiction to determine the Application and dismisses the Respondent State's objection in this regard.

24. In relation to the Respondent State's contention that it lacks jurisdiction to set aside the sentence, remove him from death row and order release from prison, the Court recalls that, pursuant to Article 27(1) of the Protocol, "[i]f 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." Clearly, therefore, the Court has jurisdiction to grant various types of reparation, including those prayed by the Applicant, should the facts of a case so dictate. The Respondent State's objection on this point is thus also dismissed.

25. In light of the above, the Court dismisses the Respondent State's objections to its material jurisdiction and holds that it has material jurisdiction to hear the present Application.

[9] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14; § 26 and *Werema Wangoko Werema and Waisiri Wangoko Werema v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29.

[10] *Cheusi v. Tanzania* (judgment), *supra*, § 32; *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33 and *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.

B. Other aspects of jurisdiction

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

27. Having noted that there is nothing on the record to indicate otherwise, the Court concludes that it has:

    i. Personal jurisdiction, in so far as the Respondent State has deposited the Declaration. In this vein, the Court reiterates its position, as stated in paragraph 2 of this Judgment, that the withdrawal of the Declaration has no bearing on cases pending before it took effect. Given that the present Application was already pending before the withdrawal, the latter has no bearing thereon.[12]
    ii. Temporal jurisdiction given that the violations alleged in the Application occurred after the Respondent State became a party to the Protocol.
    iii. Territorial jurisdiction considering that the violations alleged in the Application occurred within the territory of the Respondent State.

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

VI. ADMISSIBILITY

29. 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."

[11] Rule 39(1) of Rules of Court, 2 June 2010.
[12] *Cheusi v. Tanzania* (judgment), *supra*, § 38. See also *Ingabire Victoire Umuhoza v. Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

30. 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.”

31. 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.

32. The Court observes that the Respondent State raises an objection to the admissibility of the Application on the basis that it was not filed within a reasonable time. The Court will consider this objection before examining other conditions of admissibility, if necessary.

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

33. The Respondent State contends that the Applicant filed his Application almost two (2) years and six (6) months after the Court of Appeal dismissed his appeal. The Respondent State argues that this lapse of time was unreasonable, and the Application should be declared inadmissible. In support of its argument, the Respondent State, citing the decision of the African Commission on Human and Peoples' Rights (the Commission) in *Michael Majuru v. Zimbabwe,* submits that a period of more than six (6) months should be deemed as unreasonable for filing applications before the Court.

34. The Applicant does not respond to the objection raised by the Respondent State.

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35. 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 provide 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". Therefore, the Respondent State's reference to the period of six (6) months, as being the reasonable time period, has no basis in the Charter and cannot be justified.

36. As the Court has previously 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."[13] In assessing reasonableness, this Court has previously considered, *inter alia*, the fact that an applicant is

[13] *Zongo and Others v. Burkina Faso* (merits), *supra,* § 92. See also *Thomas v. Tanzania* (merits), *supra*, § 73.

incarcerated,[14] lay in law,[15] indigent;[16] and the time required to reflect on the advisability of seizing the Court.[17] The Court has also taken into account whether an applicant has pursued a review process and the time spent doing so.[18]

37. As the record shows, the Applicant exhausted local remedies on 17 March 2014 being the date of the Court of Appeal's judgments in his appeal. The Applicant subsequently filed his Application before this Court on 1 September 2016. The Court should, therefore, assess whether the period of two (2) years, five (5) months and fifteen (15) days that elapsed between these two events is reasonable within the meaning of Article 56(6) of the Charter.

38. In the instant case, the Court notes that at the time of filing his Application, the Applicant was incarcerated, and on death row. It is also clear, from the record, that he was lay and self-represented when filing his Application. Additionally, it is obvious that the Applicant, given his situation, required some minimum time to reflect on the opportuneness and preparation of his Application. Finally, this Court also observes that, on 2 April 2014, the Applicant filed an application for review of the Court of Appeal's judgment which was pending at the time the present Application was lodged. As such, the Applicant had to spend some time awaiting the outcome of the application for review, and to decide on the opportuneness and preparation of the present Application.

[14] *Diocles William v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52 and *Thomas v. Tanzania* (merits), *ibid*, § 74.
[15] *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54 and *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[16] *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 61 and *Amir Ramadhani v. United Republic of Tanzania* (merits), *ibid,* § 83.
[17] *Igola Iguna v. United Republic of Tanzania*, ACtHPR, Application No. 020/2017, Judgment of 1 December 2022 (merits and reparations), § 35 and *Zongo and Others v. Burkina Faso* (preliminary objections), *supra,* § 122.
[18] *John Lazaro v. United Republic of Tanzania*, ACtHPR, Application No. 003/2016, Judgment of 7 November 2023, § 49; *Werema Wangoko v. Tanzania* (merits), § 49; *Alfred Agbesi Woyome v. Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits), §§ 83-86.

39. The Court considers that the above stated circumstances constitute valid justification for the time of two (2) years, five (5) months and fifteen (15) days it took the Applicant to file this Application.

40. Given the above findings, the Court holds that the Applicant filed the present Application within a reasonable time as construed under Article 56(6) of the Charter and thus dismisses the Respondent State's objection on this point.

B. Other conditions of admissibility

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

42. The record shows that the Applicant has been clearly identified by name, in fulfilment of Rule 50(2)(a) of the Rules.

43. The Court also notes that the claims that are made by the Applicant seek to protect his 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 with a provision of the said Act. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter and holds that it meets the requirements of Rule 50(2)(b) of the Rules.

44. 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.

45. 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.

46. The requirement of exhaustion of local remedies provided for under Rule 50(2)(e) of the Rules is also met given that, prior to the present Application, the Court of Appeal, which is the highest judicial organ of the Respondent State had adjudicated over the issues raised by the Applicant by a judgment rendered on 17 March 2014.

47. 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.

48. Therefore, the Court concludes that the Application meets all the admissibility conditions under Article 56 of the Charter as read together with Rule 50(2) of the Rules, hence, declares it admissible.

VII. MERITS

49. The Applicant alleges the violation of the right to a fair trial, the right to life and the right to dignity protected under Articles 7, 4 and 5 of the Charter. The Court will examine these allegations in turn.

A. Alleged violation of the right to a fair trial

50. The Applicant alleged a violation of his right to a fair trial protected under Article 7 of the Charter through the violation of the right to be tried within a reasonable time, the right to defence, the right to be presumed innocent until proved guilty by a competent court or tribunal and the right to be tried by an impartial court or tribunal.

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

51. The Applicant alleges that pre-trial detention of five (5) years is an unreasonably long period, which constitutes a violation of his right to be tried within a reasonable time as he was arrested on 27 August 2007 and his trial only commenced on 30 November 2012. The Applicant submits that such time was unreasonable because his case was not complex, and the delay was attributable to the Respondent State. In substantiating his allegations, the Applicant avers that the Respondent State's undue delay in bringing him before the domestic courts was prejudicial to him as it undermined his ability to challenge stale and contradictory witness testimony, and impaired his ability to defend himself against the charges.

52. Furthermore, the Applicant submits that the undue delay was also prejudicial to him as the prosecution's evidence was based almost exclusively on the accounts of three (3) witnesses who were asked to recall and testify on matters that occurred five (5) years prior, casting doubt on their plausibility.

53. The Respondent State did not make any submission in respect of these allegations.

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54. Article 7(1)(d) of the Charter provides that:

> "Every individual shall have the right to have his cause heard. This comprises the right to be tried within a reasonable time …".

