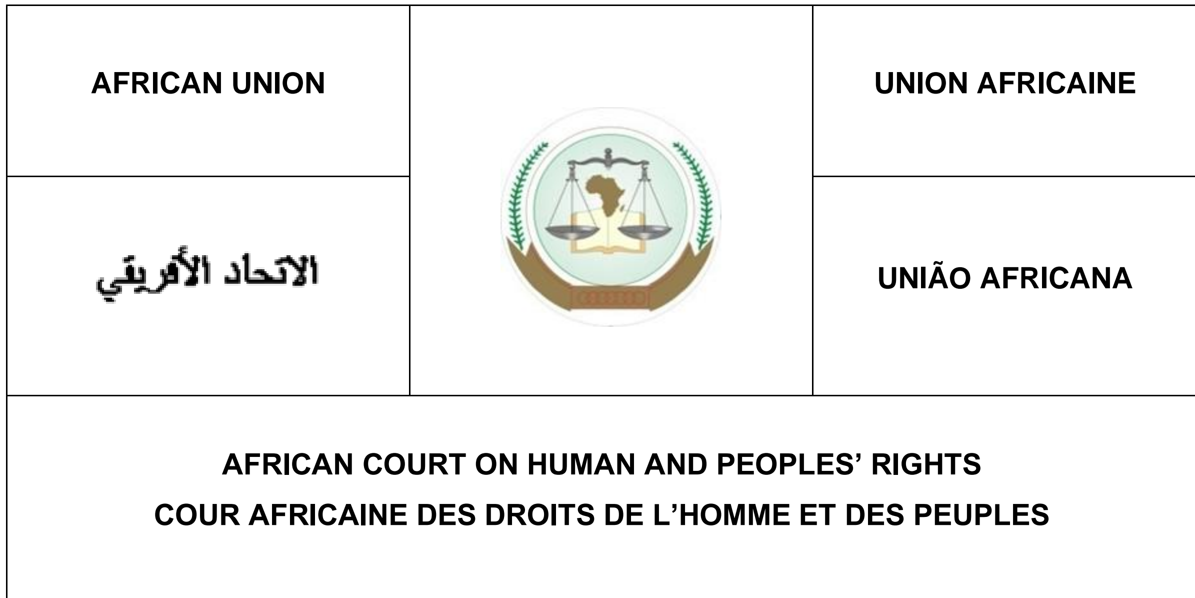

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

GHATI MWITA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 012/2019

JUDGMENT

1 DECEMBER 2022

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The Court composed of: Blaise TCHIKAYA Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO, 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:

Ghati MWITA

Represented by:

Advocate Dr. Paul OGENDI, P. Ogendi & Company Advocates

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr Boniface LUHENDE, Solicitor General, Office of the Solicitor General;
ii. Mr Mussa MBURA, Director, Civil Litigation, Principal State Attorney, Office of the Solicitor General;
iii. Mr Hangi M CHANG'A, Acting Assistant Director, Constitutional, Human Rights and Election Petitions, Principal State Attorney, Office of the Solicitor General;
iv. Ms Vivian METHOD, State Attorney, Office of the Solicitor General;

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

v. Ms Jacqueline KINYASI, State Attorney, Office of the Solicitor General; and

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

after deliberation,

renders this Judgment:

I. THE PARTIES

1. Ms. Ghati Mwita (hereinafter referred to as “the Applicant”) is a national of the United Republic of Tanzania. At the time of filing the Application, she was serving a death sentence at Butimba Central Prison, Mwanza, having been tried and convicted for the offence of murder. She alleges a violation of her rights in connection with her conviction and sentencing.

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 (“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. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal does 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]

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), § 38.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that on 4 February 2008, the Applicant allegedly set on fire Mr. Medadi Aloyce, a fisherman who was in her employment, after dousing him with kerosene, in retaliation for his alleged theft of the Applicant's fishing boat. Mr. Aloyce subsequently died as a result of injuries sustained.

4. On the same day, 4 February 2008, the Applicant was arrested and charged, before the High Court sitting at Mwanza, with the offence of murder. The preliminary hearing was conducted on 15 February 2010 and the trial commenced on 29 November 2010. In its judgment of 19 September 2011, the High Court found the Applicant guilty of murder and sentenced her to death by hanging.

5. On 11 March 2013, the Court of Appeal sitting at Mwanza dismissed the Applicant's appeal against her conviction and sentence. She subsequently filed an application for review of the Court of Appeal's decision, which was dismissed on 19 March 2015.

B. Alleged violations

6. The Applicant alleges a violation by Respondent State of Articles 1, 4, 5 and 7 of the Charter as follows:

    a. A violation of the Applicant's right to a fair trial under Article 7 of the Charter by:

        i. Detaining the Applicant for an unduly long period of time before bringing her to trial and conducting an overly lengthy trial.

        ii. Disregarding the principle of presumption of innocence.

iii. Convicting the Applicant on insufficient evidence and the trial court, without justification, disregarding the fact that the trial assessors unanimously found the Applicant not guilty.
iv. Not providing the Applicant effective counsel during trial.
v. Imposing the death penalty despite failing to ensure that the Applicant was given a fair trial.

b. A violation of the Applicant's right to life under Article 4 of the Charter by reason of her mandatory death sentence, insofar as:

i. The alleged offence fell outside of the narrow category of "most serious offences" to which the death penalty can lawfully be applied.
ii. The Respondent State did not take the personal situation of the Applicant or the alleged offence into account in imposing the death sentence.

c. A violation of the right to dignity under Article 5 of the Charter by:

i. Sentencing mentally ill prisoner to death.
ii. Sentencing the Applicant to death by hanging, which constitutes "cruel, inhuman or degrading punishment."
iii. Subjecting the Applicant to the psychological torture of "death row phenomenon".

d. A violation of Article 1 of the Charter by failing to give effect to the rights cited above.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was received at the Registry on 24 April 2019.

8. On 10 May 2019, the Registry wrote to the Applicant requesting her to provide further information and documentation in relation to her claims.

9. On 6 August 2019, the Applicant filed her submissions on reparations and attached copies of the judgments of her trial before domestic courts.

10. On 16 September 2019, the Court, *suo motu*, granted the Applicant legal aid and appointed Counsel Dr. Paul Ogendi to represent her.

11. On 29 October 2019, the Applicant, through her Court-appointed Counsel, filed a request for provisional measures which was notified to the Respondent State on 11 November 2019 for its Response thereto within fifteen (15) days of receipt. The Respondent State did not file a response.

12. On 9 April 2020, the Court issued an order for provisional measures staying the execution of the death penalty imposed on the Applicant pending the determination of the Application on the merits.

13. The Applicant filed an Amended Application on 14 April 2020, which was served on Respondent State on 24 April 2020.

14. On 1 June 2021, the Respondent State filed its Response to the amended Application and this was transmitted to the Applicant on 2 June 2021.

15. The Parties filed all their other pleadings within the time-limit permitted by the Court.

16. Pleadings were closed on 13 June 2022 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

17. In her amended Application, the Applicant prays the Court for the following:

i. A Declaration that the Respondent State has violated her rights under Articles 1, 7 (right to fair trial), 4 (right to life) and 5 (right to dignity) of the Charter;
ii. An Order that the Respondent State release the Applicant from prison with immediate effect;
iii. An Order quashing the death sentence imposed by the Respondent State on the Applicant;
iv. An Order requiring the Respondent State to pay Reparations to the Applicant as follows:
    a. Payment of Thirty-Four Thousand Three Hundred and Eight (34,308) United States Dollars as reparation for damage suffered by the Applicant;
    b. Payment of reparations in an amount the Court considers reasonable on account of material prejudice suffered;
    c. Payment of reparations in the amount of USD Thirteen Thousand (13,000) on account of legal and related expenses;
v. An order compelling the Respondent State to amend its Penal Code and related legislation pertaining to the death sentence in order to make it compliant with Article 4 of the Charter; and
vi. Such other measure(s) as the Court deems fit.

18. The Respondent State, as regards jurisdiction and admissibility, prays the Court to rule as follows:

i. Find that the Honourable Court lacks jurisdiction to hear the Application.
ii. Find that the Application has not met the admissibility requirements provided for in Article 56(6) of the Charter read together with Rule 50(2)(f) of the Rules of the Court, 2020.
iii. Declare the Application inadmissible.

19. On the merits of the Application, the Respondent State prays the Court to:

i. Find that it did not violate the Applicant's right to life, right to dignity and right to fair trial as provided for in Article 4, 5 and 7 of the African Charter on Human and Peoples' Rights.

ii. Find that it did not violate Article 1 of the African Charter on Human and Peoples' Rights.
iii. Find that the Applicant was tried and convicted in accordance with the relevant laws and international human rights standards.
iv. Dismiss the Application in its entirety with costs.

