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

MARTHINE CHRISTIAN MSUGURI

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 052/2016

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[1] (hereinafter referred to as "the Rules"), Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

Marthine Christian MSUGURI

Represented by :

i. Advocate Donald DEYA, Chief Executive Officer, Pan African Lawyers Union (PALU); and
ii. Advocate Fulgence T. MASSAWE, Legal and Human Rights Centre, Dar es Salaam, acting for the Cornell University Law School, Cornell Centre on the Death Penalty Worldwide.

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr. Boniphace Nalija Luhende, Solicitor General, Office of the Solicitor General;

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

ii. Ms Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General;
iii. Mr. Baraka LUVANDA, Ambassador, Head of Legal Unit, Minister of Foreign Affairs, East Africa, Regional and International Cooperation;
iv. Ms. Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Attorney General's Chambers;
v. Mr. Mark MULWAMBO, Senior State Attorney, Attorney General's Chambers; and
vi. Mr. Elisha E. SUKA, Foreign Service Officer, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation.

After deliberation,

renders the following Judgment:

I. THE PARTIES

1. Marthine Christian Msuguri (hereinafter referred to as "the Applicant") is a Tanzanian national who, at the time of filing this Application, was incarcerated at Butimba Central Prison in Mwanza after he was convicted and sentenced to death for the offence of murder. The Applicant alleges the violation of his rights in relation to proceedings before domestic courts.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument

withdrawing its Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect one (1) year after its deposition, that is, on 22 November 2020.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that the Applicant was charged for the murder of three (3) children. The murders occurred on 18 December 2003 at Businde village, Karagwe District at a time when the Applicant was a soldier and a militia trainer of the Tanzania People's Defence Force.

4. On 30 July 2010, the High Court of Tanzania sitting at Bukoba convicted and sentenced him to death by hanging.

5. Dissatisfied with this decision, he appealed to the Court of Appeal of Tanzania sitting at Mwanza, which dismissed the appeal in its entirety on 11 March 2013.

6. On 12 March 2013, the Applicant filed, before the Court of Appeal, an application for review on ground of manifest errors in the first judgment. At the time of the filing of the present Application, the request for review had neither been heard nor listed for hearing.

7. According to information filed by the Respondent State, on 14 December 2018, the Court of Appeal eventually dismissed the application for review for lack of merit.

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania,* ACtHPR*,* Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

B. Alleged Violations

8. The Applicant alleges that the Respondent State has violated:

    i. Articles 4 and 7 of the Charter, and Article 6 of the International Covenant on Civil and Political Rights (ICCPR) after the mandatory death sentence was imposed on the Applicant;
    ii. Article 7 of the Charter due to the fact that it failed to provide the Applicant with counsel, and held him in detention for more than six (6) years prior to his trial; and
    iii. Article 5 of Charter when the Applicant was held on pre-trial detention and in inhuman and degrading conditions of confinement .

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

9. The Application was received at the Registry on 9 September 2016 and served on the Respondent State on 16 November 2016.

10. After several extensions of time, the Parties submitted their pleadings on the merits and reparations as directed by the Court.

11. On 5 March 2018, the Cornell University Law School filed a request to represent the Applicant *pro bono* in tandem with PALU which had been representing the Applicant. The request was granted and the case file was availed to the Law School accordingly.

12. On 18 May 2020, the Cornell University Law School filed amended pleadings on behalf of the Applicant. The said pleadings were served on the Respondent State on 1 June 2020. Despite several extensions of time, the Respondent State did not respond to the amended Application.

13. Pleadings were closed on 30 June 2022 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

14. The Applicant prays the Court to direct the Respondent State to:

    i. Vacate the death sentence and grant the Applicant a new trial that comports with the fair trial guarantees of the African Charter; in the alternative,
    ii. Set aside the death sentence and grant the Applicant a resentencing hearing; and
    iii. Amend its law to ensure the respect for life.