55. In *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania,* this Court has held that the right to be tried within a reasonable time is an important aspect of fair trial.[19] The Court further held that the right to a fair

[19] *Nganyi and Others v. Tanzania* (merits), *supra*, § 127; and *Benedicto Daniel Mallya v. United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 482, § 48.

trial also includes the principle that judicial proceedings should be finalised within a reasonable time.[20]

56. The Court notes that the issue arising in the instant case is whether, as the Applicant alleges, his pre-trial detention for a period of five (5) years and three (3) months that elapsed between his arrest on 27 August 2007 and when his trial commenced on 30 November 2012, is reasonable.

57. In determining the right to be tried within a reasonable time, the Court has adopted a case-by-case approach whereby it considered, among others, factors such as the complexity of the case, the conduct of the Parties, and that of the judicial authorities who must exercise due diligence especially where the applicant faces severe penalties.[21]

58. Firstly, in assessing the nature and complexity of a case, the Court has considered factors such as the number of witnesses who testified, availability of evidence, the level of investigations, and whether specialised evidence such as DNA samples were required.[22]

59. In the present Application, the Court notes that the domestic proceedings against the Applicant did not demand extensive investigation as they involved an allegation of murder based on the evidence of a dying declaration and as the prosecution called only three (3) witnesses. Notably, the evidence and witnesses were available prior to the committal proceedings. Furthermore, no specialised evidence such as DNA samples was adduced and the arguments at trial focused on the credibility of witnesses. In the circumstances, the case cannot therefore be said to have been a complex one and the delay being complained of can therefore not be attributed to the nature and complexity of the case.

[20] *Cheusi v. Tanzania* (judgment), *supra*, § 117.
[21] *Msuguri v. Tanzania* (merits and reparations), *supra*, § 83; *Cheusi v. Tanzania* (judgment), *supra*, § 117; *Amini Juma v. United Republic of Tanzania*, ACtHPR, Application No. 024/2016, Judgment of 30 September 2021 (merits and reparations), § 104 and *Guehi v. Tanzania* (merits and reparations), *supra,* §§ 122-124.
[22] *Cheusi v. Tanzania*, *ibid.*, § 117; *Guehi*, *ibid.*, § 112; *Nganyi and Others v. Tanzania* (merits), § 115.

60. Secondly, regarding the conduct of the Parties, the Court observes that during the proceedings, the Applicant fully collaborated with the authorities and there is no suggestion that he delayed the proceedings. There is no indication from the record that the Applicant acted in any manner or made any request that contributed to the delay.

61. Thirdly, regarding exercise of due diligence by the authorities of the Respondent State, the Court notes that pursuant to Section 32(2) of the CPA, an accused must be brought before a court as soon as practicable when the offence is punishable by death.[23] Further, Section 244, as read together with section 245 of the CPA, provides that committal proceedings should be held as soon as practicable.[24] Finally, Section 248(1) of the CPA provides that proceedings may be adjourned, from time to time by warrant, and the accused person be remanded for a reasonable time, not exceeding fifteen (15) days at any one time.[25]

[23] Section 32(2) – Where any person has been taken into custody without a warrant for an offence punishable with death, he shall be brought before a court as soon as practicable.
[24] Section 244 – Whenever any charge has been brought against any person of an offence not triable by a subordinate court or as to which the court is advised by the Director of Public Prosecutions in writing or otherwise that it is not suitable to be disposed of upon summary trial, committal proceedings shall be held according to the provisions hereinafter contained by a subordinate court of competent jurisdiction.
Section 245(1) – After a person is arrested or upon the completion of investigations and the arrest of any person in respect of the commission of an offence triable by the High Court, the person arrested shall be brought within the period prescribed under section 32 of this Act before a subordinate court of competent jurisdiction within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act.
[25] Section 248(1) – Where for any reasonable cause, to be recorded in the proceedings, the court considers it necessary or advisable to adjourn the proceedings it may, from time to time by warrant, remand the accused person for a reasonable time, not exceeding fifteen days at any one time, to a prison or any other place of security.
Section 248(2) – Where the remand is for not more than three days, the court may, by word of mouth, order the officer or person in whose custody the accused person is, or any other fit officer or person, to continue to keep the accused person in his custody and to bring him up at the time appointed for the commencement or continuance of the inquiry.

62. This Court also notes that the High Court of the Respondent State is empowered pursuant to Sections 260(1),[26] and 284(1)[27] of the CPA to postpone the trial of any accused person to the subsequent session where there is sufficient cause for the delay, including the absence of witnesses. However, the same provisions are to the effect that the delay should be "reasonable".

63. In considering whether the period of five (5) years and three (3) months that elapsed between the Applicant's arrest and trial is reasonable, this Court deems it appropriate to assess the conduct of the Respondent State's judicial authorities over the said period of time. In this regard, the Court will examine steps taken both during the committal proceedings and towards the commencement of the trial.

64. Regarding the committal proceedings, the Court observes that the Applicant was arrested on 27 August 2007 and gave his statement to the police on 12 September 2007. The Court notes that in the present case, copy of the charge sheet shows that, on 7 August 2008, the Director of Public Prosecutions informed the Registry Officer of the High Court at Bukoba that the Applicant was charged with the offence of murder. The information was presented for filing on 2 September 2008. The Applicant was subsequently committed to the High Court for trial on 3 June 2009.

65. The Court observes that the applicable law of the Respondent State does not set out a specific time for committal proceedings which, as earlier mentioned, should be completed as soon as practicable. As is the general practice in domestic systems, and provided under Section 245(4)(6)(7) of the Respondent State's CPA cited earlier, judicial authorities must perform

[26] Section 260(1) – It shall be lawful for the High Court upon the application of the prosecutor or the accused person, if the court considers that there is sufficient cause for the delay, to postpone the trial of any accused person to the next session of the court held in the district or at some other convenient place, or to a subsequent session.

[27] 284(1) – Where, from the absence of witnesses or any other reasonable cause to be recorded in the proceedings, the court considers it necessary or advisable to postpone the commencement of or to adjourn any trial, the court may from time to time postpone or adjourn the trial on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused person to a prison or other place of security.

certain acts towards committal proceedings, namely to conduct thorough investigations including compiling statements of witnesses, submitting same to the directorate of public prosecution which shall assess whether the case warrants putting the accused on trial and draw up a report which shall then be submitted to the High Court. The performance of these acts obviously requires some time, the length of which may be contingent on the calendar of activities of the judicial authorities involved.

66. With respect to the commencement of the trial, the Court notes that, after the Applicant was committed to the High Court for trial on 3 June 2009, his trial actually commenced only on 30 November 2012. The Court recalls that, pursuant to the relevant provisions of the Respondent State's law cited earlier, trial shall commence in such cases as soon as practicable.

67. In the present Application, the Court observes that after the Applicant was committed to the High Court for trial on 3 June 2009, the matter was adjourned to the next session to be fixed by the District Registrar on a date to be notified and the Applicant was remanded in custody. When the matter was next brought for hearing on 31 May 2012, it was adjourned again as the session had come to an end. On 27 and 29 November 2012 respectively, the prosecution requested again for two further adjournments on account of ongoing hearings in other cases, which had yet to be completed. The Applicant's trial eventually started on 30 November 2012.

68. The Court observes that the crux of the instant case is whether the successive adjournments of the Applicant's trial constituted sufficient justification for the length of time being complained of. As earlier noted, criminal trials in the Respondent State are conducted by sessions and expediency in respect of cases being tried is contingent not only on the calendar of sessions, but also on the scheduling of pending matters. As it arises from the record of the present Application, the Applicant's trial was deferred on successive occasions due to lack of time as the sessions had come to a close before the matter could be heard. It is also ascertained that matters, which had been awaiting trial prior to the Applicant's committal

were still ongoing and the successive sessions should have followed their normal course. In making a determination on the issue at hand, it is also relevant to take into account the fact that, after the Applicant's trial commenced on 31 May 2012, it was finalised within six (6) months.

