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

GERALD KOROSO KALONGE

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 024/ 2018

JUDGMENT

13 NOVEMBER 2024

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The Court composed of: Modibo SACKO, Vice-President; Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Dennis D. ADJEI, Duncan GASWAGA – 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 the United Republic of Tanzania, did not hear the Application.

In the Matter of:

Gerald Koroso KALONGE

Self-represented

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

Dr. Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General.

after deliberation,

renders this Judgment:

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

I. THE PARTIES

1. Gerald Koroso Kalonge (hereinafter referred to as "the Applicant") is a Tanzanian national. At the time of filing the Application, he was incarcerated in Ruanda Central Prison, Mbeya, awaiting the execution of the death sentence following his conviction for murder. The Applicant alleges violation of his rights during the domestic proceedings that led to his conviction and sentence.

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

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. On 5 February 2008, at Ilolo Village within Rungwe District in Mbeya Region, Henry Mwakajila, a person with albinism disappeared and was never seen again. The police, acting on a tip, on diverse dates in May 2008, arrested the Applicant and four other individuals who are not parties to this

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, §§ 37-39.

Application. According to the record, during the Applicant's arrest, he was found to be in possession of body parts which were later proven to belong to the missing Henry Mwakajila.

4. The Applicant and his co-accused were subsequently charged with the murder of Henry Mwakajila. On 30 June 2015, the High Court of Tanzania, sitting at Mbeya, found the Applicant, and three of his co-accused, guilty of murder and sentenced them to suffer death by hanging. One of the Applicant's co-accused, however, was acquitted.

5. Aggrieved by the conviction and sentence, the four convicts appealed to the Court of Appeal sitting at Mbeya. On 12 October 2017, the Court of Appeal affirmed the conviction and sentence of the Applicant and one of his co-appellants while acquitting the other two appellants.

B. Alleged violations

6. The Applicant alleges that the Respondent State's conduct has violated his rights as follows:

    i. He was convicted and sentenced to death on the basis of insufficient evidence contrary to Articles 3(1) and 12 of the Charter;
    ii. The domestic Courts' reliance on DNA evidence to convict him was against Article 5 of the Charter;
    iii. He was wrongly convicted of murder when there was no proof that the person mentioned in the charge sheet had died contrary to Articles 3(1) and 12 of the Charter;
    iv. His right to life under Article 4 of the Charter was violated;
    v. His sentence to death by hanging is cruel and against Articles 5 and 3(2) of the Charter;
    vi. The acquittal, by the Court of Appeal, of his two co-appellants, violated Article 5 of the Charter;
    vii. His right to fair trial, under Article 7 of the Charter, was violated as he was not represented by counsel of his choice;

viii. His imprisonment has resulted in separation from his family contrary to Articles 15 and 27(1) of the Charter;

ix. His freedom of movement has been infringed as a result of his imprisonment contrary to Article 12 of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was filed on 28 September 2018.

8. On 15 January 2019, the Applicant filed his submissions on reparations.

9. On 18 April 2019, the Application including the submissions on reparations was served on the Respondent State.

10. On 24 June 2019, the Respondent State filed its Response to the Application and its submissions on reparations.

11. On 19 August 2019, the Applicant filed his Reply to the Respondent State's Response and submissions on reparations.

12. Pleadings were closed on 24 October 2019 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

13. The Applicant prays the Court that his Application be "allowed" and his conviction and sentence of death be set aside "after quashing the whole conviction". He also prays that he be released from prison and that the Respondent State should compensate him since he was "illegally" convicted to suffer death by hanging.

14. In relation to jurisdiction and admissibility, the Respondent State prays the Court to order that:

    i. The Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this Application;
    ii. The Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of the Court or Article 6(2) of the Protocol.
    iii. The Application is inadmissible;
    iv. The Application be dismissed in accordance to Rule 38 of the Rules of Court.
    v. Costs of this Application be borne by the Applicant.

15. On merits and reparations, the Respondent State prays the Court to order that:

    i. [It]has not violated the rights of the Applicant under Articles 3(2) and 5 of the African Charter on human and peoples' rights;
    ii. [It] did not violate the rights of the Applicant provided under Article 7(1) of the African Charter on Human and Peoples' Rights;
    iii. The Application be dismissed for lack of merit;
    iv. The Applicant not granted reparations;
    v. The Applicant continue to serve their sentence;
    vi. The Applicant's prayers be dismissed;
    vii. The costs of this Application be borne by the Applicant.

V. JURISDICTION

16. 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 instrument ratified by the States concerned.
    2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

17. In accordance with Rule 49(1) of the Rules, "[t]he Court shall conduct a preliminary examination of its jurisdiction … of an Application in accordance with the Charter, the Protocol and these Rules."

18. On the basis of the above-cited provisions, the Court must, in every Application, preliminarily conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

19. In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction. The Court will, thus, first consider this objection before assessing other aspects of its jurisdiction, if necessary.

A. Objection to material jurisdiction

20. The Respondent State raises three points in support of its objection. First, it contends that the Court lacks jurisdiction because "the Applicant is serving a lawful sentence for the commission of an offence as provided by valid penal statute …". Second, it contends that the Court has no jurisdiction "with regard to the prayer sought by the Applicant which relates to the quashing of the conviction order and sentence and release of the Applicant from lawful custody." Third, it asserts that "the Court is not vested with appellate nor criminal jurisdiction to determine matters of law and fact determined by domestic Courts in the Respondent State and quashing lawful conviction and sentence."

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21. In his Reply, the Applicant contends that the Court is vested with jurisdiction to hear this Application under Articles 1 and 3(1) of the Protocol since his allegations raise human rights violations. He also argues that the Respondent State has failed to cite the specific part of Article 27 of the Protocol which makes his claim for release from prison offensive. He submits, therefore, that "this Court is vested with power to hear this case being on the Charter and the Protocol."

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22. In the instant Application, the Court observes that although the Respondent State has particularised three strands to its objection, the essence of the objection is that the Court does not have either original or appellate jurisdiction to interfere with the findings of its domestic courts.