20. In relation to reparations, the Respondent State prays the Court to:

i. Find that the interpretation and application of the Protocol and the Charter does not confer jurisdiction on the Court to quash the death sentence and release the Applicant from prison;
ii. Find that the Respondent State did not violate Article 1,4,5 and 7 of the Charter and that the Applicant was accorded a fair trial by the Respondent State during the trial in domestic courts;
iii. Find that the death penalty is consistent with Article 4 of the African Charter;
iv. Dismiss the Application for Reparations;
v. Make any other Order this Honourable Court may deem right and just under the prevailing circumstances.

V. JURISDICTION

21. 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.

22. Under Rule 49(1) of the Rules, the Court "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."

23. Based on the above-mentioned provisions, the Court must conduct a preliminary assessment of its jurisdiction and dispose of objections thereto, if any.

24. In the instant Application, the Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will thus consider the objection (A) before examining the other aspects of its jurisdiction (B) if necessary.

A. Objection to material jurisdiction

25. The Respondent State argues that the "Court is devoid of jurisdiction to entertain the Application before it." It submits that the Court "is not vested with the jurisdiction to sit as an appellate court and adjudicate on matters that have been decided by the highest court in a Respondent State."

26. It is the Respondent State's submission, therefore, that the Court is not "vested with jurisdiction to adjudicate over this matter, particularly quashing the death sentence and release the Applicant from prison."

*

27. In her Reply, the Applicant, relying on the Court's decision in *Kijiji Isiaga v. Tanzania,* contends that the issues raised in the Application relate to specific violations of human rights that are protected by the Charter and that, therefore, the Court has material jurisdiction.

***

28. 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.[3]

29. As regards the contention that the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's domestic courts, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to the decisions of domestic courts.[4] At the same time, however, and notwithstanding that the Court is not an appellate court vis-à-vis domestic courts, it retains the power to assess the propriety of domestic proceedings against standards set out in international human rights instruments ratified by the State concerned,[5] which does not it make it an appellate court.

30. In relation to the contention that the Court lacks jurisdiction to order the Applicant's release from prison, the Court recalls that Article 27(1) of the Protocol provides that "[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 release from prison, should the facts of a case so dictate.

31. 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.

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[3] *Kalebi Elisamehe v. United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations), § 18.

[4] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14; *Kennedy Ivan v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 26; *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

B. Other aspects of jurisdiction

32. The Court notes that the Respondent State does not dispute its personal, temporal and territorial jurisdiction.

33. Having noted that nothing on record indicates that it lacks jurisdiction, the Court holds that it has:

    i. Personal jurisdiction insofar as the Respondent State is a party to the Protocol and has deposited the Declaration. The Court recalls, as it did in paragraph 2 of this judgment, that on 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration. In this regard, the Court reiterates its position that the withdrawal of the Declaration has no bearing on cases pending before it took effect. Given that withdrawal takes effect twelve (12) months after the deposition of the instrument of withdrawal, in this case on 22 November 2020,[6] it has no bearing on the instant Application.

    ii. Temporal jurisdiction insofar as the violations alleged occurred after the Respondent State became a party to the Charter and the Protocol. Furthermore, the alleged violations are continuous in nature insofar as the Applicant is currently serving her sentence which, she contends, violates her rights under the Charter.[7]

    iii. Territorial jurisdiction insofar as the violations alleged occurred within the Respondent State's territory.

34. Accordingly, the Court holds that it has jurisdiction to examine this Application.

---

[6] *Ambrose Cheusi v. Tanzania* (merits and reparations), §§ 35-39.

[7] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (jurisdiction) (21 June 2013) 1 AfCLR 197, §§ 71-77.

VI. ADMISSIBILITY

35. 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."

36. According to Rule 50(2) of the Rules, which essentially restates Article 56 of the Charter:

> 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 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.

37. The Court notes that the Respondent State raises an objection to the admissibility of the Application on the ground that it was not filed within a reasonable time from the date local remedies were exhausted as required by Article 56(6) of the Charter and Rule 50(2)(f) of the Rules. The Court will first consider this objection (A) and examine other conditions of admissibility (B) if necessary.

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

38. The Respondent State submits that "the judgment of the Appeal Court was delivered on 12th March 2013 while the Applicant filed the instant Application on 14 March 2019. This indicates that the Application before this Hon. Court has been filed six (6) years after local remedies were exhausted." According to the Respondent State, therefore, the time taken to file this Application cannot be considered as reasonable.

39. The Respondent State further submits, based on the Court's jurisprudence, that although Article 56(6) of the Charter does not set a time limit within which applications must be filed, the Court, in determining reasonableness of time, must take into consideration, *inter alia,* the particular situation of the Applicant. Given the preceding, the Respondent State submits that "the particular situation of the Applicant […] do not constitute justifiable grounds for the fact that it took the Applicant six (6) years to file this Application." Relying on the record of the proceedings before the High Court and Court of Appeal, the Respondent State further submits that the Applicant "is financially stable, that she is literate and had legal assistance and advocates throughout the proceedings in domestic courts." It is also the Respondent State's submission that "the Applicant has not advanced any grounds to account for the delay of up to six years before the filing of this matter."

*

40. In her Reply, the Applicant raises the following reasons as justifying the time it took for her to file the Application, after the exhaustion of local remedies:

   a. After her conviction she remained incarcerated on death row with limited access to information and her movement was restricted;
   b. The long years of incarceration and time on death row led to the deterioration of her mental and physical health and she suffered the "death row phenomenon" in addition to her pre-existing physical ailments caused by her HIV positive status. In the same vein, the Applicant was

sometimes denied access to adequate treatment and medication for her illnesses. The Applicant was thus not in the necessary physical or mental condition to educate herself as to the existence of the Court.

c. The Applicant did not have legal counsel that may have enabled her awareness of the Court's existence until, in 2019, when the Court designated *pro bono* counsel to assist her.

d. During the proceedings in domestic courts, she relied on public defenders appointed by the Respondent State who proved to be ineffective. In addition, the Applicant relied on the financial support of a family member to pay for advocates during the appeal proceedings.

e. The Respondent State has not adduced evidence to support the claim that the Applicant is financially stable.

***

41. Pursuant to Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, in order for an application to be admissible, it must be "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".

42. The Court notes that the Respondent State contests the admissibility of the Application on the basis of the Applicant's failure to file it within a reasonable time after exhaustion of local remedies. The Court observes, however, that it is incumbent on it to first satisfy itself that local remedies have been exhausted before determining the reasonableness of time taken by the Applicant to file an application.[8] This is because an adverse finding as to the exhaustion of local remedies would render the exercise of determining whether the Application was filed within a reasonable time superfluous.

43. The Court recalls that the Applicant was convicted by the High Court sitting at Mwanza on 19 September 2011. She then appealed to the Court of Appeal which upheld her conviction on 11 March 2013. The Applicant's

[8] *Ramadhani Issa Malengo v. United Republic of Tanzania*, ACtHPR, Application No. 030/2015, Ruling of 4 July 2019 (Jurisdiction and admissibility), § 38.

application for review of the Court of Appeal's decision was dismissed on 19 March 2015. Given that the Court of Appeal is the highest Court in the Respondent State, the Court finds that the Applicant exhausted local remedies before filing her Application.

44. As the Court has established: "…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."[9] In this connection, the Court has considered as relevant factors, the fact that an applicant is incarcerated,[10] being lay in law without the benefit of legal assistance,[11] their indigence, the time taken to pursue the review remedy before the Court of Appeal, or to access the documents on file,[12] intimidation and fear of reprisal,[13] the recent establishment of the Court, the need for time to reflect on the advisability of seizing the Court and determine the complaints to be submitted.[14]

45. The Court has previously stated that it is not enough for applicants to simply plead that they were incarcerated, are lay or indigent, for example, to justify their failure to file an Application within a reasonable period of time.[15] It is also important for all Applicants to demonstrate how their personal situations prevented them from filing their applications within a reasonable period.

46. The Court recalls that the present Application was filed on 24 April 2019. The Respondent State's Court of Appeal rendered its judgment dismissing the Applicant's appeal on 11 March 2013. However, the record confirms that

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[9] *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also, *Alex Thomas v. Tanzania* (merits), § 73.
[10] *Diocles William v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52; and *Alex Thomas v. Tanzania* (merits), § 74.
[11] *Alex Thomas v. Tanzania* (merits), § 73; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[12] *Nguza Viking and another v. Tanzania* (merits), § 61.
[13] *Association Pour le progress et la Defense des droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v. Mali* (merits) (11 May 2018) 2 AfCLR 380, § 54.
[14] *Norbert Zongo and Others v. Burkina Faso* (preliminary objections), § 122.
[15] *Layford Makene v. United Republic of Tanzania*¸ ACtHPR, Application No. 028/2017, Ruling of 2 December 2021 (admissibility), § 48.

the Applicant's application for review of the Court of Appeal's decision was dismissed on 19 March 2015. In this regard, the Court further recalls that an Applicant should not be penalised for choosing to pursue the review of the decision of the highest appellate court in a country.[16]

47. Given that the Court has leeway under Rule 50(2)(f), to set the date from which the computation of reasonable time for filing an Application must be determined, the Court considers that reasonableness of time, in the instant case, should, be computed from the date of the decision of the Court of Appeal on the Applicant's application for review which is 19 March 2015. Given that the Application was filed on 24 April 2019, the time at stake is four (4) years, one (1) month and five (5) days. It is this period that the Court must assess in determining whether or not the Application was filed within a reasonable time as required by Article 56(6) of the Charter.