69. In light of the above, and considering the circumstances of the case, this Court is of the view that the time of five (5) years and three (3) months that elapsed from the Applicant's arrest to the commencement of his trial cannot be considered as unreasonable within the meaning of Article 7(1)(d) of the Charter.

70. As a consequence, the Court finds that the Respondent State did not violate the Applicant's right to be tried within a reasonable time as guaranteed by Article 7(1)(d) of the Charter.

ii. Alleged violation of the right to defence

71. The Applicant alleges that his right to defence was violated due to the failure of the Respondent State to provide him with effective legal representation and to call additional witnesses.

72. The Court will consider each of these two allegations in turn.

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73. The Court notes that Article 7(1)(c) of the Charter provides that:

> "Every individual shall have the right to have his cause heard. This comprises the right to defence, including the right to be defended by counsel of his choice."

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a) On the failure to provide effective legal representation

74. The Applicant alleges that his defence was materially undermined by his own attorney's failure to call or conduct a reasonable investigation to discover critical witnesses whose testimonies may have corroborated his testimony or contradicted testimony of the prosecution's key witnesses in his defence. He submits that his counsel also failed to interview known witnesses to determine if they had information that could aid in his defence. The Applicant argues that counsel's failure to call witnesses resulted in the assessors drawing adverse inferences against him which undermined both his alibi and his credibility generally. He submits that counsel should have anticipated that negative inferences would be drawn against his client and taken preventive measures. He concludes that the deficient legal representation fell far short of the standards of effectiveness required by the law and undermined his right to defence.

75. Without responding directly to the Applicant's allegations, the Respondent State in its Response submits that the Applicant was represented by counsel and his rights were in no way curtailed.

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76. The Court recalls that, as it has held in *Marthine Christian Msuguri v. United Republic of Tanzania,* the right to defence as provided for in Article 7(1)(c) of the Charter should be understood to mean that legal counsel should be effective even if provided by the State.[28] The Court has also held that for representation to qualify as effective, it should be one that provides counsel with sufficient time and means to prepare an adequate defence at all stages right from the arrest of the individual, without any interference.[29] As the

[28] *Msuguri v. Tanzania* (merits and reparations), *supra*, § 91 and *Juma v. Tanzania* (judgment)*, supra,* § 84.
[29] *Ghati Mwita v. United Republic of Tanzania* ACtHPR, Application No. 012/2019, Judgment of 1 December 2022 (judgment), §§ 122-123; *Henerico v. Tanzania* (merits and reparations), *supra,* § 109 and *African Commission on Human and Peoples' Rights v. The Republic of Libya* (merits) (3 June 2016) 1 AfCLR 153, § 93.

Court has held, it is the Respondent State's duty to provide adequate representation to an accused and intervene only when the representation is not adequate.[30] The question to be determined is whether counsel provided by the Respondent State for the Applicant was effective.

77. The Court notes that the Applicant alleges that his counsel did not call any defence witnesses despite there being witnesses who could aid in his defence. However, there is nothing on the record to demonstrate that the Respondent State impeded the counsel who it designated to represent the Applicant, to access him and consult him on the preparation of his defence. Further, the Applicant does not aver that he informed the domestic courts of the alleged shortcomings in the counsel's conduct in relation to his defence. In the circumstances, the Court finds that the Applicant was free to raise, with the High Court and Court of Appeal, his discontent about the manner in which he was represented. Therefore, these allegations are not sufficiently substantiated, and, are accordingly dismissed.

78. In light of the foregoing, the Court holds that the Respondent State discharged its obligation to provide the Applicant with effective free legal assistance. The Court, therefore, finds that the Respondent State did not violate Article 7(1)(c) of the Charter regarding the right to defence.

b) On the failure to call additional witnesses

79. The Applicant alleges that the trial assessors improperly inferred that because his counsel failed to call witnesses, he did not have any evidence to support his *alibi* or his account of events more generally. The Applicant avers that when the assessors made it clear that the lack of additional witnesses prejudiced his defence, the Respondent State's courts were obligated to seek further witness testimony, *suo motu.*[31]

[30] *Henerico v. Tanzania* (merits and reparations), *ibid,* § 106.
[31] In terms of Section 231(4) of the Respondent State's Criminal Procedure Act Cap 20 RE 2002, in cases whereby the accused person states that he has witnesses to call but they are not present in court and if the court is satisfied that the absence of the witnesses is not due to the fault or neglect of the accused person, the court may take steps to compel the attendance of such witnesses.

80. In support of his argument, the Applicant cites the Court's decision in *Diocles William v. Tanzania* where it was held that although the applicant through his counsel had opted not to call witnesses, the latter did not cease to be necessary during trial. It is the Applicant's contention that, in such instances, the Respondent State's judicial authorities are required to be proactive in ascertaining whether the Applicant no longer intended to call his witnesses. According to the Applicant, the fact that the Respondent State failed to do so in the instant case amounts to a violation of the right to defence.

81. Without responding directly to the Applicant's allegations, the Respondent State in its Response submits that the Applicant was afforded a fair hearing, and that the Application has no merit and must be dismissed.

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82. In its caselaw, the Court has held that an essential aspect of the right to defence includes the right to call witnesses in one's defence.[32] Further, the Court has held that the right to defence as set out in Article 7(1)(c) of the Charter is a key component of the right to a fair trial and reflects the potential of a judicial process to offer the parties the opportunity to express their claims and submit their evidence.[33]

83. The question to be determined is whether obtaining the attendance of witnesses during the domestic proceedings was the sole responsibility of the accused or whether the judicial authorities of the Respondent State also had the duty to ensure the presence of defence witnesses.

[32] *Umuhoza v. Rwanda* (merits), *supra,* § 93; *Ivan v. Tanzania* (merits and reparations), *supra,* § 73 and *William v. Tanzania* (merits), *supra,* § 62.
[33] *Sébastien Germain Ajavon v. Republic of Benin* (judgment) (4 December 2020) 4 AfCLR 133, § 141.

84. In this regard, the Court recalls that the right to defence is fulfilled when the Applicant is informed of this right and where the Respondent does not bar him from calling witnesses, as is the case in the present matter.[34]

85. In the present Application, the Court notes that under Section 231(4) of the Respondent State's Criminal Procedure Act (CPA):

> Where the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel attendance of such witnesses.

86. The record shows that at the beginning of the trial proceedings, counsel for the Applicant submitted that the defence would not call witnesses save for the accused himself.[35] This Court also notes that after close of the prosecution's case, the trial court judge informed the Applicant of his right to give evidence on his own behalf and to call witnesses in his defence in line with the provisions of Section 293(2)(a) and (b) of Criminal Procedure Act. In response, counsel stated that the accused person would defend himself under oath and would be the only defence witness.[36] As Section 231(3) of the Respondent State's Criminal Procedure Act provides, after notification of the right to call witnesses, if the accused person elects not to do so, a court is entitled to draw adverse inferences against him.

87. In respect of the Applicant's reliance on the *Diocles William* case, this Court recalls that as it held in the said judgment:[37]

> […] it was necessary for the Respondent State's judicial authorities to be more proactive, in particular, in ascertaining whether the Applicant

[34] *Mhina Zuberi v. United Republic of Tanzania,* ACtHPR, Application No. 054/2016, Judgment of 26 February 2021 (judgment), §§ 73-74 and *Ivan v. Tanzania* (merits and reparations), *supra,* §§ 75-76.
[35] *The Republic v. Dominick S/O Damian*, Criminal Sessions Case No. 61 of 2008, *supra,* page 4.
[36] *Ibid,* pages 25-26.
[37] *William v. Tanzania* (merits), *supra*, §§ 64-66.

> no longer intended to call his witnesses either because he did not actually want them to appear on his behalf or because he did not have the means to obtain their attendance […].