23. In connection with the Respondent State's objection, the Court reiterates that by virtue of Article 3(1) of the Protocol, it has jurisdiction to consider 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 instruments ratified by the Respondent State.[3] Given that the Applicant is, among other things, alleging possible violations of Articles 1, 2, 3, 4, 5, 7 and 12 of the Charter, the Court finds that it has material jurisdiction to determine these allegations.

24. Regarding the Respondent State's assertion that the Court neither has original criminal jurisdiction or appellate jurisdiction, the Court recalls its established position that it does not exercise original or appellate jurisdiction with respect to the decisions of domestic courts.[4] The preceding notwithstanding, the Court retains the authority to evaluate the conformity of domestic proceedings to the standards established in international human rights instruments ratified by the concerned State.[5]

25. Following from the above, therefore, if the procedure leading to the conviction and sentencing of an applicant is found to be in violation of the standards provided for in the Charter, then, the Court is empowered to make

[3] *Kalebi Elisamehe v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 265, § 18; *Gozbert Henrico v. United Republic of Tanzania*, ACtHPR, Application No. 056/2016, Judgment of 10 January 2022 (merits and reparations), §§ 33-40.
[4] *Kenedy Ivan v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 26; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.
[5] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Werema Wangoko Werema and Another v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29 and *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.

such orders as would remedy the violation(s) including, where necessary, the quashing of a conviction and release of an applicant. The preceding follows from a correct interpretation of Article 27(1) of the Protocol. The Court thus finds without merit the Respondent State's allegation that it does not have the power to order the quashing of a conviction and release of a convict.

26. In view of the above, the Court dismisses the Respondent State's objection to its material jurisdiction and holds that it has material jurisdiction to hear this Application.

B. Other aspects of jurisdiction

27. The Court notes that the Parties do not contest other aspects of its jurisdiction. However, being cognizant of Rule 49(1) of the Rules,[6] the Court must satisfy itself that all aspects of its jurisdiction are met before proceeding.

28. In relation to its personal jurisdiction, the Court recalls that the Respondent State is a party to the Protocol and had deposited the Declaration under Article 34(6) of the Protocol. The Court further recalls that on 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration. As per the Court's jurisprudence, the withdrawal of the Declaration does not apply retroactively and only takes place 12 months after notice of such withdrawal has come into effect, in this case, on 22 November 2020.[7] This Application, having been filed on 5 December 2018, which was before the said date, is thus unaffected by the withdrawal. Consequently, the Court holds that it has personal jurisdiction.

29. Regarding its temporal jurisdiction, the Court notes that the present Application is based on the Applicant's trial and appeal, which were concluded when the Court of Appeal pronounced its judgment on 30 June

[6] Rule 49(1) of the Rules of the Court, 2020.
[7] *Cheusi v. Tanzania, supra*, §§ 35-39.

2015. The Court further notes that the Court of Appeal's judgment was delivered after the Respondent State had ratified the Charter and the Protocol. Further, the Applicant remains incarcerated, waiting for execution of a sentence that he claims emanated from an unfair trial.[8] As the Court has previously held, in such a case the violations are deemed to be continuing which fact confers the Court with temporal jurisdiction to scrutinise such claims.[9]

30. As regards its territorial jurisdiction, the Court notes that all the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that its territorial jurisdiction is established.

31. Considering all the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. ADMISSIBILITY

32. In accordance with Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter."

33. Pursuant to Rule 50(1) of the Rules, "[t]he 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."

34. Rule 50(2) of the Rules,[10] which in substance restates the provisions of Article 56 of the Charter, provides as follows:

[8] *Tanganyika Law Society and Legal and Human Rights Centre v. United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 84.
[9] *Nobert Zongo and Others v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, § 68; *Igola Iguna v. United Republic of Tanzania*, ACtHPR, Application No. 020/2017, Judgment of 1 December 2022 (merits and reparations), § 18.
[10] Rule 40, Rules of Court, 2 June 2010.

Applications filed before the Court shall comply with all of the following conditions:

a. Indicate their authors even if the latter request anonymity,
b. Are compatible with the Constitutive Act of the African Union and with 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 the Commission is 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 Charter of the Organization of African Unity or the provisions of the Charter.

35. The Court notes that the Respondent State raises an objection to the admissibility of the Application relating to the requirement of exhaustion of local remedies. The Court will consider this objection, first, before examining other conditions of admissibility, if necessary.

A. Objection based on non-exhaustion of local remedies

36. The Respondent State contends that the Applicant has not exhausted local remedies and thus his Application should be declared inadmissible.

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37. The Applicant submits that he exhausted local remedies. He contends that the Respondent State has failed to provide details of the further remedies that he should have exhausted after the Court of Appeal's judgment.

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38. The Court notes that pursuant to Rule 50(2)(e) of the Rules, any application filed before it must fulfil the requirement of exhaustion of local remedies unless the local remedies are unavailable or ineffective, or the domestic procedure to pursue them is unduly prolonged.[11] This is to ensure that, as the primary duty bearers, States have the opportunity to address human rights violations occurring within their jurisdiction before an international body is called upon to intervene. In its jurisprudence, the Court has affirmed that in order for this requirement to be met, the remedies that should be exhausted must be ordinary judicial remedies.[12]

39. In the instant Application, the Court observes that the Applicant was tried before the High Court sitting at Mbeya and convicted on 30 June 2015. Thereafter, the Applicant appealed to the Court of Appeal sitting at Mbeya which affirmed the conviction and sentence on 12 October 2017. It was only after the Court of Appeal's decision that this Application was filed on 28 September 2018. Given that the Court of Appeal, within the Respondent State's legal system, is the highest judicial body that one has recourse to, the Court finds that the Applicant exhausted domestic remedies.

40. In view of the foregoing, the Court holds that the Applicant exhausted local remedies as required under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and therefore dismisses the Respondent State's objection.

B. Other conditions of admissibility

41. The Court notes that there is no contention regarding the Application's compliance with the conditions set out in Rule 50(2)(a), (b), (c), (d), (f) and

[11] *Kennedy Owino Onyachi and Charles Mwanini Njoka v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 56.
[12] *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 308, § 95.

(g) of the Rules. It, however, must satisfy itself that the Application fulfils these requirements.