48. In the present Application, the Court notes that the Applicant is not only incarcerated but has been on death row since her conviction. The Court takes special cognisance of the fact that she attempted to avail herself of the review procedure after the Court of Appeal dismissed her appeal. Given that the Applicant was entitled to wait for the outcome of the review process, the Court cannot penalise her for having recourse to this remedy. In the circumstances, the Court finds that the period of four (4) years, one (1) month and five (5) days is reasonable within the meaning of Article 56(6) of the Charter.[17]

49. The Court thus dismisses the Respondent State's objection alleging that the Application was not filed within a reasonable time.

[16] *Nguza Viking and another v. Tanzania* (merits), § 58.
[17] *Nguza Viking and another v. Tanzania* (merits), §§ 60-61; *Armand Guehi v. Tanzania* (merits and reparations), § 56.

B. Other conditions of admissibility

50. The Court notes that although no objection has been raised regarding the conditions set out in Rule 50(2) (a), (b), (c), (d), (e) and (g) of the Rules, it must ensure that the Application fulfils these requirements.

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

52. The Court also notes that the claims made by the Applicant seek to protect her rights guaranteed under the Charter. Furthermore, 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. Additionally, 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 requirement of Rule 50(2)(b) of the Rules.

53. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State or its institutions, in compliance with the Rule 50(2) (c) of the Rules.

54. The Application is also not based exclusively on news disseminated through mass media, rather it is based on documents from the municipal courts of the Respondent State. Thus the Application complies with Rule 50 (2) (d) of the Rules.

55. The condition set out in Rule 50 (2) (e) of the Rules is that an application should be filed after exhaustion of local remedies. In this regard, the Court has held that, the Respondent State is deemed to have had the opportunity to redress the violations alleged by the Applicant that arose from those

proceedings insofar as the criminal proceedings against an applicant have been determined by the highest appellate court.[18]

56. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 12 March 2013. Thereafter, the Applicant's application for review was dismissed by the Court of Appeal on 19 March 2015. The Court holds, therefore, that the Respondent State had the opportunity to address the violations alleged by the Applicant arising from her trial in the various courts. Consequently, the Application has complied with the requirement under Rule 50 (2) (e) of the Rules.

57. The Court also holds that the Application does not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union as required under Rule 50 (2) (g) of the Rules.

58. As a consequence of the foregoing, the Court finds that the Application fulfils all the requirements set out under Article 56 of the Charter as restated in Rule 50(2) of the Rules and accordingly finds the Application admissible.

VII. MERITS

59. The Applicant alleges that the Respondent State has violated her right to life, right to dignity and right to a fair trial as guaranteed under Articles 4, 5 and 7 of the Charter, respectively. She further alleges that by failing to give effect to these rights, the Respondent State also violated Article 1 of the Charter.

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[18] *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

A. Alleged violation of the right to life

60. The Applicant alleges that the Respondent State violated her right to life by imposing the death penalty outside the category of cases to which it can lawfully be applied and also by imposing the death penalty without considering the circumstances of the offender and offence.

i. Imposition of the death penalty

61. The Applicant refers to jurisprudence from various jurisdictions to support her submission that death sentences should be imposed for the most serious offences, the most gruesome, the most extreme, "the rarest of the rare" and "the worst of the worst".[19] The Applicant submits that a court should consider that the nature of the offence must be interpreted with a restrictive lens and pertinently, the offence should be assessed against other murder cases and not with ordinary "civilised" behaviour. According to the Applicant, the Respondent State did not apply this high threshold when imposing the death penalty on her thereby violating her right to life.

*

62. In response, the Respondent State submits that the death penalty is a lawful sentence for the offence of murder as provided for under Section 197 of its Penal Code and this sentence has been upheld by its Court of Appeal. Further, the Respondent State argues that "looking at the wording of Article 4 of the African Charter, death penalty is permitted provided that it is carried out in accordance with the law." Specifically in relation to the Applicant, the Respondent State submits that her death sentence is lawful because "the facts constituting her offence are 'worst of the worst' as the murder was premeditated" and "was carried out through setting the deceased on fire."

[19] Human Rights Committee (HRC), Communication 1421/2005, *Larranaga v. Philippines*, Views adopted on July 24,2006, § 7.2; *Republic v. Jamuson White*, Criminal Case No. 74 of 2008 (unreported), High Court of Malawi; *Trimmingham v. The Queen* [2009] UKPC 25, § 21; and HRC Communication No. 4701/1991, *Kindler v. Canada*, Views adopted on July 30, 1993, §14.3.

The Respondent State also disputes the Applicant's allegation that she is a person of good character.

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63. The Court observes that Article 4 of the Charter provides that "[h]uman beings are inviolable. Every human being shall be entitled to respect for [their] life and the integrity of [their] person. No one may be arbitrarily deprived of this right."

64. At the outset, the Court acknowledges global trends towards the abolition of the death penalty, represented, in part, by the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[20] At the same time, however, it notes that the death penalty remains on the statute books of some states and that no treaty, on the abolition of the death penalty has gained universal ratification.[21] Presently, the Second Optional Protocol to the ICCPR, the Court notes, has ninety (90) State Parties out of the one hundred-seventy three (173) State Parties to the ICCPR.

65. Specifically in relation to Africa, the Court takes cognisance of the continent-wide developments in relation to the death penalty. By way of illustration, in 1990, only one country, Cape Verde, had abolished the death penalty. Today, out of the fifty-five (55) African Union member States, twenty-five (25) have abolished the death penalty in law, fifteen (15) have placed a long-term moratorium on executions while fifteen (15) retain capital punishment. Most recently in 2020, Chad abolished the death penalty, followed by Sierra Leone in 2021 and the Central African Republic and Equatorial Guinea in 2022.

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[20] *Amini Juma v. United Republic of Tanzania*, ACtHPR, Application No.024/2016, Judgment of 30 September 2021 (merits and reparations), § 122 and *Ally Rajabu and Others v. United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations), § 96. Notably, the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

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

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

67. As to the Applicant's contention that she was sentenced to death in circumstances that do not justify the penalty, the Court recalls that both the High Court and the Court of Appeal established that the Applicant caused the death of one Medadi Aloyce by setting him on fire. The High Court's findings, which were confirmed by the Court of Appeal, were that the Applicant's intention to cause death was established by her failure to offer any assistance to Medadi Aloyce "when she saw him burning, shouting or screaming for help" and also "despite having a car, she desisted from assisting by rushing [the victim] to hospital for treatment." These findings have not been discredited before this Court.

68. In the circumstances, the Court finds that the Applicant has failed to offer cogent argument(s) or evidence to contradict the facts established by the domestic courts in relation to the circumstances of Medadi Aloyce's death and her role in the death. Given that no patent error(s) by the trial court or even the appellate court has been noted, the Court holds that there is no reason to question the grounds for the decisions of the said courts.

69. Given the preceding, the Court dismisses the Applicant's allegation that the death penalty was improperly imposed on her without considering the nature of the offence she committed.

ii. Denial of discretion in the imposition of the death penalty

70. The Applicant argues that the mandatory death penalty limits the discretion of judicial officers to consider mitigating evidence. Relying on the Court's decision in *Ally Rajabu v. Tanzania*, she submits that this results in the death penalty being imposed mechanically or generically.

71. With regard to her trial, the Applicant submits that the Respondent State should have taken into account her lack of intent to kill the victim, but that to substantiate her intention to kill, the trial judge adopted the characterisation put forth by the prosecution of her as a "cruel woman". The Applicant also alleges that she has experienced severe hardships including child abuse, female genital mutilation, attempted forced marriage at the age of twelve (12) years, domestic physical violence meted by her first husband, rape by superior police officer while serving in the police force, living with HIV, and the death of her second husband in her second year of imprisonment.

72. It is also the Applicant's submission that the High Court overlooked her demonstrable capacity for rehabilitation and reform in view of the fact that she did not have a prior criminal record and the twelve (12) years she served as a police officer and her charitable pursuits. She also points to the fact that she is now sixty (60) years old, which means that she has already served her life-time imprisonment and should be released.

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73. In response, the Respondent State reiterates its submission about the lawfulness of the death penalty in its territory. It also points out that "the Applicant's allegation as to the good character is a mere afterthought since she, with malice aforethought murdered the deceased. And that is not definitely an attribute of a person with good character."