88. It is of significant relevance that in the *Diocles William* case, the Applicant called witnesses on three (3) occasions without success and in the end, he gave up.[38] Conversely, in the present Application, the Applicant through his counsel informed the trial court, twice, that he would not be calling witnesses. Further, in the *Diocles William* matter, this Court held that the judicial authorities of the Respondent State should be proactive in seeking witnesses *suo motu* in cases where the Applicant is without legal aid which is not the case in the present matter as the Applicant was represented. As such, the facts in the matter of *Diocles William* can be distinguished from those arising in the present matter as the Applicant was sufficiently notified of this right and chose not to call any witnesses.

89. In view of the above, the Court dismisses the Applicant's allegation and finds that the Respondent did not violate Article 7(1)(c) of the Charter regarding the right to defence in respect of seeking additional defence witnesses.

iii. Alleged violation of the right to be presumed innocent

90. The Applicant alleges that the Respondent State violated the presumption of innocence due to the reliance on insufficiently strong or credible evidence. He alleges that his conviction is based on evidence that is neither strong nor credible resulting in a conviction that lacked the requisite degree or any degree of certitude. He avers that the prosecuting authorities of the Respondent State failed to corroborate or properly evaluate the weak and contradictory eyewitness evidence used to identify him as the assailant. He submits that the only evidence against him came from uncorroborated eyewitness and two (2) witnesses to a dying declaration of the deceased.

[38] *Ibid.*

91. The Applicant further avers that the Respondent State's courts failed to draw logical inferences from the prosecution's omission of relevant evidence and failed to supplement the record with tangible evidence of a murder weapon or DNA evidence. He submits that the evidence relied on to convict him clearly did not meet "beyond reasonable doubt"' standard required under the Respondent State's criminal law.

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92. The Respondent State submits that the Applicant's allegations are disputed; that they have no merit and the Applicant is put to strict proof. The Respondent State submits that during the testimony of PW1, it was clear that the witness was at the crime scene as she testified that she shouted for help when she found the Applicant and his brother beating their mother and later trying to burn her alive with banana leaves to conceal the evidence.

93. The Respondent State avers that the trial court warned itself on the dangers of convicting on the testimony of a single witness and was satisfied that the witness was telling the truth. It is the Respondent State's contention that despite the rule that corroboration should always be required in all cases involving dying declarations, conviction on the evidence of a single witness cannot be ruled out if the court is fully satisfied that the witness is telling the truth. The Respondent State avers that with that type of testimony, there was extensive evidence for the trial court to consider while making a determination on the issue of visual identification.

94. With respect to the dying declaration, the Respondent State submits that the deceased also told her husband that the Applicant had assaulted her and that the trial court held that the deceased person mentioned her assailants as the Applicant and his brother. The Respondent State argues that the evidence was clear and, upon due assessment, the High Court found it to be sufficient to warrant a conviction. The Respondent State submits that the Court of Appeal also considered the evidence on record

and held that it was sufficient to uphold the decision of the High Court. Based on the evidence that was produced in court and that led by the defence, the Court ultimately held that the Prosecution had proven its case beyond reasonable doubt, and convicted the Applicant. The Respondent State argues that the Applicant's allegations do not have merit and prays for their dismissal for lack of merit.

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95. Pursuant to Article 7(1)(b) of the Charter, 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.

96. The Court notes that upholding 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".[39] As this Court has also held in *Diocles William v. United Republic of Tanzania,* the principle that a criminal conviction should be "established with certitude" is a crucial principle in cases where the death penalty is imposed.[40]

97. The Court further recalls its position in *Kijiji Isiaga v. United Republic of Tanzania* where it held that domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular piece of evidence. As an international human rights court, the Court cannot usurp this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[41]

98. Having noted that, the Court also reiterates its position that while it does not have the power to evaluate matters of evidence that were settled in national courts, it is vested with jurisdiction to determine whether the assessment of

[39] *Abubakari v. Tanzania* (merits), *supra,* § 174; *Juma v. Tanzania* (judgment), *supra,* § 70 and *Isiaga v. Tanzania* (merits), *supra,* § 67.
[40] *Wiliam v. Tanzania* (merits), *supra*, § 72.
[41] *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65 and *Wanjara & 4 ors v. United Republic of Tanzania* (judgment) (25 September 2020) 4 AfCLR 673, § 78.

the evidence in the national courts complies with relevant provisions of international human rights instruments.[42]

99. Regarding the Applicant's allegation that his conviction was based on evidence that is neither strong nor credible, the record before the Court shows that both the High Court and the Court of Appeal relied on the evidence of a dying declaration made by the deceased to a number of people including three (3) prosecution witnesses, coupled with visual identification.[43]

100. Regarding visual identification, both the High Court and the Court of Appeal, after taking cognisance of the dangers of the evidence of visual identification, were satisfied that PW1 identified the Applicant as the conditions were favourable. The domestic courts took into account that PW1 knew the accused for quite a long time and he was a familiar face, that he talked to the accused and his brother at close range and that the incident happened when it was daylight.[44] The same courts further ascertained that all circumstances of possible mistakes were ruled out and the identity of the accused person was established with certitude.

101. With regards to the deceased's dying declaration, the domestic courts evaluated the evidence of two (2) witnesses, that is, PW2 and PW3 and were satisfied that the deceased person mentioned the Applicant and his brother as her assailants.[45] From the record, both PW2 and PW3 enquired from the deceased who her assailants were and she mentioned the Applicant and his brother, with PW1 also testifying that she heard the question and the answer by the deceased. Furthermore, both the High Court

[42] *Kennedy Ivan v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 48, § 61; *Elisamehe v. Tanzania* (judgment), *supra*, § 66 and *Jonas v. Tanzania* (merits), *supra,* § 69.
[43] *The Republic v. Dominick S/O Damian*, Criminal Sessions Case No. 61 of 2008, Judgment of the High Court of Tanzania at Bukoba, 14 December 2012, page 12 and *Dominick Damian v. The Republic,* Criminal Appeal No. 154 of 2013, Judgment of the Court of Appeal of Tanzania at Bukoba, 17 March 2014, page 1.
[44] *The Republic v. Dominick S/O Damian*, Criminal Sessions Case No. 61 of 2008, *ibid,* pages 12-16 and *Dominick Damian v. The Republic,* Criminal Appeal No. 154 of 2013, *ibid,* pages 4-5.
[45] *The Republic v. Dominick S/O Damian*, Criminal Sessions Case No. 61 of 2008, *ibid,* pages 17-19 and *Dominick Damian v. The Republic,* Criminal Appeal No. 154 of 2013, *ibid,* pages 5-6.

and Court of Appeal concurred that the conduct of the Applicant in escaping from the village as stated by his own father, PW3, is sufficient evidence to corroborate the dying declaration.[46] The record, therefore, shows that the evidence was fairly evaluated and that it was strong and credible to warrant a conviction.

102. Additionally, on the Applicant's allegation that the prosecuting authorities of the Respondent State failed to corroborate or properly evaluate contradictory eyewitness testimony used to identify him as the assailant, this Court finds no manifest error as to the manner in which the domestic courts dealt with the evidence of identification and the dying declaration. This Court reiterates its position that when visual or voice identification is used as evidence to convict a person, all circumstances of possible error should be ruled out and the identity of the suspect should be established with certitude.[47] In the instant case, both the High Court and the Court of Appeal, after taking cognizance of the dangers of visual identification, satisfied themselves that the Applicant was properly identified as stated above. The domestic courts also noted that in view of the strong evidence on the record, corroboration was not necessary.

103. This Court is cognizant of the Applicant's submission that PW1 and PW2 tendered contradictory evidence regarding his whereabouts after the incident. In this respect, the Court notes that both the High Court and Court of Appeal examined the submissions and evidence before them and held that there was no material contradiction in the evidence of the prosecution.