42. From the record, the Court notes that the Applicant is clearly identified by name thereby fulfilling Rule 50(2)(a) of the Rules.

43. The Court also notes that the Applicant's claims seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union. The Court, therefore, holds that the requirement of Rule 50(2)(b) of the Rules is met.

44. The Court further notes that the language used in the Application is not disparaging or insulting toward the Respondent State, its institutions, or the African Union in compliance with rule 50(2)(c) of the Rules.

45. The Court also observes that the Application is not exclusively based on news disseminated through mass media; rather, it is based on judicial decisions from the domestic Courts of the Respondent State. The Court finds, therefore, that the Application complies with rule 50(2)(d) of the Rules.

46. In relation to the requirement for filing applications within a reasonable timeframe, under Rule 50(2)(f) of the Rules, the Court recalls that neither the Charter nor the Rules specify the time frame within which applications must be filed after the exhaustion of local remedies. As per the Court's jurisprudence, "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-to-case basis.[13]

[13] *Zongo and others v. Burkina Faso* (merits), *supra*, § 92.

47. With regard to the instant Application, the Court notes that the decision of the Court of Appeal was rendered on 12 October 2017 while the Application was filed on 28 September 2018. The period at stake hence is 11 months and 16 days. It is this period, therefore, that the Court must assess to determine reasonableness.

48. In its jurisprudence, the Court has taken into consideration, among other factors, incarceration and being on death row with the resultant limited movement and limited access to information[14] as being relevant factors in determining the reasonableness of time.[15] The Court has also found the time to be manifestly reasonable when the period under consideration is relatively short.[16]

49. In the present Application, given the Applicant's situation as a lay and incarcerated person who filed the Application without counsel's assistance, and in light of the relatively short length of time i.e. 11 months and 16 days, the Court finds that the Application was filed within a reasonable time as required by Rule 50(2)(f) of the Rules.

50. Concerning the admissibility requirement specified under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules, the Court notes that there is nothing on record to show that the Application concerns 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. The Court, thus, finds that the Application complies with Rule 50(2)(g) of the Rules.

[14] *Igola Iguna v. United Republic of Tanzania* (merits and reparations), *supra*, §§ 37-38.
[15] *Thomas v. United Republic of Tanzania* (merits), *supra,* § 73; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[16] *Sebastian Germain Ajavon v. Republic of Benin* (merits and reparations) (29 March 2021) 5 AfCLR 94, § 87; *Augustino Niyonzima v. United Republic of Tanzania*, Application No. 058/2016 , Judgment of 13 June 2023 (merits and reparations), § 58.

51. Given all the above, the Court, therefore, finds that all the admissibility requirements are met and holds the instant Application admissible.

VII. MERITS

52. The Applicant alleges that the Respondent State violated his rights to: equality and equal protection of the law, life, dignity, fair trial, the enjoyment of his family life and free movement as protected under the Charter. The Court will address each of the Applicant's allegations individually.

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

53. The Applicant submits that the Court of Appeal dismissed his Appeal while acquitting the third and fourth appellants although, according to him, the circumstances and facts of the case were similar. This, he contends, is a violation of his right to equality and equal protection of the law under Article 3 of the Charter.

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54. The Respondent State argues that all the accused persons were treated equally and the Applicant was convicted based on the strength of evidence against him, specifically Exhibit EP7. It submits that he was convicted because it was proven that he was found in possession of a box containing the fingers and other tissues of a human being which were later proven to belong to Henry Mwakajila.

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55. The Court notes that Article 3 of the Charter provides as follows:

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

56. The right to equality before the law and equal protection of the law, enshrined under Article 3 of the Charter, is closely related to the right to protection against discrimination, protected in Article 2 of the Charter.[17] The right to equality before the law requires that "all persons shall be equal before the courts and tribunals."[18] The two key precepts in Article 3 are that the entities in charge of applying the law must do so equally with respect to all and that the law itself must treat everyone equally.[19]

57. In relation to the Applicant's allegations, the Court recalls that the burden of proof for a human rights violation lies with he/she that alleges.[20] In the instant Application, the Court observes that the Applicant has made a general allegation that his right to equality before the law and equal protection of the law was violated simply from the fact that his co-appellants were acquitted. He, however, neither makes specific submissions nor provides evidence to demonstrate that the acquittal of his co-appellants was a violation of his right to equality and equal protection of the law.

58. The Court notes, from the record, that the domestic courts assessed the evidence against each of the persons accused of the murder of Henry Mwakajila at an individual level and drew conclusions applicable to each accused person separately. In the circumstances, the Court finds that there is no basis for it to conclude that there was a violation of the Applicant's right to equality and equal protection of the law.

59. The Court, therefore, dismisses the Applicant's allegation of the violation of his rights under Article 3 of the Charter.

[17] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, § 138.
[18] *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, §§ 84-85.
[19] *XYZ v. Republic of Benin* (merits and reparations) (27 November 2020) 4 AfCLR 49, § 151.
[20] *Sijaona Chacha Machera v. United Republic of Tanzania,* ACtHPR, Application No. 035/2017 Judgment of 22 September 2022 (merits), § 82; *Yassin Rashid Maige v. United Republic of Tanzania,* ACtHPR, Application No. 018/2017 Judgment of 5 September 2023 (merits and reparations), § 124.

B. Alleged violation of the right to life

60. The Applicant contends that the Respondent State violated his right to life as enshrined in Article 4 of the Charter. In support of his contention, the Applicant alleges that his right was violated because the national courts convicted him on the basis of suspicions thus resulting in erroneous decisions by both the High Court and the Court of Appeal. To substantiate the preceding, the Applicant submits that Henry Mwakajila was not proven to have died and may as well have simply travelled outside of the Respondent State's borders.

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61. The Respondent State, in response, argues that the elements for the offence of murder were established beyond reasonable doubt before the Applicant was convicted. It thus refutes the Applicant's submission that he was convicted on the basis of suspicions. It also points out that witnesses were called during the Applicant's trial to testify to the fact that since his disappearance, Henry Mwakajila had never been seen alive again.

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62. Article 4 of the Charter provides that "[h]uman 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."