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74. The Court notes that the grounds that the Applicant raises in support of her allegation of the violation of Article 4 of the Charter are based on the fact that the mandatory death penalty constitutes an arbitrary deprivation of the right to life by virtue of the fact that it constrains the discretionary power of a trial court. The Court observes that the specific grounds invoked by the Applicant relate to the reasons for which she believes the domestic courts ought to have passed an individuated sentence on her.

75. In assessing the arbitrariness of the Applicant's death sentence, the Court recalls its established jurisprudence in relation to the criteria for such assessment, namely, whether or not there is a legal basis for the death sentence; whether the death sentence was meted out by a competent court and whether due process was observed in the proceedings that culminated in the imposition of a death sentence.[22]

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

77. In relation to the second criterion, the Court observes that the Applicant's contention is not based on the fact that the courts of the Respondent State lacked jurisdiction to hear the case that led to her being sentenced to death but on the fact that the High Court could only impose the death sentence because it is the only one provided for in law for murder, thus denying the judge the discretionary power to pronounce any other sentence.[23] Given that no grounds have been led by the Applicant to establish that domestic courts acted in want or even in excess of their jurisdiction in determining the

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

case against the Applicant, the Court thus finds that the death sentence imposed on the Applicant was meted by a competent court.

78. In relation to compliance with due process, the Court finds that the mandatory nature of the death penalty, as provided for under Section 197 of the Respondent State's Penal Code, leaves the national courts with no choice but to sentence a convict to death, resulting in arbitrary deprivation of life.[24] By taking away the discretionary power of a judge to impose a sentence on the basis of proportionality and the personal situation of a convicted person, the mandatory death sentence does not comply with the requirements of due process in criminal proceedings. The Court considers that if the domestic courts of the Respondent State were vested with discretion to determine the sentencing of persons found culpable of murder, the High Court, by way of illustration, could have legitimately considered all the factors that the Applicant has raised before this Court in possible mitigation of her sentence.

79. In the circumstances, the Court holds that the death sentence, as prescribed by section 197 of the Respondent State's Penal Code, does not pass the third criterion for assessing arbitrariness of the sentence. It further holds, in line with its jurisprudence, that the mandatory death penalty constitutes an arbitrary deprivation of the right to life under Article 4 of the Charter.[25]

80. The Court thus finds that the Respondent State violated Article 4 of the Charter by sentencing the Applicant to death under a regime that did not provide her an opportunity to mitigate her sentence upon conviction.

B. Alleged violation of the right to dignity

81. The Applicant submits that, by imposing the death penalty, the Respondent State violated her right to dignity because "she suffers from depression and

[24] *Amini Juma v. Tanzania* (merits and reparations), § 130; *Ally Rajabu and others v. Tanzania* (merits and reparations), § 109; *Gozbert Henerico v. Tanzania* (merits and reparations), § 148.
[25] *Ally Rajabu and others v. Tanzania* (merits and reparations), § 114.

anxiety, and is predisposed to mental health problems." Specifically, she submits that in the past she was diagnosed with Major Depressive Disorder and currently she suffers from Persistent Depressive Disorder. She also argues that "the designated method of execution – hanging – is plainly a "cruel, inhuman or degrading punishment." Lastly, she argues that she is "experiencing the psychological torture of "death row phenomenon", which is widely regarded as a "cruel, inhuman or degrading punishment". The Applicant also points out that her mental and physical well-being has been complicated by her pre-existing physical ailments caused by her HIV positive status.

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82. The Respondent State submits that the three (3) grounds raised by the Applicant be dismissed. Firstly, the Respondent State reiterates that Applicant was found guilty and sentenced in accordance with the law, so that her death penalty is a lawful sentence. Secondly, that the Applicant's claims relating to mental health are neither substantiated nor were they raised in her defence during the trial. Thirdly, that the Applicant does not establish a causal link between the murder and the allegations that she is a victim of rape, forced marriage and female genital mutilation which, in any case, have not been substantiated by any evidence. In the Respondent State's view, "the murder is connected with her grievance over her missing boat and not gender-based violence."

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

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

84. The Court recalls the Applicant's first contention, where she asserts that the Respondent State did not consider that sentencing a mentally ill person to death violates Article 5 of the Charter. The Court finds that the issue for determination is rather whether the mandatory death penalty pronounced following the proceedings complies with the guarantees of the right to a fair trial, especially Article 7(1) of the Charter which provides that: "[e]very individual shall have the right to have his cause heard."[26]

85. In this regard, the Court notes that there is nothing on record to indicate that the Applicant or her representatives raised her mental health status, at the preliminary hearing, during the trial proceedings or as a ground of appeal before the Court of Appeal. The Court also notes that the Applicant did not submit that it was apparent to the trial court that she was mentally incompetent during her trial. In the absence of probative proof of the Applicant's mental health at the time of her trial before the High Court, the Court has no basis, relating to the Applicant's mental health, to fault the findings of the trial court.[27] In the circumstances, the plea that the Respondent State sentenced a person suffering from mental illness to death is merely an argument invoked after the sentence had been passed. In view of the preceding, the Court finds that the Respondent State did not violate Article 7(1)(d) of the Charter.

86. In relation to the second and third contentions raised by the Applicant, the Court notes that the Applicant challenges the implementation of the death penalty by hanging. The Court recalls that it has previously held in *Ally Rajabu and Others v. Tanzania* that, the implementation of the death penalty by hanging, where such a penalty is permitted, is "inherently degrading" and "encroaches upon dignity in respect of the prohibition of […] cruel, inhuman and degrading treatment".[28] The Court, therefore, finds that

[26] *Gozbert Henerico v. Tanzania* (merits and reparations), § 156.
[27] Cf. Communication No. 684/1996, *RS v. Trinidad and Tobago* (Human Rights Committee), § 7.2 (2 April 2022).
[28] *Ally Rajabu and others v. Tanzania*, (merits and reparations), §§ 119 -120 and *Amini Juma v. Tanzania* (merits and reparations), § 36.

the Respondent State violated Article 5 of the Charter for prescribing the death sentence by hanging.

87. The Court confirms, specifically with regard to the Applicant's contention in respect of the effects of her spending a long time on death row, that the period of waiting for an execution can cause stress on persons sentenced to death particularly when the wait is long. The Court emphasises that detention on death row is inherently inhuman and encroaches upon human dignity. This Court considers that the stress associated with detention on the death row stems from the natural fear of death that a condemned prisoner has to live with.[29] However, given that a person sentenced to death is still entitled to exhaust all judicial processes, a balance must be struck between permitting one to access the available judicial remedies while not keeping individuals whose sentences have been confirmed by the highest court on death row indefinitely.[30] In such a case, states such as the Respondent are encouraged to determine appropriate sentences for persons originally sentenced to death which remove the constant possibility of the enforcement of the death penalty that persons on death row have to endure.

88. The Court recalls that in the instant case, the Applicant was found guilty and sentenced to death on 19 September 2011. The final judicial pronouncement, in relation to her case, was the decision of the Court of Appeal dismissing her application for review on 19 March 2015. To date, therefore, the Applicant has spent at least seven (7) years on death row, after the conclusion of all judicial proceedings in her case.

89. The Court considers that such detention and the length of time thereof have inevitably caused the Applicant to endure a level of suffering that infringes upon her dignity. The Court, therefore, finds that the Respondent State

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[29] *Attorney General v. Susan Kigula and 417 others,* Constitutional Appeal No. 03 of 2006, (Supreme Court of Uganda) and *Attorney General of the Commonwealth of the Bahamas v. Farrington and Ministry of Public Safety and Immigration and others* [1997] AC 413 421-425.

[30] *Attorney General v. Kigula* (as above).

violated the Applicant's right to dignity guaranteed under Article 5 of the Charter.

C. Alleged violation of the right to a fair trial

90. The Applicant alleges that by virtue of the proceedings leading up to her being found guilty of murder and sentenced to death, her right to a fair trial guaranteed under Article 7 of the Charter was violated as follows:

i. The delay between the Applicant's arrest and her trial

91. The Applicant alleges that she spent three (3) years, six (6) months in custody, being the period between her arrest and conviction, which she submits "constitutes unreasonable delay according to settled international law." More specifically, the Applicant points out that she was arrested in February 2008, charged with the offence of murder on 22 September 2009. Subsequently, her trial commenced in November 2010, and she was sentenced in September 2011.

92. Relying on the Court's decisions in *Alex Thomas v. Tanzania*, *Mariam Kouma & Ousmane Diabate v. Mali*, *Wilfred Onyango and others v. Tanzania* and *Armand Guehi v. Tanzania*, the Applicant submits that the Court interpreted the terms "unreasonable delay" based on three (3) criteria.[31] First, as regards the complexity of the case she avers that her prosecution was based exclusively on the testimony of four (4) eyewitnesses only, hence the trial ought to have been concluded at a quicker pace. Second, as regards the behaviour of the parties, she argues that the delay was attributable to the Respondent State inasmuch as the public hearing was adjourned several times notwithstanding that she neither called witnesses nor filed multiple applications before the trial court. Finally, as regards the behaviour of the judicial authorities, the Applicant submits

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[31] *Alex Thomas v. Tanzania*, § 104; *Mariam Kouma and Ousmane Diabate v. Mali*, (admissibility) (21 March 2018) 2 AfCLR 237, § 38; *Wilfred Onyango Nganyi and others v. United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 136; *Armand Guehi v. Tanzania* (merits and reparations), § 122.

that there is nothing to suggest that any delay was attributable to her conduct.