104. With regards to the Applicant's allegation that the prosecution failed to introduce any forensic evidence, the record before this Court shows that both the High Court and the Court of Appeal relied on the evidence of three (3) witnesses and a dying declaration. The domestic courts evaluated the

[46] *The Republic v. Dominick S/O Damian*, Criminal Sessions Case No. 61 of 2008, *ibid,* page 19 and *Dominick Damian v. The Republic,* Criminal Appeal No. 154 of 2013, *ibid,* pages 5-6.
[47] *Ivan v. Tanzania* (merits and reparations), *supra,* § 64 and *Niyonzima Augustine v. United Republic of Tanzania,* ACtHPR, Application No. 058/2016, Judgment of 13 June 2023 (judgment), § 96.

facts and evidence, and concluded that that there was strong evidence on the record to home a conviction.[48] The judgments of the domestic courts reveal that PW1 gave a clear account of the incident and testified that she saw the Applicant and his brother assaulting the deceased with sticks.[49]

105. In light of the foregoing, this Court considers that the manner in which the domestic courts evaluated the presented evidence and the weight accorded to it does not disclose any manifest error or miscarriage of justice to the Applicant.

106. The Court, therefore, dismisses the Applicant's allegations that his right to be presumed innocent until proved guilty by a competent court or tribunal was violated and finds that the Respondent State did not violate Article 7(1)(b) of the Charter.

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

107. The Applicant alleges that the trial court participated in cross-examination of witnesses, the purpose of which, as set out in the Respondent State's legislation, is to allow an adverse party to shake the witnesses' credibility by injuring his character, and to elicit answers that might incriminate him or might directly or indirectly expose him to a penalty or forfeiture. It is the Applicant's averment that by cross-examining the witnesses in his case, the trial court took a position adverse to him and became a second prosecutor, violating his right to a fair trial.

108. The Respondent State did not specifically respond to this allegation but maintained generally that the Applicant's rights under the Charter and the Constitution were fully observed and protected.

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[48] *The Republic v. Dominick S/O Damian*, Criminal Sessions Case No. 61 of 2008, *ibid,* pages 15-16 and *Dominick Damian v. The Republic,* Criminal Appeal No. 154 of 2013, *ibid,* page 7.
[49] *Republic v. Dominick S/O Damian*, Criminal Sessions Case No. 61 of 2008, *ibid,* pages 2-3 and *Dominick Damian v. The Republic,* Criminal Appeal No. 154 of 2013, *ibid,* page 4.

109. The Court notes that Article 7(1)(d) provides that:

> "Every individual shall have the right to have his cause heard. This comprises the right to be tried within a reasonable time by an impartial court or tribunal."

110. This Court has held that "impartiality within the meaning of Article 7(1)(d) of the Charter must be understood as the absence of bias or prejudice in the consideration of a case in court. As such, bias cannot be presumed and must be irrefutably proven by the party alleging it".[50]

111. The Court recalls its position in *Makungu Misalaba v. United Republic of Tanzani*a that the obligation of impartiality owed by judges extends to assessor bias, or the appearance thereof, which has the potential to cast doubt on the accuracy of the judges' factual findings and the overall credibility of the courts.[51] The Court further takes judicial note of the position of the domestic courts of the Respondent State regarding the duty of assessors in criminal matters such as in *Mapuji Mtogwashinge v. The Republic,* where the Court of Appeal of Tanzania stated that the duty of assessors is to put questions to witnesses for clarification and not to cross-examine as the aim of cross-examination is to "contradict, weaken or cast doubt upon the accuracy of the evidence by the witness during examination in chief."[52]

112. This Court notes, from the record of the High Court proceedings, that the questions asked by the assessors were not recorded, only the witnesses' responses were recorded. As highlighted in the case of *Mapuji Mtogwashinge v. The Republic*, assessors are not precluded from questioning witnesses to ensure clarity. The Court further notes, from the record, that there is nothing to show that the questions asked by the

[50] *Fidèle Mulindahabi v. Republic of Rwanda* (judgment), *supra,* § 70; *Umuhoza v. Rwanda* (merits), *supra*, §§ 103 and 104; *Thomas v. Tanzania* (merits), *supra,* § 124.
[51] *Makungu Misalaba v. United Republic of Tanzania*, ACtHPR, Application No. 033/2016, Judgment of 7 November 2023 (merits and reparations), §§ 93-99.
[52] *Mapuji Mtogwashinge v. The Republic* (Criminal Appeal No. 97 of 2015 (unreported).

assessors contradicted or weakened the evidence that the witnesses had given during their testimonies. Furthermore, the recorded witness responses were confirmations of statements that all the three witnesses had already made in their testimonies.[53] Therefore, it cannot be said, as the Applicant contends, that the trial court breached his rights owing to the assessors questioning witnesses. As the Court has earlier established in the present Judgment, the manner in which the domestic courts evaluated the evidence does not reveal any manifest error or a miscarriage of justice to the detriment of the Applicant.

113. Consequently, the Court dismisses the Applicant's contentions that the Respondent State failed to arrange a trial that was free from actual or perceived bias and holds that the Respondent State did not violate the Applicant's right to be tried by an impartial court or tribunal under Article 7(1)(d) of the Charter.

B. Alleged violation of the right to life

114. The Applicant alleges that the breach of various rights to a fair trial in the course of the proceedings that led to his sentencing rendered the imposition of the death penalty a violation of the right to life.

115. The Applicant avers that the Respondent State violated his right to life under Article 4 of the Charter by imposing the mandatory death penalty without giving due consideration to the personal circumstances of the offender and the particular offence, including its specific aggravating or attenuating elements. It is the Applicant's contention that the Respondent State imposed the death penalty based solely on its mandatory nature in municipal law while such a sentence was not warranted or compatible with their right to life due to good character and lack of any prior criminal history. The Applicant further submits that the Respondent State also failed to prove

[53] *The Republic v. Dominick S/O Damian*, Criminal Sessions Case No. 61 of 2008, *supra,* pages 10-13; 15-17 and 19-21.

that it imposed the death sentence because the offence was most serious in nature and his case was the rarest of rare cases.

116. The Respondent State did not respond to these allegations.

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117. Article 4 of the Charter provides that:

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

118. The Court notes that the Applicant raises three grounds relating to the alleged violation of the right to life due to the mandatory imposition of the death penalty, namely, the nature of the offence and circumstances of the offender, the lawfulness of the sentence and compliance with guarantees of due process during the trial. The Court considers that these grounds boil down to whether the mandatory imposition of the death penalty constitutes an arbitrary deprivation of the right to life under Article 4 of the Charter.

119. On the arbitrary deprivation of the right to life as protected under Article 4 of the Charter, the Court recalls its consistent position as exemplified in *Ally Rajabu and Others v. United Republic of Tanzania*. In the said judgment, the Court held that the mandatory imposition of the death sentence is arbitrary and therefore violates the right to life where i) it is not provided by law; ii) it is not meted out by a competent court; and iii) it does not result from proceedings that align with fair trial, namely because it deprives the judicial officer the discretion to consider circumstances peculiar to the offence and the offender.[54]

[54] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §§ 99-100.

120. The Court notes that the Applicant in the present Application does not challenge the power of the domestic courts to impose the death sentence. His allegations revolve around the issues of legality of the mandatory death sentence, and whether its imposition was in abidance with fair trial, namely whether the judicial officer had the leeway to consider circumstances peculiar to the case. The Court will consider these two issues in turn.

121. Regarding the condition of legality, the Court notes that the death sentence is provided for in Section 197 of the Penal Code of the Respondent State. The requirement that the penalty should be provided by law is thus met. The Court considers that, while the Applicant seems to also challenge the legality of the mandatory imposition of the death penalty in light of international law, his submissions in this respect rather revolve around the seriousness of the offence and the specific circumstances of the offender. As such, the challenge is not on the legality of the mandatory imposition of the death sentence but rather on the requirement of fairness in imposing the said sentence, which will be examined subsequently.