63. In the instant Application, the Court observes that the Applicant's grievance is that his right to life was violated due the conviction and sentence that were, allegedly, founded on suspicions. A key plank in the Applicant's argument is that Henry Mwakajila was not proven to have died and may very well have simply travelled outside the Respondent State's borders.

64. The record reveals that both the High Court and the Court of Appeal addressed their minds to the absence of direct evidence in relation to the death of Henry Mwakajila. In the judgment of the High Court, for example,

the trial judge noted that the presumption of death, as established under section 117 of the Respondent State's Evidence Act, was applicable given that Henry Mwakajila had not been seen or heard of by persons who would ordinarily be expected to have heard from him in the five years preceding the trial.

65. In a similar fashion, the Court of Appeal, in its judgment, acknowledged that the evidence against the Applicant was circumstantial. It then reiterated that for such evidence to found a conviction, it must be capable of no more than one interpretation. The Court of Appeal then considered the evidence against the Applicant, and his co-appellants, before confirming the Applicant's conviction.

66. In so far as the Applicant alleges that his rights were violated because he was convicted on mere suspicions, therefore, the Court finds the allegation to be baseless.

67. The above notwithstanding, the Court notes that the Applicant was convicted and sentenced to death under the mandatory regime applicable in the Respondent State. This calls into question the possible arbitrariness of the sentence imposed on the Applicant.

68. As established in its jurisprudence, a three-part test is employed in international human rights law in assessing the arbitrariness of a death sentence.[21] This test requires checking whether the death sentence is provided for by law, whether the sentence was passed by a competent Court and whether there was due process in the proceedings leading to the imposition of the death sentence.

69. Regarding the first criterion, the Court notes that the death sentence is provided for in section 197 of the Respondent State's penal code. Thus, the criterion is met in the present case.

[21] *International Pen and others (on behalf of Ken Saro-wiwa) v. Nigeria,* Communication 137/94.139/94,154/96,161/97 (2000) AHRL 212 (ACHPR 1998), §§ 1-10 and 103.

70. Regarding the second criterion, the Court observes that the High Court is the competent Court in the Respondent State to deal with offences that carry the death penalty. Therefore, the sentence was imposed by a competent court and the second requirement is equally met.

71. In relation to the third criterion, the Court recalls that in *Ally Rajabu and Others v. Tanzania*, it held that the death penalty can only be imposed in accordance with the norms and standards required in a fair trial.[22] In this regard, the Court held that "any penalty must be imposed by a tribunal that is independent in the sense that it retains full discretion in determining matters of facts and law."[23] The Court finds that, by taking away the discretionary power of a judicial officer to impose a sentence on the basis of proportionality and the individual circumstances of a convicted person, the mandatory death sentence falls foul of the requirements of due process in criminal proceedings.[24]

72. As stressed in its case-law, the mandatory imposition of the death sentence, as applied under the Respondent State's law is also 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.[25] The Court recalls that, 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.[26]

73. Overall, therefore, the Applicant has failed to prove that he was convicted on mere suspicions. Nevertheless, his right to life was violated by his

[22] *Rajabu and Others v. Tanzania*, *supra*, § 98.
[23] *Ibid*, § 107.
[24] *Ibid,* § 110.
[25] *Dominic Damian v. United Republic of Tanzania*, ACtHPR, Application No. 048/2026, Judgment of 4 June 2024 (merits and reparations), § 128.
[26] *Rajabu and Others v. Tanzania* (merits and reparations), *supra*, § 109 and *Juma v. Tanzania* (judgment), *supra*, §§ 124-125.

conviction and sentence to death under a regime that did not accord the judicial officer discretion to consider the appropriate sentence for the offence.

74. As such, the Court holds that the mandatory imposition of the death penalty against the Applicant in the present Application constitutes a violation of the right to life as provided under Article 4 of the Charter.

C. Alleged violation of the right to dignity

75. The Applicant argues that his conviction and sentence to death by hanging "is a cruel action against Article 5 of the African Charter on Human and Peoples' Rights."

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76. The Respondent State submits that "the allegation that the death penalty by hanging imposed on him is an act of cruelty [and against the Charter] is disputed and the Applicant is put to strict proof thereof." It further submits that under its laws murder is punishable by death and given that the death penalty is legal within its legal system there can be no violation of the Charter.

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77. The Court recalls that Article 5 of the Charter provides as follows:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of 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.

78. The Court notes that the Applicant avers that his sentence to death by hanging contravenes Article 5 of the Charter. In this connection, the Court recalls that the question of execution by hanging, in the Respondent State,

has previously been dealt with.[27] Given that there is no information to suggest that the legal situation in the Respondent State has changed, the Court reiterates its holding that the implementation of the death penalty by hanging is "inherently degrading" and encroaches upon dignity in respect of the prohibition of […]cruel, inhuman and degrading treatment".[28] The Court, therefore, holds that hanging as a method of executing the death penalty, violates the right to dignity under Article 5 of the Charter.

79. In these circumstances, the Court, therefore, holds that the Respondent State violated the Applicant's rights under Article 5 of the Charter.

D. Alleged violation of the right to a fair trial

80. The Court notes that the Applicant makes several allegations which question the manner in which his right to a fair trial was safeguarded by the Respondent State.

81. At the outset, the Court recalls that Article 7(1)(c) of the Charter, in so far as is material, provides that "[e]very individual shall have the right to have his cause heard …". As the Court has held,[29] this provision may be interpreted in light of the provisions of Article 14(1) of the ICCPR which provides that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law …". A combined reading of the two provisions confirms that everyone has a right to a fair trial.