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93. The Respondent State submits that the Applicant was tried within a reasonable time hence there was no violation of Article 7(1) (d) of the Charter. The Respondent State further submits that the Applicant was first arraigned before the District Court for committal proceedings as her offence is only triable by the High Court. Further, the Respondent State avers that the whole process of committal proceedings takes time. Citing the Court's decision in *Onyango Nganyi and others v. Tanzania* case, the Respondent State submits that the Court has held that the determination of unreasonable delay must be done on a case-by-case basis. According to the Respondent State, the Court should consider that owing to the seriousness and complexity of the offence and proceedings involved, the time spent between the arrest and conviction of the Applicant was reasonable within the meaning of Article 7(1)(d) of the Charter.

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94. The Court recalls that Article 7(1)(d) of the Charter stipulates that "[e]very individual shall have the right to have [their] cause heard. This comprises…the right to be tried within a reasonable time by an impartial court or tribunal."

95. The Court further recalls that in *Wilfred Onyango and another v. Tanzania* it held that in determining whether or not the duration of a trial is reasonable, each case must be treated on its own merits and that three (3) criteria should be determinative, namely, the complexity of the case, the behaviour of the Applicant, and the behaviour of the national judicial authorities.[32]

[32] *Wilfred Onyango Nganyi and others v. Tanzania* (merits), §§135-136.

96. The Court recalls that the Applicant was arrested on 4 February 2008, that the preliminary hearing was conducted on 15 February 2010, that her trial commenced on 29 November 2010 and that the High Court found the Applicant guilty and sentenced her on 19 September 2011. In total, the High Court proceedings leading to the Applicant's conviction, therefore, were concluded after three (3) years, seven (7) months.

97. As regards the time period the between the arrest of the Applicant and the commencement of her trial, the Court further recalls that two (2) years, nine (9) months and twenty-five (25) days elapsed. Regarding the argument in respect of the undue prolongation of the trial, the Court notes that from the date of commencement of the trial to the conclusion of the same, a period of nine (9) months and sixteen (16) days elapsed. The Court will thus take into account this timeline in determining whether or not the time taken to conclude the Applicant's trial is reasonable.

98. As regards the time it took to commence proceedings against the Applicant, the Court observes that the Respondent State offers only a general explanation, to the effect that committal proceedings at the District Court are often prolonged, an explanation that, in any case, is not supported with evidence. The Court notes that there is nothing on record to justify delay in the commencement of the trial inasmuch as, for example, the prosecution principally relied on eye witnesses to the murder.[33] The Court notes that the Respondent State also does not make any argument to demonstrate that the delayed commencement of the trial was due to the Applicant's conduct. In the circumstances, the Court finds that the period of two (2) years, nine (9) months and twenty-five (25) days between the Applicant's arrest and the commencement of her trial is an inexcusable delay in the domestic procedures and, therefore, constitutes a violation of Article 7(1)(d) of the Charter.

[33] Cf. *Gozbert Henerico v. Tanzania*, § 88.

99. The Court further observes that the record of proceedings at the High Court shows two (2) interrelated adjournments. The Court notes that the Prosecution closed its case on 30 November 2010. On the same day, the Applicant's defence lawyer sought leave of the Court to begin the defence case. The trial judge dismissed this prayer as, "the case was fixed for trial for only two (2) days and today is the last day for this case". For the court, the alternative was to adjourn the case to another date**.** At the behest of the court, this date was to be fixed by the District Registrar who, on 8 July 2011, set the period from 26 July 2011 to 27 July 2011 for the defence to stage its case.

100. In light of the above, the nature of the offence and the trial on the whole, the Court finds that the period of nine (9) months and sixteen (16) days taken to conclude the trial is reasonable. Consequently, the Court finds that the Respondent State did not violate Article 7(1)(d) of the Charter by reason of the time it took to conclude the Applicant's trial before the High Court.

ii. Alleged bias during the Applicant's trial

101. The Applicant alleges that the trial court violated Article 7(1)(b) of the Charter by contravening the principle of presumption of innocence and by shifting the burden of proof to the Applicant when it observed that it was inconceivable why the Applicant failed to call witnesses to corroborate her defence. Additionally, the Applicant alleges that the record of proceedings demonstrates that the assessors cross-examined witnesses throughout the proceedings, which is unlawful.

102. In her Reply, the Applicant submits that the trial judge was prejudiced against her, which was demonstrated in two (2) respects, first, by relying on the prosecution's "discriminatory preconceptions" that the Applicant is a "cruel woman", rather than on the evidence of guilt. Second, the trial judge did not take into account the mitigating circumstances of the Applicant during sentencing.

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103. The Respondent State submits that these claims be dismissed by making reference to the Court of Appeal's decision, which, allegedly, addressed the Applicant's contentions. The Respondent State also submits that the burden of proof was not shifted, thus the trial was free from bias, and that the assessors are, by law, allowed to put questions to accused persons, which is what they did during the Applicant's trial.

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104. The Court observes that Article 7(1)(b) of the Charter provides that, "[e]very individual shall have the right to have [their] cause heard. This comprises…the right to be presumed innocent until proved guilty by a competent court or tribunal."

105. With regard to the grounds invoked by the trial judge in relation to the Applicant, particularly the allegation that she was described as a "cruel woman", the Court notes that this issue was considered by the Court of Appeal in order to determine if the trial court had indeed shifted the burden of proof. The Court of Appeal found that the burden of proof was not shifted and that the proceedings before the High Court were fair.

106. On its own perusal of the record, the Court finds that no grounds have been made out on the basis of which the Court of Appeal's findings can be impeached, particularly in relation to the alleged violation of Article 7(1)(b) of the Charter. In view of the preceding, the Court dismisses the Applicant's allegation of a violation of Article 7(1)(b) of the Charter on the ground that the High Court shifted the burden of proof.

107. In relation to the argument on the role of the assessors in the Applicant's trial, the Court observes, from the record, that during the trial the assessors sought clarifications from the Applicant. The Court notes that the Applicant has failed to demonstrate how this constitutes a violation her right to be presumed innocent under Article 7(1)(b) of the Charter. The Court takes

particular cognisance of the fact that under Tanzanian law, assessors are permitted to seek clarifications from accused persons. It thus behoves the Applicant to prove that, in a particular case, the assessors went beyond merely seeking clarifications, which was not shown to be the case in the instant matter. Consequently, the Court dismisses the Applicant's claim that the Respondent State violated her right to be presumed innocent and be tried by an impartial tribunal protected by Article 7(1)(b) of the Charter.

iii. The Applicant was sentenced based on insufficient, unreliable and circumstantial evidence

108. The Applicant argues that the prosecution witness' testimony was inconsistent and lacked credibility, that the trial court used circumstantial evidence to convict her; that the requirement of malicious intent was not proven and that the trial judge disregarded the assessors finding that the Applicant was not guilty.

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109. The Respondent State submits that following the Applicant's appeal, the Court of Appeal examined the alleged inconsistencies of the witness testimonies and the issue of reliance on circumstantial evidence, and upheld the Applicant's guilty verdict nonetheless. In all, the Respondent State avers that these inconsistencies were too trivial to cast doubt on the guilt of the Applicant. In addition, the Respondent State submits that the opinion of the assessors is not binding on the trial judge pursuant to Section 298(2) of its Criminal Procedure Act.

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110. The Court underscores that Article 7 of the Charter can be read in the light of Article 14 of the ICCPR, which deals with fair trial rights in great detail.[34] It follows, from a combined reading of these provisions that the right to a fair

[34] See *Armand Guehi v. Tanzania* (merits and reparations), § 73. See also *Wilfred Onyango Nganyi and Others v. Tanzania* (merits), §§ 33-36. The Respondent State became a Party to the ICCPR on 11 July 1976.

trial includes the right to a public hearing before a competent, independent and impartial court.

111. The Court considers, as it has consistently held, that upholding the right to have one's cause heard requires that, in criminal matters, the accused is convicted only upon being clearly proven guilty.[35] This requirement applies with even greater relevance where an accused person is at risk of incurring a severe penalty[36] and particularly in instances involving the death sentence as is the case in the instant Application.