122. With regards to abidance by fair trial, the Applicant's argument is two-fold, namely, whether the mandatory imposition was cognisant, firstly, of the nature of the offence and, second, of the circumstances of the offenders.

123. On the nature of the offence, the Court notes the Applicant's averment that the Respondent State did not prove how the offence in his case was of such seriousness and gravity that it warranted the mandatory imposition of the death penalty.

124. The Court takes note of Article 6(2) of the ICCPR, which provides that "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide ...".

125. In the case of *Ghati Mwita v. United Republic of Tanzania*, this Court held that the death penalty should exceptionally "be reserved only for the most heinous of offences committed in seriously aggravating circumstances".[55]

126. The Court further takes note of international human rights case-law on the seriousness and gravity of an offence that warrants the imposition of the mandatory death penalty. For example, the Inter-American Court of Human Rights (IACHR) has held that intentional and unlawful deprivation of another's life can and must be recognized and addressed under various factors that correspond with the wide range of seriousness of the surrounding facts, taking into account the different facets that can come into play such as a special relationship between the offender and the victim, motives for the behaviour, the circumstances under which the crime is committed and the means employed by the offender. The IACHR held that the approach allows for a graduated assessment of the seriousness of the offence, so that it will bear an appropriate relation to the graduated levels of gravity of the applicable punishment.[56]

127. In *S v. Makwanyane*, the South African Constitutional Court summarised the position as follows: "[T]he death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence".[57] Further, in *Mitcham and Others v. Director of Public Prosecution*, the Eastern Caribbean Court of Appeal held that "the burden of proof at the sentencing hearing lies on the prosecution and the standard of proof shall be beyond reasonable doubt."[58]

[55] *Mwita v. Tanzania* (judgment), *supra,* § 66.
[56] *Boyce et al. v. Barbados*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 20 November 2007. Series C No. 169, paras. 46-63 and *Hilaire, Constantine, and Benjamin et al. v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment of June 21, 2002. Series C No. 94, para. 106.
[57] *S v. Makwanyane,* Case No. CCT/3/94, Judgement of 6 June 1995, para 46.
[58] *Mitcham & Ors v. DPP*, Crim. App. Nos 10-12 of 2002, Eastern Caribbean Court of Appeal, para 2.

128. The Court observes that, as stressed in its earlier mentioned case-law, the mandatory imposition of the death sentence as applied under the Respondent State's law is arbitrary within the meaning of Article 4 of the Charter as it deprives the judicial officer of the discretion to consider specific circumstances of particular cases, including whether such cases fall within the classification of the rarest of cases for which a death penalty can be lawfully imposed. As it emerges from the submissions of the Parties in the present Application, the trial courts did not have the leeway to examine whether the seriousness of the offence warranted the sentence that was meted out. Given the above, the Court holds that the Respondent State violated the Applicant's right to life by failing to take into account the nature of the offence.

129. As far as the situation of the offender is concerned, this Court recalls that, as it held in the above cited *Rajabu* judgment, the mandatory imposition of the death penalty, as provided for in Section 197 of the Penal Code of the Respondent State, falls short of the requirements of due process as it takes away the discretionary power of a judicial officer to impose a sentence on the basis of the individual circumstances of a convicted person.[59] In *Marthine Christian Msuguri v. United Republic of Tanzania*, the Court examined whether the Applicant had suffered post traumatic disorder prior to the commission of the offence and whether he suffered from insanity at the time of commission.[60] The Court recalls that, as established in its jurisprudence, a system of mandatory capital punishment deprives the complainant of the most fundamental right, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her cause.[61]

[59] *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* § 110.
[60] *Msuguri v. Tanzania* (judgment), *supra,* §§ 66-72.
[61] *Rajabu and Others v. Tanzania* (merits and reparations), *ibid,* § 109 and *Juma v. Tanzania* (judgment), *supra,* §§ 124-125.

130. The Court also takes cognisance of international jurisprudence with regards to the consideration of the circumstances of the offender in imposing the mandatory death penalty. In *Dial and Others v. Trinidad and Tobago*, the IACHR held that when certain laws make it mandatory to impose a death sentence automatically, this does not permit the trial courts to consider the particular circumstances of the accused including their criminal record.[62] The High Court of Malawi in *Kafantayeni and Others v. Attorney General* stated that, in a capital case, the right to a fair trial requires that offenders be permitted to present evidence of mitigation relevant to the individual circumstances either of the offence or of the offender.[63]

131. In the instant Application, the Court notes that the Applicant contends that the Respondent State imposed the death penalty without considering his circumstances with regard to good character and lack of any prior criminal history. The Court is of the view that as a general principle, and by natural justice and fairness, imposition of sentences, let alone such serious and grave sentence as the death penalty, should always involve the possibility for mitigation. The Court considers that the elements of good character and lack of any prior criminal history invoked by the Applicant in the present Application falls within the category of circumstances that apply in mitigating sentences. Therefore, by not taking these factors into consideration, the proceedings leading to the mandatory imposition of the death sentence in the present case did not abide by the requirement of fairness. This is because the law takes away from the trial court the discretion to examine circumstances that are peculiar to the concerned case, including those relating to the offender and the offence.

[62] *Dial et al. v. Trinidad and Tobago,* Judgment of November 21, 2022 (merits and reparations) paragraph 48.
[63] *Kafantayeni and others v. Attorney General*, Constitutional Case No.12 of 2005 (unreported). See also, *Attorney General v. Susan Kigula and 417 Others*, Constitutional Appeal No. 03 of 2006 (Supreme Court of Uganda), §§ 63-64; *Mutiso v. Republic*, Crim. App. No. 17 of 2008 at 8, 24, 35 (July 30, 2010) (Kenya Ct. App.).

132. In the matter at hand, the Court holds that the mandatory imposition of the death penalty, as provided for in Section 197 of the Respondent State's Penal Code, and as automatically applied by the High Court in the case of the Applicant, is arbitrary as it does not meet the requirement of fairness set out in Article 4 of the Charter in violation of the right to life.

133. The Court, therefore, finds that the Respondent State violated the Applicant's right to life under Article 4 of the Charter owing to the arbitrary imposition of the death penalty as the judicial officer lacked discretion to take into account the nature of the offence and the circumstances of the offender in the mandatory imposition of the death penalty.

C. Alleged violation of the right to dignity

134. The Applicant alleged a violation of his right to dignity under Article 5 of the Charter through the imposition of the death penalty which amounts to cruel and inhuman treatment.

135. The Respondent State did not respond to these allegations.

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136. The Court notes that Article 5 of the Charter provides that:

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

137. In the matter of *Ally Rajabu and Others v. United Republic of Tanzania,* this Court stated that many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto. This Court held

that hanging a person is one of such methods that is inherently degrading.[64] The Court also recalls its position in the matter of *Amini Juma v. United Republic of Tanzania* where it held that the execution of the death penalty by hanging encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment.[65]

138. The Court reiterates its position that in accordance with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should be that methods of execution must exclude suffering or involve the least suffering possible in cases where the death penalty is permissible.[66] Having found that the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature, the Court holds that, as the method of implementation of that sentence, hanging inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment.[67] The Court considers that these findings apply to the present Application.

139. Given the above, the Court finds that the Respondent State violated the Applicant's right to dignity and not to be subjected to cruel, inhuman or degrading punishment and treatment, guaranteed under Article 5 of the Charter regarding the imposition of the death sentence by hanging.