82. Before individually assessing the specific allegations made by the Applicant, the Court wishes to reiterate its approach to considering allegations that

[27] *Rajabu and Others v. Tanzania*, *ibid*, §§ 119-120; *Henerico v. Tanzania*, *supra*, §§ 169-170; *Juma v. Tanzania*, *supra*, §§ 135-136.
[28] *Rajabu v. Tanzania* (merits and reparations), *ibid*, §§ 119-120.
[29] *Christopher Jonas v. United Republic of Tanzania* (reparations) (25 September 2020) 4 AfCLR 545, §§ 64-65.

question the manner in which domestic courts dealt with questions that arose during trial or appellate processes, especially evidential matters. As pointed out in *Alex Thomas v. Tanzania*:[30]

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

83. The above approach has been consistently confirmed by the Court[31] For example, in *Kijiji Isiaga v. Tanzania*, [32] the Court restated its approach as follows:

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

84. The essence of the above approach is that the Court will, generally, be very slow to interfere with factual and evidential findings made by domestic courts except where there is manifest irregularity resulting in a miscarriage of justice. In the instant Application, the Applicant makes several allegations the crux of which is that his right to a fair trial was compromised due to the

[30] *Thomas v. Tanzania*, *supra*, § 130.
[31] See, for example, *Jonas v. Tanzania*, *supra*, § 69.
[32] (merits) (21 March 2018) 2 AfCLR 218, §§ 65-66.

manner in which the proceedings before the High Court and the Court of Appeal were conducted. The Court will, below, address each of the allegations made by the Applicant.

i. Conviction on the basis of insufficient evidence

85. The Applicant alleges that his conviction was not based on sufficient evidence. In support of his allegation, he argues that the prosecution failed to prove that someone had been killed. He submits, therefore, that the person alleged to have been killed, Henry Mwakajila, "was not killed or was not proved to be dead."

86. The Applicant further alleges that his conviction was founded on the statement admitted by the High Court as Exhibit EP7 which was made by a person who was deceased by the time of trial and was, therefore, never called to testify.

87. The Applicant also submits that the Respondent State did not prove that the alleged victim of his actions was dead. He avers that the Respondent State relied on bone tissue and fingers, which could have been retrieved from a different human being, to convict him of murder.

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88. The Respondent State argues that the Applicant was found with a box having parts of a human being, which were later DNA tested and found to tally with the DNA extracts from the shirt of Henry Mwakajila, the victim. It also submits that the DNA analysis showed a match as between the body parts found with the Applicant and the blood of Bahati Seme Mwakajila – who is Henry Mwakajila's sister and who was also called as prosecution witness no. 3 during the High Court proceedings.

89. As to Exhibit EP7, the Respondent State submits that section 34B of its Evidence Act allows the admission of such statements. It further submits

that the propriety of the admission of Exhibit EP7 was carefully considered by the Court of Appeal before being allowed to stand.

90. The Respondent State submits further that ample proof was presented before domestic courts proving the death of the Henry Mwakajila and also of the complicity of the Applicant in the death.

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91. The dictates of a fair trial require that the imposition of a sentence in a criminal trial and in particular a heavy sentence, should be based on strong and credible evidence.[33]

92. In the instant case, the record shows that the High Court convicted the accused, partly, based on the DNA evidence. The findings of the High Court on this point were reviewed by the Court of Appeal in affirming his conviction and sentence. Notably, the person who conducted the DNA analysis was called as a witness for the prosecution (PW 14) before the High Court and the Applicant, and his co-appellants, were accorded opportunity to cross examine her. The Court also notes that domestic courts were aware that the evidence against the Applicant was circumstantial and needed to be treated with the appropriate circumspection.

93. In the circumstances, the Court finds that the evidence relied on to convict the Applicant has not been impeached. Further, and as noted by the Court of Appeal, once it was established that the Applicant was found with human body parts belonging to a missing person, the Applicant ought to have explained how he came to be in possession of those parts. It was in part, due to the Applicant's failure to explain his possession of the body parts belonging to the deceased that he was convicted.

[33] *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 174.

94. As to the domestic courts reliance on Exhibit EP7, the Court notes, from the record, that the Court of Appeal found that "it was unsafe to found conviction to the appellants basing on uncorroborated evidence of Kefasi Lyambulilo Mwakalinga." Nevertheless, it was noted that Exhibit EP7 was amply corroborated by the testimony of other prosecution witnesses. Following from this, the Court of Appeal found that the only reasonable inference was that the Applicant was involved in the killing of Henry Mwakajila.

95. The Court also notes, from the record, that the domestic courts dealt with the issue of the death of the victim which had become a critical issue given that the victim's body had not been found. Both the High Court and the Court of Appeal acknowledged that this was a case in which the presumption of death applied. As was pointed out by the Court of Appeal, given the timing of the disappearance of the victim and the first and second appellants being found in possession of the victim's large intestines and bone tissue and fingernails, the burden fell on them to explain how they came to be in possession of the victim's body parts. The Applicant, however, failed to rebut the presumption.

96. The Court finds, therefore, that there was nothing wrong with the manner in which the presumption of death was applied in the Applicant's trial. It concludes, therefore, that the Applicant's right to a fair trial was not violated by reason of application of the presumption of death.

97. In its assessment of the analysis of the evidence by the domestic courts, this Court has found nothing to fault both the High Court and the Court of Appeal's approach. It thus finds that the allegation that the Applicant was convicted on the basis of insufficient evidence to be unfounded.

98. This Court, therefore, dismisses the allegation that the domestic courts erroneously convicted the Applicant on the basis of insufficient evidence.

ii. Domestic courts' reliance on DNA evidence

99. The Applicant contends that the Respondent State violated his rights by relying on DNA evidence which he alleges was faulty.[34] He submits that as a result the prosecution failed to prove the case against him beyond reasonable doubt.

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100. The Respondent State refutes this allegation and submits that the Applicant was properly tried and convicted. It points out that it was not disputed that the Applicant was found in possession of a box containing human bones and tissue which were later proved to belong to Henry Mwakajila.

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101. The Court takes judicial notice of section 240 of the Respondent State's Criminal Procedure Act, which lays down the procedure for admitting medical reports in criminal trials.[35] The Court notes, from the record, that the medical officer who signed the DNA certificate was called as a witness, before the High Court, and examined by both the prosecution and defence in relation to the results of her DNA analysis.

102. The Applicant, however, has not particularised which part of the DNA testing process fell afoul of his right to a fair trial. In the circumstances, the Court is unable to uphold the Applicant's contention that the domestic courts improperly relied on the DNA evidence to convict him.

[34] Deoxyribonucleic acid (abbreviated DNA) is the molecule that carries genetic information for the development and functioning of an organism.