112. The Court further observes that, while it does not substitute national courts when it comes to assessing the evidence adduced in domestic proceedings, it retains the power to examine whether the manner in which such evidence was considered is compatible with international human rights norms.[37] One critical concern in this connection is to ensure that the consideration of facts and evidence by domestic courts was not manifestly arbitrary or did not result in a miscarriage of justice.[38]

113. In the present case, the Court notes that it has to assess, in view of the alleged inconsistency and lack of credibility of the prosecution witness testimony, the trial court's reliance on circumstantial evidence to convict the Applicant; the fact that malice aforethought was not proven; and the disregard of the assessors' finding by the trial judge. It is based on this assessment that the Court will determine whether the guilty verdict and the ensuing sentence are compatible with standards set out earlier.

114. Although the alleged evidentiary issues highlighted by the Applicant relate to the trial before the High Court, the Court observes that the record of

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[35] *Armand Guehi v. Tanzania* (merits and reparations), §§ 105-111. See also, *Werema Wangoko Werema and another v. Tanzania* (merits), §§ 59-64; and *Mohamed Abubakari v. Tanzania* (merits), §§ 174, 193 and 194.

[36] See, *Oscar Josiah v. Tanzania,* (merits) (28 March 2019) 3 AfCLR 83, § 51 and *Kijiji Isiaga v. United Republic of Tanzania*, ACtHPR, Application No. 032/2015, Judgment of 25 June 2021 (merits), §§ 78, 79.

[37] See, *Mohamed Abubakari v. Tanzania* (merits), §§ 26, 173; *Armand Guehi v. Tanzania* (merits and reparations), §§ 105-111; and *Werema Wangoko Werema and another v. Tanzania* (merits), §§ 59-64.

[38] See, *Mohamed Abubakari v. Tanzania* (merits), §§ 26 and 173.

Appeal shows that the Court of Appeal also considered the same and decided to uphold the High Court's findings. In the Court's own assessment, the insufficiency or unreliability of the evidence adduced before the High Court is not supported by the facts on record. Given that the High Court heard all the witnesses, the Court cannot, in line with its constant jurisprudence, consider the grounds invoked by the said courts unless there are manifest errors, which is not the case in the instant Application.

115. The Court also holds that the domestic courts examined what the Applicant calls circumstantial evidence and found no manifest errors warranting its intervention. Similarly, the Court notes that the High Court clearly outlined the ground on which it found that the Applicant acted with malicious intent, i.e., the Applicant did not attempt to assist the victim when he was on fire as well as her failure/refusal to offer transport to take the deceased to hospital.

116. The Court also notes that, as pointed out earlier, in the Respondent State's system the judge is not bound by the opinion of the assessors. It is thus unable to infer a violation of the Applicant's right to a fair trial simply because the trial judge overruled the assessors.

117. Given that the evidence on record does not reveal any manifest error(s), which occasioned a miscarriage of justice to the Applicant, the Court holds that the Respondent State did not violate the Applicant's right to a fair hearing as protected under Article 7 of the Charter.

iv. Alleged violation of the right to effective representation

118. The Applicant alleges that her State-appointed defence counsel was ineffective, which resulted in a violation of Article 7(1)(c) of the Charter. Specifically, she alleges that her counsel, before the High Court, demonstrated ineptitude by not calling witnesses to testify on her behalf. This, according to the Applicant, is a "manifest lack of effective legal representation." The Applicant also faults the conduct of her defence

counsel for failing to call character witnesses who would have refuted the prosecution's claim that she was a cruel woman.

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119. The Respondent State submits that the Applicant was effectively represented throughout her trial and even during her appeal. It also submits that the Applicant's claim that her trial was "undermined" by ineffective counsel "is baseless since it is not proven that she really intended to call any witness." The Respondent State further submits that if the Applicant's counsel was indeed ineffective, she had the avenue of "recusing the counsel before the trial Judge, of which she did not avail herself." Citing *Onyango Nganyi v. Tanzania,* the Respondent State submits that "a State cannot be held liable for every misconduct on the part of the counsel appointed for legal aid."

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

121. The Court recalls that it has held that Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, guarantees for anyone charged with a serious criminal offence, the right to be automatically assigned counsel free of charge whenever the interests of justice so require.[39]

122. The Court further recalls that it has previously considered the issue of effective representation in the matter of *Evodius Rutechura v. Tanzania,* where it held that the right to free legal assistance comprises the right to be defended by counsel. However, the right to be defended by counsel of one's choice is not absolute when the choice is made through a free legal

[39] *Alex Thomas v. Tanzania* (merits), § 124.

assistance scheme.[40] It further held that what matters is whether the accused is given effective legal representation rather than whether he or she is allowed to be represented by a lawyer of their own choosing.[41] The Court reiterates that it is the duty of the Respondent State to provide adequate representation to an accused person and intervene only when the representation is not adequate.[42] If, however, there are allegations of ineffective legal representation, it is important, that all such allegations must be backed by evidence.[43]

123. As was recognised in *Gozbert Henrico v. Tanzania*,[44] a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. The quality of the defence provided depends, essentially, on the relationship between the client and his representative. The State should intervene only where the lawyer's manifest failure to provide effective representation is brought to its attention. The Court, however, recalls that with regard to effective legal representation through a free legal assistance scheme, it is not sufficient for a State to provide counsel. The State must also ensure that those who provide legal assistance under that scheme have enough time and facilities to prepare an adequate defence, and to provide robust representation at all stages of the legal process starting from the arrest of the individual for whom such representation is being provided.

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

125. The Court notes that the Respondent State provided the Applicant counsel at its expense during the proceedings before the High Court. The Court in

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[40] ECHR, *Croissant v. Germany* (1993) App No.13611/89, § 29; *Kamasinski v. Austria* (1989) App No. 9783/82, § 65
[41] ECHR, *Lagerblom v. Sweden* (2003) App No 26891/95, §§ 54-56.
[42] ECHR, *Kamasinski v. Austria*, § 65.
[43] *Ibid.*, § 75.
[44] *Gozbert Henerico v. Tanzania*, (merits and reparations), §§ 108-109.

particular notes that during her arraignment and the preliminary hearing, the Applicant was represented by Advocate Laurian, while during the trial before the High Court, she was represented by Advocates Nasimire and Deo Mgengeli. At the Court of Appeal, the Applicant had the services of two learned advocates, Mr. Salum Amani Magongo, who was assigned to the Applicant by the Respondent State, and Mr. James Andrew Bwana, who was privately hired by the Applicant herself.

126. The Court further notes that there is nothing on record to demonstrate that the Respondent State impeded the earlier listed counsel from accessing the Applicant in order to consult and prepare for her defence. The record also does not demonstrate that the Respondent State denied the Applicant's counsel adequate time and facilities required to prepare the Applicant's defence.

127. The Court further finds that there is nothing on the record to demonstrate that the Applicant informed the High Court or the Court of Appeal of any shortcomings in counsel's conduct of her defence. There is also no evidence on record to demonstrate that the Applicant intended to call witnesses but was hindered in this due to the conduct of her counsel. The Court notes that the Applicant was free to raise, with the domestic courts, her discontent about the manner in which she was represented, in particular, the fact that no defence witnesses were called to counter the prosecution's case. The Court takes special notice of the fact that, before the Court of Appeal, the Applicant was represented by counsel of her own choice, in addition to the one appointed by the Respondent State.

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

v. Allegation that mandatory death penalty stemmed from an unfair trial

129. The Applicant contends that the alleged violations of Article 7(1) outlined earlier in this judgment have in turn occasioned a violation of her right to life under Article 4 of the Charter, by virtue of the mandatory death sentence.

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130. The Respondent State submits that the Applicant's trial, conviction and sentence were in accordance with the law. It also contends that the Applicant was accorded the right to be heard and that the trial court properly considered the evidence of both parties. Similarly, the Court of Appeal ensured that the charges against the Applicant were proven beyond reasonable doubt and confirmed the impugned decision. It is the Respondent State's submission, therefore, that the Applicant's trial met all the criteria for a fair trial as enshrined in Article 7 of the Charter.

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131. Given the findings herein earlier, the Court reiterates that the Respondent State violated the Applicant's right to a fair trial only to the extent that there was an unreasonable delay between her arrest and the commencement of her trial before the High Court. However, the Court does not find the same to have vitiated the entirety of the Applicant's trial before the domestic courts. In the circumstances, the Court holds that the sentence imposed on the Applicant did not flow from a process that breached the principle of fair trial and, therefore, dismisses the Applicant's allegations.

D. Alleged violation of Article 1 of the Charter

132. The Applicant alleges that the Respondent State violated Article 1 of the Charter by failing to amend its Penal Code which permits the mandatory death sentence as well as execution by hanging.

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133. The Respondent State submits that the Applicant was tried, convicted and sentenced in accordance with law and that the Court of Appeal was satisfied that the case against the Applicant was proven beyond reasonable doubt. It thus avers that the allegation of a violation of Article 1 of the Charter should be dismissed for lack of merit.

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134. The Court notes that it has consistently held that "when the Court finds that any of the rights, duties and freedoms set out in the Charter are violated, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with or that it has been violated."[45]

135. In the instant case, the Court has held that the Respondent State has violated Articles 4, 5, 7(1)(d) of the Charter. On the basis of the foregoing, the Court finds that the Respondent State also violated Article 1 of the Charter.