VIII. REPARATIONS

140. In his submission on reparations, the Applicant prays the Court to order the Respondent State to:

    i. Revoke the death sentence and remove him from death row;
    ii. Amend its laws to ensure respect for the right to life;

[64] *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* §§ 118-119.
[65] *Juma v. Tanzania* (judgment)*, supra,* § 136.
[66] *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* § 118.
[67] *Ibid,* §§ 119-120.

iii. Release him from prison as a retrial would be fraught with practical difficulties given the passage of time since the alleged offence and it would be grossly unfair to him to remain in custody pending a retrial given the extensive period of time in which he has already been incarcerated; and

iv. Pay reparations in such amount as the Court deems fit. He submits that he has suffered severe hardships as a result of the breach of his rights under the Charter and subsequent twelve (12) years of imprisonment, including seven (7) years on death row which has also severely impacted his family life.

141. In Response to the Applicant's submission on reparations, the Respondent State prays the Court for the following:

i. That the Applicant continue to serve his sentence; and

ii. That all the reliefs sought by the Applicant be denied.

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142. The Court recalls Article 27(1) of the Protocol which 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 the fair compensation or reparation.

143. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act and causation should be established between the wrongful act and the alleged prejudice.[68] Furthermore, and where granted, reparation should cover the full damage suffered. It is also clear that it is always the Applicant that bears the onus of justifying the claims made.[69]

[68] *XYZ v. Republic of Benin* (judgment) (27 November 2020) 4 AfCLR 49, § 158 and *Sébastien Germain Ajavon v. Republic of Benin* (reparations) (28 November 2019) 3 AfCLR 196, § 17.
[69] *Juma v. Tanzania* (merits and reparations), *supra,* § 141; *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31; and *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§ 27-29.

144. In the present Application, the Court has found that the Respondent State violated the Applicant's right to life and right to dignity as guaranteed under Articles 4 and 5 of the Charter, respectively. The Court, therefore, finds that the Respondent State's responsibility has been established. The Applicant is, therefore, entitled to reparations commensurate with the extent of the established violations.

A. Pecuniary reparations

i. Material prejudice

145. 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.[70] Further, this Court has held that an Applicant bears the burden of providing evidence to support his/her claims for material prejudice.[71]

146. In the instant case, the Applicant simply prays the Court to grant reparation in such amount as the Court deems fit. He does not indicate the nature of the material prejudice that he has suffered and how this is linked with the violation of his rights under Articles 4, and 5 of the Charter. In any event, the Applicant does not support his prayers with proof of the loss incurred.

147. In the circumstances, the Court, therefore, does not grant reparation for material prejudice to the Applicant.

[70] *Nguza Viking (Babu Seya) and Another v. United Republic of Tanzania* (reparations) (8 May 2020) 4 AfCLR 3, §15 *and Kijiji Isiaga v. Republic of Tanzania*, AfCtHPR, Application No. 011/2015, Judgment of 25 June 2021 (reparations), § 20.
[71] *Msuguri v. Tanzania* (merits and reparations), *supra*, § 122; *Elisamehe v. Tanzania* (merits and reparations), *supra,* § 97 and *Guehi v. Tanzania* (merits and reparations), *supra*, § 15.

ii. Moral prejudice

148. While not specifically referring to moral prejudice, the Applicant prays for the Court to order the Respondent State to pay reparations in such amount as the Court deems fit for the severe hardships that he has suffered as a result of the breach of his rights under the Charter. The Applicant also submits that he has suffered severe hardships as a result of the twelve (12) years of imprisonment, including seven (7) years on death row which severely impacted his family life.

149. The Court notes that, moral prejudice is that which results from the suffering, anguish and changes in the living conditions for the victim and his family.[72] As established in this judgment, the Applicant suffered several violations which inherently involve moral prejudice. These include imposition of the mandatory death penalty, the death row, all of them compounded by overall inhuman and degrading circumstances. The Court further observes that in the instant Application, while the death sentence is yet to be carried out, the Applicant has inevitably suffered prejudice from the established violations caused by the very imposition of the mandatory death sentence.

150. In light of the foregoing, the Court holds that the Applicant is entitled to moral damages as there is a presumption that he has suffered some form of moral prejudice as a result of the above-mentioned violations. The Court has held that the assessment of quantum in cases of moral prejudice must be done in fairness and taking into account the circumstances of the case.[73] The practice of the Court, in such instances, is to award lump sums for moral loss.[74]

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[72] *Mtikila v. Tanzania* (reparations), *supra,* § 34; *Cheusi v. Tanzania* (judgment), *supra,* § 150 and *Viking and Another v. Tanzania* (reparations), *supra,* § 38.
[73] *Juma v. Tanzania* (judgment), *supra,* § 144; *Viking and Another v. Tanzania* (reparations), *supra,* § 41 and *Umuhoza v. Rwanda* (reparations), *supra,* § 59.
[74] *Zongo and Others v. Burkina Faso* (reparations), *supra*, §§ 61-62 and *Guehi v. Tanzania* (merits and reparations), *supra,* § 177.

151. In view of all of the above, and taking into account other similar cases involving the Respondent State,[75] the Court awards the Applicant the sum of Three Hundred Thousand Shillings (TZS 300,000) as moral damages.

B. Non-pecuniary reparations

152. The Applicant prays the Court to order the Respondent State to revoke the death sentence, remove him from death row and release him from prison. He also prays for the Court to order the Respondent State to amend the provision of its law on the mandatory death sentence to ensure respect for life.

153. The Respondent State on its part prays the Court to order that all reliefs sought by the Applicant should be denied.

i. Amendment of the law to ensure respect for life and dignity

154. The Applicant prays the Court to order the Respondent State to amend its laws to ensure respect for the right to life.

155. The Court recalls its position in previous judgments dealing with the mandatory imposition of the death penalty where it has ordered the Respondent State to undertake all necessary measures to remove from its Penal Code the provision for the mandatory imposition of the death sentence.[76] The Court notes that to date it has issued several identical orders for the removal of the mandatory death penalty which were delivered in 2019, 2021, 2022, and 2023; yet, as at the date of the present judgment, the Court does not have any information to the effect that the Respondent State has implemented the said orders.

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[75] *Crospery Gabriel and Another v. United Republic of Tanzania*, ACtHPR, Application No. 050/2016, Judgment of 13 February 2024 (merits and reparations), § 153; *Romward William v. United Republic of Tanzania*, ACtHPR, Application No. 030/2016, Judgment of 13 February 2024 (merits and reparations), § 86.

[76] *Mwita v. Tanzania* (judgment), *supra,* § 166; *Msuguri v. Tanzania* (merits and reparations), *ibid*, § 128; *Henerico v. Tanzania* (merits and reparations), *supra,* § 207 and *Juma v. Tanzania* (judgment), *supra,* § 170.

156. The Court notes that in the present judgment it has found that the mandatory imposition of the death penalty violates the right to life guaranteed under Article 4 of the Charter and therefore holds that the said sentence ought to be removed from the books of the Respondent State within six (6) months of the notification of the present Judgment.

157. Similarly, in its previous judgments,[77] this Court has held that a finding of violation of the right to dignity owing to the use of hanging as a method of execution of the death penalty warranted an order that the said method be removed from the books of the Respondent State. In light of its finding in this Judgment, the Court orders the Respondent State to take all necessary measures to remove "hanging" from its laws as the method of execution of the death sentence, within six (6) months of the notification of the present Judgment.

ii. Rehearing

158. The Applicant submits that while the normal recourse for violations of an Applicant's right to a fair trial would be to re-open the defence case or hold a rehearing, in his case a retrial would be fraught with practical difficulties given the passage of time since the alleged offence and it would be grossly unfair to him to remain in custody pending a rehearing given the extensive period of time in which he has already been incarcerated.