[35] Section 240(3) – "Where a report referred to in this section is received in evidence the Court may, if it thinks fit, and shall, if so requested by the accused person or his advocate, summon and examine or make available for cross-examination the person who made the report; and the Court shall inform the accused person of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection".

103. The Court further notes that the Court of Appeal also relied on the testimonies of PW5, PW6, PW8 and PW9 in finding that Exhibit P9, containing the human body parts, belonged to the Applicant.

104. In light of the above, the Court dismisses the Applicant's allegation of a violation of his right to fair trial by reason of the domestic courts' reliance on DNA evidence.

iii. Acquittal of co-appellants

105. The Applicant submits that the Respondent State violated his right to a fair trial when the Court of Appeal acquitted the third and fourth appellants while convicting him. This, he submits, is the case because the facts of the case were very similar.

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106. The Respondent State refutes this allegation and submits that there was no unequal treatment in the acquittal of the other appellants. It points out that specific evidence had been presented against all the accused persons before domestic courts. It submits that the Applicant was convicted based on the strength of EP7 as well as the possession of a box having fingers and other tissues of a human being which were proved to belong to Henry Mwakajila.

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107. The Court notes that in the Court of appeal, the evidence against each appellant was reconsidered. It was on the basis of this reconsideration that the conviction against the Applicant was upheld while the convictions of the other appellants were set aside. In its evaluation of the record, the Court has found no error in the manner in which the Court of Appeal evaluated the evidence considered by the High Court resulting in the eventual acquittal of some of the appellants. The Court also takes notice that each of the individuals charged with the murder of Henry Mwakajila needed to prove their own innocence given that specific evidence was brought against each

of them. The acquittal of some, among the accused persons, therefore, by itself, cannot be said to be a violation of human rights.

108. In the circumstances, the Court finds that the procedure the domestic Courts adopted in finding the first and second appellant guilty and reaffirming their sentences while quashing the conviction and setting aside the sentences of the third and fourth appellants did not violate Article 7(1) of the Charter.

109. The Court, therefore, dismisses the allegation that the domestic Courts erroneously acquitted the Applicant's co-appellants while affirming his conviction and sentence.

iv. Alleged failure to permit representation by legal practitioner of choice

110. The Applicant contends that the Respondent State violated his right to legal representation contrary to Article 7(1) of the Charter. Specifically, his grievance is that he was not allowed to be represented by a legal practitioner of his choice.

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111. The Respondent State disputes the Applicant's submission and contends that the Applicant is raising this allegation as an afterthought as he did not raise it before the Court of Appeal. It submits, therefore, that this allegation should be dismissed.

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112. According to Article 7(1)(c) of the Charter, the right to have one's cause heard includes "the right to defence, including the right to be defended by counsel of [their] choice."

113. The Court has previously interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the ICCPR,[36] and determined that the right to defence includes the right to be provided with free legal assistance.[37]

114. In the matter of *African Commission on Human and Peoples' Rights v. Libya*, the Court held that "every accused person has a right to be effectively defended by a lawyer, which is at the heart of the notion of a fair trial".[38] Equally, in *Evodius Rutechura v. Tanzania*[39] the Court held that the right to fair trial includes the right to be represented by counsel.

115. In assessing the applicability of this right, the Court emphasises that an important consideration is whether the accused is provided with effective legal representation rather than whether he or she is allowed to be represented by a lawyer of their own choosing.[40] The Court considers that, "effective assistance of counsel" comprises two aspects.[41] First, defence counsel should not be restricted in the exercise of representing his client. Second, counsel should not deprive a client of effective assistance by failing to provide competent representation that is adequate to ensure a fair trial or, more broadly, a just outcome.[42]

116. In the present case, the Applicant has simply asserted that he was not allowed to be represented by counsel of his choice. The judgment of the Court of Appeal confirms that the Applicant, and all his co-appellants, were represented by counsel. The Applicant has not demonstrated that his counsel was prevented from effectively representing him by reason of the conduct of the Respondent State. As a matter of fact, the record indicates that the Applicant never raised any issues about his representation during

[36] The Respondent State became a State party to the ICCPR on 11 June 1976.
[37] *Thomas v. Tanzania* (merits), *supra,* § 114*; Isiaga v. Tanzania* (merits), *supra,* § 72; *Onyachi and Njoka v. Tanzania* (merits), *supra*, § 104.
[38] *African Commission on Human and Peoples' Rights v. Libya* (merits) (2016) 1 AfCLR 153, § 95.
[39] *Evodius Rutechura v. United Republic of Tanzania* (merits and reparations) (26 February 2021) 5 AfCLR 7 § , § 73.
[40] ECHR, *Lagerblom v. Sweden* (2003) App No. 26891/95, §§ 54-56.
[41] HRI/GEN/1/Rev.9 (Vol. I) page 256, §§ 333-335.
[42] ECHR, *Strickland v. Washington*, 466 U.S. 668 336; 686 (1984), 336; *Lafler v. Cooper*, 566. No 10-209 slip. op. (2012) (erroneous advice during plea bargaining).

the appeal proceedings. In the circumstances, the Court finds his allegations unfounded.

117. In view of all of the above, the Court, therefore, holds that the Respondent State did not violate the Applicant's right to a fair trial under Article 7 of the Charter.

E. Alleged violation of the right to enjoy family life

118. The Applicant contends that the Respondent State violated his right to family by separating him from his family through a wrongful conviction.

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119. The Respondent State submissions did not address this allegation.

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120. Article 18 of the Charter, in so far as is material, provides as follows:

> 1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
> 2. The State shall have the duty to assist the family which is the custodian or morals and traditional values recognized by the community.

121. The Court notes that the Applicant's allegations on this point stem from his conviction and subsequent incarceration. Given that his separation from his family is due to his conviction, which this Court has found no reason to set aside, the Court finds that there is no basis for holding that the Respondent State violated Article 18 of the Charter.

122. Consequently, the Court finds that the Respondent State did not violate the Applicant's right to enjoy family life as guaranteed by Article 18 of the Charter.

F. Allegation of violation of the Applicant's right to free movement

123. The Applicant contends that the Respondent State has violated his right to leave and return to his country contrary to Article 12 of the Charter.