15. The Respondent State prays the Court to:

    i. Declare that it lacks jurisdiction to hear the Application;
    ii. Declare that the Application is not admissible for not exhausting local remedies and not being filed within a reasonable time;
    iii. Find that the Respondent State has not violated any of the provisions as alleged by the Applicant; and
    iv. Dismiss the prayers of the Applicant and order the latter to bear the costs of the proceedings.

V. JURISDICTION

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

    1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

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

17. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[3]

18. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

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

A. Objection to material jurisdiction

20. The Respondent State avers that this Court does not have appellate jurisdiction to determine matters of facts and law such as that of the defence of insanity of the Applicant in the present case. According to the Respondent State, this issue was determined with finality by the Court of Appeal.

21. It is also the contention of the Respondent State that this Court does not have jurisdiction to examine the present Application as it cannot quash the conviction, set aside the sentence or order the Applicant's release.

22. The Applicant rebuts the Respondent State's objection and asserts that the Court has jurisdiction to consider this Application so long as it alleges a violation of rights guaranteed in the Charter and ICCPR.[4]

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23. The issue arising in respect of jurisdiction in the present Application is whether this Court has jurisdiction to examine the case and grant the Applicant's prayers.

[3] Rule 39(1), Rules of Court, 2 June 2010.
[4] Ratified by the Respondent State on 11 June 1976.

24. The Court recalls that under 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.[5]

25. The Court further recalls that, as is now firmly established in its case-law, it does not exercise appellate jurisdiction with respect to claims already examined by domestic courts.[6] However, the Court reiterates its position that it retains the power to assess the propriety of domestic proceedings as against standards set out in international human rights instruments ratified by the State concerned.[7]

26. In the present matter, the Applicant is asking this Court to determine whether the proceedings before the domestic courts were conducted in line with the Respondent State's obligations under the Charter, ICCPR and other human rights instruments ratified by the Respondent State. The Court is empowered by provisions of Article 3(1) of the Protocol to ensure the observance of these obligations.

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

B. Other aspects of jurisdiction

28. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

[5] *Kalebi Elisamehe v. United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 18.
[6] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.
[7] *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.

29. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further recalls that, as it has previously held, the withdrawal of a Declaration does not have any retroactive effect and also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect as is the case of the present Application.[8] In light of the foregoing, the Court finds that it has personal jurisdiction to examine this Application.

30. In respect of its temporal jurisdiction, the Court notes that the violations alleged by the Applicant occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[9] Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

31. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred within the territory of the Respondent State, which is a state party to the Protocol. In the circumstances, the Court holds that it has territorial jurisdiction.

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

[8] *Andrew Ambrose Cheusi v. Tanzania* (merits and reparations), §§ 35-39; *Ingabire Victoire Umuhoza v. United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.
[9] See *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 64, 65; *Norbert Zongo and Others v. Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 71-77, 83.

VI. ADMISSIBILITY

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

34. In line with Rule 50(1) of the Rules, “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”

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

> Applications filed before the Court shall comply with all of the following conditions:
>
> a. Indicate their authors even 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 African Union or the provisions of the Charter.

36. The Court notes that the Respondent State raises objections to the admissibility of the Application. The Court will therefore first consider the said objections (A) before examining other conditions of admissibility (B) if needed.

A. Objections to the admissibility of the Application

37. The Respondent State raises two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies while the second one relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of local remedies

38. The Respondent State argues that the Application does not meet the requirement of exhaustion of local remedies as provided under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules[10] which states that a case concerning the violation of human rights must be heard at all levels of domestic courts before being filed before the Court. According to the Respondent State, this Application was filed prematurely because the Applicant still had the option to institute a constitutional petition before the High Court under the Basic Rights and Duties Enforcement Act for the enforcement of the rights allegedly violated.

39. The Applicant refutes the Respondent State's objection and argues that he was not compelled to file a constitutional petition under the Basic Rights and Duties Enforcement Act because the said remedy is extraordinary as previously decided by this Court. According to the Applicant, remedies are exhausted once he goes through the required criminal trial process up to the Court of Appeal.