VIII. REPARATIONS

136. The Court notes that Article 27(1) of the Protocol stipulates that "[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."

137. As per the Court's jurisprudence, for reparations to be granted, the Respondent State should first be responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, where granted, reparations should cover the full damage suffered.

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[45] *Alex Thomas v. Tanzania* (merits), § 135; *Norbert Zongo and Others v. Burkina Faso* (merits), § 199; *Kennedy Owino Onyachi and another v. Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 159.

138. The Court reiterates that the onus is on the Applicant to provide evidence in support of his/her allegation.[46] With regard to moral damages, the Court has consistently held that it is presumed and that the requirement of proof is not strict.[47]

139. The Court also restates that the measures that a State can take to remedy a violation of human rights includes restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, considering the circumstances of each case.[48]

140. In the instant Application, the Applicant's claims for pecuniary reparations are quoted in United States Dollars. As the Court has established, generally, damages will be awarded in the currency of the State in which loss was incurred.[49] In the instant Application, therefore, the Court will apply this standard and monetary reparations, if any, will be assessed in Tanzanian Shillings.

141. As this Court has earlier found, the Respondent State violated the Applicant's right to life, right to dignity and right to a fair trial, guaranteed respectively under Articles 4 and 5 and 7 of the Charter. The Court, therefore, finds that the Respondent State's responsibility has been established. The prayers for reparations will, therefore, be examined against these findings.

[46] *Kennedy Gihana and others v. Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139; See also *Reverend Christopher R. Mtikila v. Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, § 15(d); and *Kalebi Elisamehe v. Tanzania* (merits and reparations), § 97.
[47] *Ally Rajabu and Others v. Tanzania* (merits and reparations), § 136; *Armand Guehi v. Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119; *Norbert Zongo and Others v. Burkina Faso* (reparations), § 55.
[48] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also, *Kalebi Elisamehe v. Tanzania,* (merits and reparations), § 96.
[49] See, *Lucien Ikili Rashidi v. Tanzania* (merits and reparations), § 120 and *Ingabire Victoire Umuhoza v. Rwanda* (reparations), § 45.

A. Pecuniary reparations

142. The Applicant claims pecuniary reparations for both the material and moral prejudice which she alleges is a result of the violations suffered due to the Respondent State's conduct.

i. Material prejudice

143. The Applicant alleges that upon her arrest, the police seized her car and motorcycle, which at the time of filing this Application, had not been returned to her family. The Applicant, therefore, prays the Court to order the return of the items in the same condition as before seizure. In terms of the quantum of damages, the Applicant submits that "a new Land Rover Discovery retails from hundred and six thousand, three hundred (USD 106,300) United States Dollars and a used Land Rover Discovery of a similar model and age (but taking into account depreciation and wear and tear for the period the Respondent was incarcerated) retails from approximately Forty Thousand Five Hundred (40,500) USD."

144. The Applicant prays the Court to grant her a reasonable award for the material prejudice suffered, taking into account the principle of equity and the ten (10) years in prison.

145. The Applicant also requests the reimbursement of Mrs. Barbara Doerner, her sister-in-law, for expenses incurred during her appeal procedure. In addition, the applicant prays for Five Thousand (USD 5,000) United States Dollars to cater for counsel's preparation and lodging her grounds of appeal and Eight Thousand (USD 8,000) United States Dollars to cater for counsel's representation in arguing the appeal. In total, the Applicant requests the payment of Thirteen Thousand (USD 13,000) United States Dollars in legal fees.

146. In her Reply, the Applicant submitted that she is not in a position to produce the log book for her motor vehicle registration number T382 ADJ Land

Rover Discovery-TDI 300 since it was seized by the police. She also stated that she cannot produce the logbook for the motor cycle registration number T 292 AWD since she does not remember who has the logbook. The Applicant also stated that she is unable to produce business permits for her fishing business since she was operating this on a small and informal scale.

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147. The Respondent State submits that the claim for monetary damages as a result of the alleged appropriation of her car and motorcycle is unsubstantiated as the Applicant has not adduced any proof of her ownership of the alleged properties or that the alleged properties were taken by the police. The Respondent State thus prays the Court to dismiss the claim for monetary damages.

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148. The Court notes that for reparations for material prejudice to be granted, there must be a causal link between the violation established by the Court and the prejudice suffered, but the Applicant must also specify the nature of the prejudice and the proof thereof.[50]

149. In the instant Application, the Court has established that the Applicant's rights protected by Articles 4, 5 and 7 of the Charter were violated. However, the Court notes that the Applicant has not established the causal link between the violation of her earlier stated rights and the alleged loss of her motorcycle and car.

150. The Court reiterates that with regard to material prejudice, the general rule is that the burden of proof is on the Applicant.[51] Given the absence of

[50] *Kijiji Isiaga v. United Republic of Tanzania*, ACtHPR, Application No. 032/2015, Judgment of 25 June 2021 (reparations), § 20.
[51] *Lohé Issa Konaté v. Burkina Faso* (reparations), § 15. *Mohamed Abubakari v. Tanzania*, (reparations) (4 July 2019) 3 AfCLR 334, § 22; *Kijiji Isiaga v. Tanzania* (reparations), § 15.

documentary proof to support the Applicant's claims, the Court dismisses the prayer for reparation for material prejudice.

151. In relation to the claim for legal costs, the Court recalls its established case-law that reparations paid to victims of human rights violations may also include the reimbursement of lawyers' fees.[52] However, in the present case, the Court finds that the Applicant has failed to provide evidence in support of her request for reimbursement of legal costs. Consequently, the Court dismisses the Applicant's prayer on this point.

ii. Moral prejudice

152. The Applicant prays the Court to award her reparations for moral prejudice based on two pleas. The first relates to the disruption of her life plan due to her arrest, conviction and detention on death row. The Applicant submits that prior to the criminal proceedings against her, she had set up a charity for fighting against female genital mutilation. She further avers that she also worked with local women's groups. Further, she submits that her incarceration has separated her from her family and friends as well as her daughter. In the second plea, the Applicant submits that the eight (8) years on death row have been traumatic and particularly hard on her due to her advanced age and illness.

153. In light of the above, the Applicant prays the Court to grant her:

i. Based on precedent awards ordered in *Lohé Issa Konate v. Burkina Faso* (Judgment on Reparations), Decision of 3 June 2016, Application No. 4 of 2013, a lump sum of Twenty Thousand 20,000 USD as compensation for moral damage suffered by her, with an additional uplift of ten thousand (10,000) USD in recognition of the exceptional suffering the Applicant endured due to her imprisonment on death row; or

[52] *Norbert Zongo and others v. Burkina Faso* (reparations), § 79; *Mtikila v. Tanzania* (reparations), § 39. *Mohamed Abubakari v. Tanzania* (reparations), § 81.

ii. Based on the precedent awards ordered in the Zongo Case, supra, we pray the Court grants a sum based on the current Tanzanian average yearly minimum wage of USD 1,593 multiplied by the 10 years the Applicant has been imprisoned under death row, amounting to a total of USD 17,523, with an additional uplift of USD 10,000 in recognition of the exceptional suffering the Applicant endured due to her imprisonment on death row; or

iii. Based on the precedent awards ordered in the *Zongo* Case, supra, we pray the Court grant a sum based on the Value of a Statistica Life (VSL) in Tanzania at USD 158,000 given a life expectancy of approximately 65 years (Income Elasticities and Global Values of a Statistical Life, Journal of Benefit-Cost Analysis (2017), p. 247), amounting to a value of USD 24,308 for the 10 years of life the Applicant lost due to her imprisonment, in addition to an additional uplift of USD 10,000 in recognition of the exceptional suffering the Applicant endured due to her imprisonment on death row.

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154. The Respondent State submits that there is neither violation nor any harm which it committed against the Applicant. Further, that there is neither proof that substantiates the causal link between the harm suffered and the purported violation of the Applicant's rights.

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155. The Court recalls its established case-law where it has held that moral prejudice is presumed in cases of human rights violations and the quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.[53] The Court has, thus, adopted the practice of granting a lump sum in such instances.[54]

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[53] *Norbert Zongo and Others v. Burkina Faso* (reparations), § 55; *Ingabire Victoire Umuhoza v. Rwanda* (reparations), § 59; *Christopher Jonas v. United Republic of Tanzania* ACtHPR, Application No. 011/2015, Judgment of 25 September 2020 (reparations), § 23.

[54] *Lucien Ikili Rashidi v. Tanzania* (merits and reparations), § 119; *Minani Evarist v. United Republic of Tanzania*, (merits and reparations) (21 September 2018) 2 AfCLR 402 (merits), § 84-85; *Armand Guehi v. Tanzania* (merits and reparations), § 177; *Christopher Jonas v. Tanzania* (reparations), § 24.