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124. The Respondent State did not address this allegation in its Response.

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125. Article 12 of the Charter, materially, provides as follows:

> 1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
> 2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

126. The Court reiterates its earlier finding that it did not find any manifest errors in the procedure adopted by the Respondent State in convicting the Applicant. Given the lawfulness of the conviction, which is the direct precursor to the limitation of the Applicant's freedom of movement, the Court finds that the Applicant's right to movement was not violated.

127. Consequently, the Court finds that the Respondent State did not violate the Applicant's right to freedom of movement as guaranteed by Article 12 of the Charter.

VIII. REPARATIONS

128. The Applicant prays that the Court grant him reparations for the violations he suffered including quashing his conviction and sentence and ordering his release.

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129. The Respondent State prays that the Court should dismiss the request for reparations contending that the Applicant was convicted and sentenced in accordance with the law. The Respondent State asserts that in order for the Court to award reparations, it must first find a violation of human rights and establish that the said violation caused harm.

130. In the instant Application, the Respondent State argues that the Applicant, apart from requesting an order for his acquittal and compensation, has not proved violation of his rights and any loss or damage suffered as a result of such violation. Accordingly, the Respondent State submits that the Court should not award reparations requested by the Applicant.

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

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

132. The Court has consistently held that for reparations to be granted, the Respondent State should, first, be intentionally responsible for the wrongful act. Second, causation should be established between the wrongful act and

the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered.[43]

133. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers, particularly for material damages.[44] With regard to moral damages, the Court has held that the requirement of proof is not strict,[45] since it is presumed that there is prejudice caused when violations are established.[46]

134. The Court also restates that the measures that a State may take to remedy a violation of human rights include restitution, compensation, and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.[47]

135. In this instant case, the Court has established that the Respondent State's conduct has violated the Applicant's right to life and right to dignity only. It is in respect of these violations, therefore, that the Court must assess the reparations due.

A. Pecuniary reparations

i. Material prejudice

136. The Applicant simply prayed the Court to grant him reparations in accordance with Article 27 of the Protocol, without specifying the nature of the pecuniary reparations sought. He has not indicated the nature of the

[43] *Rajabu and Others v. Tanzania* (merits and reparations), *supra*, § 136; *Guehi v. Tanzania* (merits and reparations), *supra,* § 55; *Lucien Ikili Rashidi v. United Republic of Tanzania of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119.
[44] *Kennedy Gihana and Others v. Republic of Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139.
[45] *Zongo and Others v. Burkina Faso* (reparations), *supra*, § 55. See also *Elisamehe v. Tanzania* (merits and reparations), *supra*, § 97.
[46] *Zongo and Others v. Burkina Faso* (reparations), *Ibid*.
[47] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20.

material prejudice he suffered and how this is linked with the violation of his rights under the Charter.

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137. For its part, the Respondent State reiterated its prayer that the Applicant's request be dismissed.

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138. Given the Applicant's failure to first, specify his material prejudice, and second, to prove the same, the Court dismisses the prayer for reparations for material prejudice.

ii. Moral prejudice

139. The Applicant does not expressly request the Court to grant reparations for moral prejudice; he simply prays for the Court to grant him reparations.

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140. The Respondent State submits that the Applicant's conviction and subsequent sentencing were a result of his actions and therefore he is not entitled to any reparations.

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141. In line with its established case law, moral prejudice is presumed in cases of human rights violation. In this case, the Court notes, the quantum of damages is assessed based on equity, taking into account the circumstances of the case.[48]

142. In the instant Application, the Court finds that the Applicant suffered violations which involve moral prejudice. These include imposition of the mandatory death penalty and the time he continues to spend on death row

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

both of which are compounded by overall inhuman and degrading circumstances on death row. Given the circumstances of the case, and in light of the Court's jurisprudence that a judgment in favour of a victim is in itself a form of satisfaction and a reparation for moral damages,[49] the Court, in its discretion, awards the Applicant, Three Hundred Thousand Tanzanian Shillings (TZS 300,000) for moral damages suffered.

B. Non-pecuniary reparations

i. Quashing of conviction and release

143. The Applicant prays the Court to quash his conviction and sentence and restore his liberty. He also prays the Court to set aside the sentence imposed on him and order his release from prison.

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144. The Respondent State maintains that the Applicant's prayer for release should be dismissed as he is serving a lawful sentence imposed on him in accordance with its laws. It also reiterates that an order for the release of the Applicant is not within the mandate of the Court.

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145. The Court reiterates Article 27(1) of the Protocol empowers the Court, upon finding a violation, to order measures of reparations including, the release of prisoners. The Court notes that the Applicant prays that his conviction be quashed and he is released. Regarding this prayer, the Court recalls that, as established in its case-law, it can only make such an order in compelling circumstances.[50]

[49] *Mtikila v. Tanzania* (reparations), *supra*, § 45.
[50] *Elisamehe v. Tanzania* (merits and reparations), *supra*, § 112.

146. The Court notes that its finding of a violation in the present Application only pertains to the non-compliance with the Charter of the mandatory death penalty as well as the means chosen by the Respondent State for executing convicts. Without minimising the gravity of the violations, the Court considers that the nature of the violations does not reveal any circumstances that signifies that the Applicant's imprisonment amounts to a miscarriage of justice or an arbitrary decision. The Applicant also failed to elaborate on specific and compelling circumstances to justify the order for his release. The prayer for release is, therefore, not warranted, and the Court consequently dismisses the same.[51]

147. While the Applicant's prayer for release is not warranted, he was sentenced to death under a regime which did not accord the domestic Courts discretion on the sentence. Given that the Court had found the mandatory sentencing regime to be inconsistent with the Charter, it is necessary for it to make an order dealing with this sentencing regime.