159. The Court considers that, while the Applicant states that he does not wish for the reopening of the defence case or a retrial, a related order is in the interest of justice to give effect to the correlated order that the domestic provision on the mandatory death sentence be removed. The Court reiterates its earlier position that the violations in the case of the Applicant did not impact on his guilt and conviction, and that the sentencing is affected

[77] *Deogratius Nicholaus Jeshi v. United Republic of Tanzania*, ACtHPR, Application No. 017/2016, Judgment of 13 February 2024 (merits and reparations), §§ 111, 112, 118; *Romward William v. United Republic of Tanzania*, ACtHPR, Application No. 030/2016, Judgment of 13 February 2024 (merits and reparations), § 94.

only to the extent of the mandatory nature of the penalty. The Court holds that a remedy is warranted in that respect.

160. The Court, therefore, orders the Respondent State to take all necessary measures for the rehearing of the case on the sentencing of the Applicant through a process that does not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.

iii. Restitution and release

161. The Applicant prays for the Court to order the Respondent State to revoke the death sentence imposed on him and remove him from death row.

162. The Applicant also prays the Court to order the Respondent State to release him from prison. He submits that a retrial would be fraught with practical difficulties given the passage of time since the alleged offence, therefore the suitable remedy would be his release from prison.

163. On the prayer that the sentence be revoked, the Court has held that orders such as vacating the death sentence are to be determined on a case-by-case basis having due consideration mainly to proportionality between the measure sought and the extent of the violation established.[78]

164. In the present case, the Court has found that the provision for the mandatory imposition of the death sentence in the Respondent State's legal framework violates the right to life protected in Article 4 of the charter. The Court, therefore, orders the Respondent State to vacate the death penalty in the case of the Applicant and remove him from death row pending the rehearing ordered above.

[78] *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* § 156.

165. With respect to the prayer for release, the Court recalls its position in *Gozbert Henerico v. United Republic of Tanzania* where it held that:

> The Court can only order a release if an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice.[79]

166. The Court notes that the violations found in the present judgment do not impact on the Applicant's guilt and conviction, and the sentencing is affected only to the extent of the mandatory nature of the penalty. The commission of the offence as adjudicated by domestic courts has thus remained unaffected in the proceedings before this Court. Further, the order made above for a rehearing of the Applicant's case on sentencing demand that he remains in custody pending the said proceedings. The prayer for release is consequently declined.

iv. Publication of the Judgment

167. Though the Applicant did not make any request for publication of this judgment, pursuant to Article 27 of the Protocol and its inherent powers, the Court will consider this measure. In its previous judgments, the Court has *suo motu* ordered the publication of its judgments after taking into account the circumstances of the cases.[80]

168. The Court observes that, in the present Application, the violation of the right to life by the provision on the mandatory imposition of the death penalty goes beyond the individual case of the Applicant. The Court notes that threats to life associated with the mandatory death penalty remain alive in

[79] *Henerico v. Tanzania* (merits and reparations), *supra,* § 202; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 84; *Minani Evarist v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402, § 82 and *Juma v. Tanzania* (judgment)*, supra,* § 165.
[80] *Mwita v. Tanzania* (judgment), *ibid,* §§ 175-176; *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* § 165 and *Henerico v. Tanzania* (merits and reparations), *supra,* §§ 208-210.

the Respondent State, and, as noted above, the Court has no information that its previous decisions in this respect have been implemented. Further, the guarantee of the right to life is a supreme right in the Charter. In view of the above, the Court orders the publication of this Judgment.

v. Implementation and reporting

169. The Parties did not make specific prayers in respect of implementation and reporting.

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170. 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.[81]

171. The Court observes that, in the present case, the violation of the right to life by the provision on the mandatory imposition of the death penalty goes beyond the individual case of the Applicants and is systemic in nature. The same applies to the violation in respect of execution by hanging. The Court further notes that its finding in this Judgment bears on a supreme right in the Charter, that is, the right to life.

172. In view of this, therefore, the Court deems it necessary to order the Respondent State to periodically report on the implementation of this judgment in accordance with Article 30 of the Protocol. The report should detail the steps taken by the Respondent State to remove the impugned provision from its Penal Code.

[81] *Crospery Gabriel and Another v. United Republic of Tanzania*, ACtHPR, Application No. 050/2016, Judgment of 13 February 2024 (merits and reparations), §§ 142-146; *Rajabu v. Tanzania* (merits and reparations), *supra*, § 171 and *Henerico v. Tanzania* (merits and reparations), *supra*, § 203.

173. 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 and the deadlines that the Court set have since lapsed. In view of this fact, the Court still considers that the orders are warranted both as an individual protective measure, and a general restatement of the obligation and urgency behoving on the Respondent State to scrap the mandatory death penalty and provide alternatives thereto. 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.

IX. COSTS

174. The Parties did not make any submissions regarding the costs of the Application.

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175. The Court notes that Rule 32(2) of its Rules provides that “unless otherwise decided by the Court, each party shall bear its own costs, if any.”

176. Noting that there is no reason for it to depart from that provision in the instant case, the Court decides that each Party shall bear its own costs.

X. OPERATIVE PART

177. For these reasons:

THE COURT,

Unanimously

On jurisdiction

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

On admissibility

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

On merits

v. *Holds* that the Respondent did not violate the Applicant's right to a fair trial protected under Article 7(1)(b) of the Charter with regard to the right to be presumed innocent until proved guilty by a competent court or tribunal;
vi. *Holds* that the Respondent State did not violate the Applicant's right to defence protected under Article 7(1)(c) of the Charter with regard to the provision of effective legal representation and calling of additional witnesses;
vii. *Holds* that the Respondent State did not violate the Applicant's right to a fair trial, protected under Article 7(1)(d) of the Charter with regard to the right to be tried by an impartial court or tribunal;

By a majority of eight (8) Judges for and two (2) Judges against, Justices Rafaâ BEN ACHOUR and Blaise TCHIKAYA dissenting,

viii. *Holds* that the Respondent State did not violate the Applicant's right to a fair trial, protected under Article 7(1)(d) of the Charter with regard to the right to be tried within a reasonable time;

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

ix. *Holds* that the Respondent State violated the Applicant's right to life protected under Article 4 of the Charter in relation to the mandatory imposition of the death penalty by failing to allow the judicial officers discretion to take into account the nature of the offence and the circumstances of the offender;

x. *Holds* that the Respondent State violated the Applicant's right to dignity and not to be subjected to cruel, inhuman or degrading punishment and treatment protected under Article 5 of the Charter in relation to the imposition of the death penalty by hanging.

Unanimously,

On reparations

Pecuniary reparations

xi. *Does not* grant reparations for material prejudice;

xii. *Grants* the Applicant's prayer for reparation for moral prejudice suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300,000);

xiii. *Orders* the Respondent State to pay the sum ordered in (xii) free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

Non-pecuniary reparations

xiv. *Does not grant* the Applicant's prayer for release;

xv. *Orders* the Respondent State to revoke the death sentence imposed on the Applicant and remove him from death row;

xvi. *Orders* the Respondent State to take all necessary measures, within six (6) months from the notification of this Judgment to

remove the mandatory imposition of the death penalty from its laws;

xvii. *Orders* the Respondent State to take all necessary measures, within six (6) months from the notification of this Judgment to remove “hanging” from its laws as a method of execution of the death penalty;

xviii. *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;

xix. *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

xx. *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

xxi. *Orders* each Party to 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(2) of the Rules, the Dissenting Opinions of Justice Rafaâ BEN ACHOUR and Justice Blaise TCHIKAYA are appended to this Judgment.

In accordance with Article 28(7) of the Protocol and Rule 70(3) of the Rules, the Declaration of Justice Dumisa B. NTSEBEZA is appended to this Judgment.

Done at Arusha, this Fourth Day of June in the Year Two Thousand and Twenty-Four in English and French, the English text being authoritative.