156. The Court notes that the Respondent State violated the Applicant's right to life, right to dignity and right to a fair trial on account of which she suffered moral prejudice. Accordingly, the Applicant is entitled to moral damages.

157. The Court also notes that the disruption of Applicant's life plan is related to her incarceration. However, since the Court has not found the Applicant's incarceration to be unlawful, it can therefore not award any reparations for harm suffered.

158. The Court, however, recalls that it has found the mandatory nature of the death penalty constitutes a violation of Articles 4 and 5 of the Charter and that the delayed commencement of the Applicant's trial infringed Article 7(1)(d) of the Charter. It thus reiterates its case-law to the effect that, in respect of human rights violations, reparations for moral prejudice are awarded in equity on the basis of the Court's discretion.

159. The Court recalls that the High Court sentenced the Applicant to death by hanging on 19 September 2011 and the sentence was upheld by the Court of Appeal on 11 March 2013. This Court finds that the Applicant suffered prejudice as from the date of her sentencing. The uncertainty of waiting for both the outcome of the appeal and thereafter the possible execution only added to the psychological tension experienced by the Applicant. The Applicant's prejudice was also exacerbated by the delay she endured before the commencement of her trial. In the circumstances it is beyond doubt that the Applicant has suffered trauma.

160. In view of the above, the Court finds that the Applicant has endured moral and psychological suffering and decides to grant her moral damages in the sum of Tanzanian Shillings Seven Million (TZS 7,000,000).

B. Non-pecuniary reparations

161. The Applicant prays the Court to quash her sentence and set her free. Noting that the Applicant also makes prayers in relation to the Respondent

State's law providing for the mandatory death sentence, and in the light of its earlier findings in the present Judgment, this Court considers it appropriate to first examine the prayer to amend the Penal Code.

i. Guarantees of non-repetition

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

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163. The Respondent State did not submit on this request.

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164. The Court recalls that, in previous judgments dealing with the mandatory death penalty involving the same Respondent State, it had ordered that the provisions in its Penal Code providing for the mandatory death penalty be removed to align with the country's international obligations.[55] The Court takes judicial notice of the fact that three (3) years after the first such judgment was issued, the Respondent State has not, as at the date of the present judgment, implemented the said order. Notably, identical orders were also issued in two other judgments delivered in 2021 and 2022, none of which has been implemented thus far.

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

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[55] *Gozbert Henerico v. Tanzania*, § 207; *Amini Juma v. Tanzania*, § 170.

166. In order to guarantee the non-repetition of the violations at issue herein, the Court orders the Respondent State to undertake all necessary measures to repeal the provision for the mandatory death penalty in its Penal Code.[56]

ii. Restoration of liberty

167. According to the Applicant, there are compelling reasons for the Court to order her release. She contends, in particular, that re-opening the defence case or holding a re-trial would "result in prejudice and occasion miscarriage of justice", given the following circumstances: the passage of time since the alleged offence; the unfairness of the Applicant remaining in custody pending a retrial after ten years in detention; the risk that a re-trial may be subject to an unlawful mandatory death sentence; the existence of tainted evidence that is not capable of being corrected in fresh proceedings; and the Applicant's rehabilitation.

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168. The Respondent State submits that the Court should dismiss this prayer insofar as the Applicant was arrested, found culpable and sentenced in accordance with the law.

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169. Regarding the request to be set free, the Court recalls that it can only make such order in compelling circumstances. The Court notes that its findings in the present Application only pertain to the sentencing and do not therefore affect the conviction of the Applicant. The prayer for release is therefore not warranted, and the Court consequently dismisses the same.

170. The Court however consider that, while the Applicant states not wishing 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 findings of this

[56] *Ally Rajabu and Others v. Tanzania* (merits and reparations), § 136.

Court that the Respondent State violated Articles 4, 5 and 7 of the Charter have a bearing on the sentence pronounced against the Applicant on account of the mandatory nature of the death penalty, hence warranting remedial measures.

171. Consequently, 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 a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.

iii. Restitution

172. The Applicant points out that she cannot be returned to the state she was in prior to her incarceration. Relying on *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan,* she submits that she be paid damages in the quest to restore her to the situation prior to the occurrence of the violations.

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173. The Respondent State submits that the since the Applicant is not a victim of its deliberate actions or negligence, she cannot pray for damages under the umbrella of restitution.

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174. The Court notes that the Applicant claims for damages as a form of restitution. However, given the Court's earlier orders for compensation to be paid to the Applicant for the moral prejudice she has suffered; the order for the Respondent State to hold a sentencing hearing for the Applicant; and the Court's pronouncement on the incompatibility of the mandatory death penalty with the Charter, it is the Court's finding that the claim for restitution has already been catered for. Accordingly, the Court dismisses the Applicant's claim for damages as a form of restitution.

iv. Publication

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

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176. 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 in the Respondent State. There is also no indication as to whether measures are being taken for the law to be amended and aligned with the Respondent State's international human rights obligations, with the result that the guarantees provided in the Charter are still not certain for rights-holders. The Court thus finds it appropriate to order publication of this judgment.

v. Implementation and reporting

177. 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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178. 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.[57] Given the non-compliance demonstrated earlier in this judgment, the Court considers that restating the same timeframe in the present Application would undermine

[57] *Ally Rajabu v. Tanzania*, *ibid*, § 171, xv, xvi; *Gozbert Henerico v. Tanzania*, *ibid*, § 203.

the urgency of having the impugned provision removed from the Respondent State's Penal Code. In the circumstances, the Court decides to set the time for implementation at six (6) months from the date of the present judgment.

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

180. The Court also notes that the Respondent State has not implemented the orders in any of the earlier referred to 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.

IX. COSTS

181. None of the Parties made submissions on costs.

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

183. The Court notes that in the instant case, there is no reason to depart from this principle. Accordingly, the Court decides that each party shall bear its own costs.

X. OPERATIVE PART

184. For these reasons:

THE COURT

Unanimously:

On jurisdiction

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

On admissibility

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

On merits

v. *Finds* that the Respondent State has not violated the Applicant's right to fair trial under Article 7(1) (b) of the Charter with regard to being presumed innocent until proven guilty by a competent court;
vi. *Finds* that the Respondent State has not violated the Applicant's right to effective counsel under Article 7(1)(c) of the Charter;
vii. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial enshrined in Article 7(1) of the Charter, with regard

to the allegation of conviction on the basis of insufficient, unreliable and circumstantial evidence;

viii. *Finds* that the Respondent State has violated the Applicant's right to life under Article 4 of the Charter in relation to the mandatory nature of the death penalty;

ix. *Finds* that the Respondent State has violated the right to dignity under Article 5 of the Charter by prescribing hanging as a method of the execution of the death penalty;

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

xi. *Finds* that the Respondent State has violated Article 1 of the Charter.

On reparations

Pecuniary reparations

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

xiii. *Dismisses* the Applicant's prayer related to reimbursement of legal fees;

xiv. *Grants* the Applicant's prayer for reparations for the moral prejudice and awards her the sum of Tanzanian Shillings Seven Million (TZS 7 000 000);

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

Non-pecuniary reparations

xvi. *Dismisses* the Applicant's prayer for release from prison;

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

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

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;

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

On Costs

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

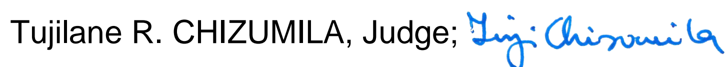
Signed:

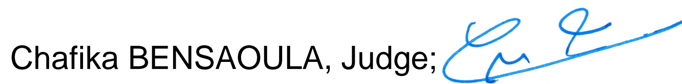
Blaise TCHIKAYA, Vice-President;

Ben KIOKO, Judge;

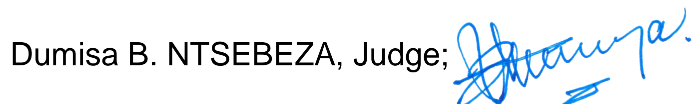
Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

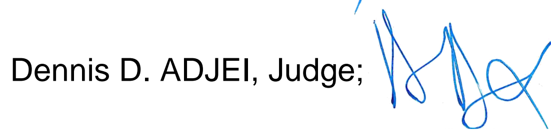
Tujilane R. CHIZUMILA, Judge; 

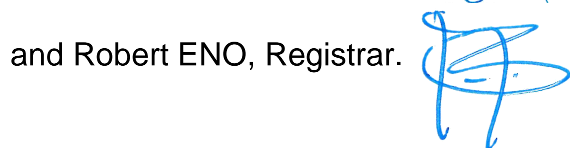
Chafika BENSAOULA, Judge; 

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge; 

Modibo SACKO, Judge;

Dennis D. ADJEI, Judge; 

and Robert ENO, Registrar. 

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the Separate Opinion of Justice Blaise Tchikaya is appended to this Judgment.

Done at Arusha, this 1st Day of December in the Year Two Thousand and Twenty-Two in English and French, the English text being authoritative.