148. In connection to the Applicant's prayers, the Court recalls that it 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.[52] In the instant Application, given 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 Applicant's death penalty and remove him from death row.

ii. Rehearing

149. Although the Applicant did do not make any prayer for re-hearing of his case, the Court considers that it is in the interests of justice to make an order

[51] *Stephen John Rutakikirwa v. United Republic of Tanzania*, ACtHPR, Application No. 013/2016, Judgment of 24 March 2022 (merits and reparations), § 88.
[52] *Rajabu and others v. Tanzania, supra*, § 156.

regarding rehearing to give full effect to the order that it has made directing the repeal of the mandatory death penalty.[53] As previously noted, the violations in the case of the Applicant did not impact on his guilt and conviction, and that the sentencing is affected only to the extent of the mandatory nature of the penalty.

150. In the circumstances, the Court 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 the mandatory imposition of the death penalty while upholding the full discretion of the judicial officer.

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

151. Neither the Applicant nor the Respondent State made any specific prayers in respect of the need for amendment of laws to ensure respect for the rights to life and dignity. However, as is established in its jurisprudence, the Court holds that the consideration of this relief necessarily follows from its earlier findings in respect of the mandatory death penalty in the Respondent State.

152. In its previous judgments dealing with the mandatory imposition of the death penalty, the Court 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.[54]

153. In the present judgment the Court has again established that the mandatory imposition of the death penalty violates the right to life guaranteed under Article 4 of the Charter. It, therefore, holds that the said sentence ought to be removed from the statutes of the Respondent State within six months of the notification of the present Judgment.

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[53] *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, ACtHPR, Application No. 015/2016, Judgment of 3 September 2024 (merits and reparations), §§ 240-241.
[54] *Ghati Mwita v. United Republic of Tanzania* ACtHPR, Application No. 012/2019, Judgment of 1 December 2022 (judgment), § 166; *Marthine Christian Msuguri v. United Republic of Tanzania*, ACtHPR, Application No. 052/2016, Judgment of 1 December 2022 (merits and reparations), § 128; *Henerico v. Tanzania* (merits and reparations), *supra,* § 207 and *Juma v. Tanzania* (judgment)*, supra,* § 170.

154. Similarly, as per its jurisprudence,[55] 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 laws 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 months of the notification of the present Judgment.

iv. Publication of the Judgment

155. None of the parties made any submissions in respect of the publication of this Judgement.

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156. The Court considers, however, that for reasons now firmly established in its practice and in the peculiar circumstances of this case, publication of this Judgment is necessary. Given the current state of law in the Respondent State, threats to life associated with the mandatory death penalty persist.

157. The Court thus finds it appropriate to order publication of this Judgment within a period of three months from the date of notification.

v. Implementation and reporting

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

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[55] *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.

159. The justification provided earlier, in respect of the Court's decision to order publication of the judgement, is equally applicable in respect of implementation and reporting. The Court notes that in its previous judgments directing the repeal of the provision on the mandatory death penalty, the Respondent State was directed to implement the decisions within one year of issuance of the same.[56]

160. 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 Application and is systemic in nature. The same applies to the violation of the right to dignity by reason of the method of execution. The Court further notes that its finding in this Judgment bears on a supreme right in the Charter, that is, the right to life.

161. 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.

162. The Court recalls that it has ordered the Respondent State 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 as a general restatement of the obligation and urgency behoving on the Respondent State to remove the mandatory death penalty and provide alternatives thereto.

163. The Court holds, therefore, that the Respondent State is under an obligation to report on the steps taken to implement this Judgment within six months from the date of notification of this Judgment.

[56] *Rajabu and Others v. Tanzania* (merits), *supra,* § 171; *Henerico v. Tanzania* (merits), *supra,* § 203.

IX. COSTS

164. Each Party prays the Court to order that the other Party should bear the costs.

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165. The Court observes that rule 32(2) provides that “unless otherwise decided by the Court, each party shall bear its own costs, if any.”

166. The Court finds no justification for departing from the above provision in the circumstances of the case and, therefore, Rules that each Party shall bear its own costs.

X. OPERATIVE PART

167. 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* the Application admissible.

On merits

v. *Holds* that the Respondent State did not violate the Applicant's right to equality and equal protection before the law as provided for in Article 3 of the Charter;
vi. *Holds* that the Respondent State did not violate the Applicant's right to a fair trial as provided in Article 7 of the Charter;
vii. *Holds* that the Respondent State did not violate the Applicant's right to enjoy family life as provided under Article 18 of the Charter;
viii. *Holds* that the Respondent State did not violate the Applicant's right to free movement provided under Article 12 of the Charter;

By a majority of eight Judges for, and two Judges against, Judges Blaise TCHIKAYA and Dumisa B. NTSEBEZA dissenting on the issue of the death penalty;

ix. *Holds* that the Respondent State violated the Applicant's right to life under Article 4 of the Charter due to the mandatory imposition of the death penalty;
x. *Holds* that the Respondent State violated the Applicant's right to dignity under Article 5 of the Charter by reason of prescribing hanging as a method for execution of the death penalty.

Unanimously

On reparations

On pecuniary reparations

xi. *Dismisses* the Applicant's claims for pecuniary reparations;
xii. *Grants* the Applicant's prayer for damages for the moral prejudice he suffered and awards him the sum of Three Hundred Thousand Tanzania Shillings (TZS 300,000);

xiii. *Orders* the Respondent State to pay the sum awarded under (xii) above, free from tax as fair compensation to be made within six 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.

On non-pecuniary reparations

xiv. *Dismisses* the Applicant's prayer for quashing of his conviction and release from prison;

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

xvi. *Orders* the Respondent State to immediately, take all necessary steps, within six months, to remove the mandatory imposition of the death penalty from its Penal Code as it impinges on the discretion of the judicial officers in imposing sentences;

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

xviii. *Orders* the Respondent State to take all necessary measures, within six months from the notification of this Judgment to remove "hanging" from its laws as a method of execution of the death penalty;

xix. *Orders* the Respondent State to publish this Judgment, within a period of three 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 year after the date of publication.

Implementation and reporting

xx. *Orders* the Respondent State to submit to it, within six 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 months until the Court considers that there has been full implementation thereof.

On costs

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

Signed:

Modibo SACKO, Vice-President;

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;

Duncan GASWAGA, Judge;

and Robert ENO, Registrar.

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

Done at Arusha, this Thirteenth Day of November in the year Two Thousand and Twenty-Four in English and French, the English text being authoritative.