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[10] Rule 40 of the Rules, 2 June 2010.

40. The issue arising for determination regarding admissibility in the present case is whether the Applicant ought to have instituted a constitutional petition before the High Court for the alleged violation of his fundamental rights.

41. Pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before this Court shall fulfil the requirement of exhaustion of local remedies. Regarding the remedies which have to be exhausted, the Court has previously held that such remedies should be ordinary.[11] In respect of the Respondent State, the Court has also held on numerous occasions that applicants are not required to exhaust the remedy of the constitutional petition before the High Court for breach of fundamental rights because such remedy is extraordinary.[12] As the Court has determined, in instances where the Applicant has gone through the judicial system up to the Court of Appeal, which is the highest court of the land, he is considered to have exhausted the required remedies.[13]

42. The Court notes that in the present Application, the Applicant's appeal was determined through a judgment rendered on 11 March 2013 by the Court of Appeal, which is the highest judicial authority of the Respondent State. Given that the constitutional petition is not a remedy that the Applicant ought to have used, it must therefore be considered that domestic remedies were exhausted in the present matter.

[11] *Laurent Munyandilikirwa v. Republic of Rwanda*, ACtHPR, Application No. 023/2015, Ruling of 2 December 2021, § 74; *Alex Thomas v. Tanzania* (merits), § 64.
[12] *Gozbert Henerico v. United Republic of Tanzania*, ACtHPR, Application No. 056/2016, Judgment of 10 January 2022, § 61; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 46; *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Alex Thomas v. Tanzania* (merits), §§ 63, 65.
[13] *Hamis Shaban alias Hamis Ustadh v. United Republic of Tanzania*, ACtHPR, Application No. 026/2015, Judgment of 2 December 2021, § 51; *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

43. Consequently, the Court holds that the Applicant has exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and therefore, dismisses the Respondent State's objection.

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

44. The Respondent State claims that the Application was not filed within a reasonable time after local remedies were exhausted. It is the Respondent State's contention that the Applicant has not stated any reason for not lodging the present Application within six (6) months of the Court of Appeal dismissing the criminal appeal on 11 March 2013. According to the Respondent State, such is the requirement set out by the African Commission on Human and Peoples' Rights in the case of *Michael Majuru v. Zimbabwe*.

45. The Applicant on his part refutes the Respondent State's objection and argues that the time he spent awaiting a decision on his application for review of the Court of Appeal's judgment should count towards the time required to exhaust local remedies. The Applicant further avers that the review process was ongoing when he filed the present Application and responsibility falls on the Respondent State to explain the delay.

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46. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that applications must be filed "… within reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter". Therefore, the Respondent State's reference to the period of six (6) months cannot be justified.

47. The Court recalls that in assessing reasonableness, consideration should be given to the situation of the Applicant, namely whether he was incarcerated, lay and indigent, or had limited knowledge of the operation of this Court.[14] Furthermore, while exhausting extraordinary remedies, such as the review procedure may not be mandatory depending on circumstances of the case, the time spent in attempting to exercise these remedies should be considered in assessing reasonableness under Article 56(5) of the Charter.[15]

48. From the record before the Court, the Applicant exhausted local remedies on 11 March 2013, being the date of the Court of Appeal's judgment. Given that the present Application was filed on 9 September 2016, the Court should assess whether the period of three (3) years, five (5) months and twenty-eight (28) days is reasonable within the meaning of Article 56(6) of the Charter.

49. In the instant case, the Court notes that the Applicant is incarcerated, and is on the death row. He also filed an application for review of the Court of Appeal's judgment on 12 March 2013. On 9 September 2016, the Applicant filed the present Application, having awaited the outcome of his review application for over three (3) years.

50. The Court considers that the above stated circumstances constitute valid justification for the time it took the Applicant to file this Application subsequent to the judgment of the Court of Appeal. This Court therefore finds that such time is reasonable within the meaning of Article 56(6) of the Charter.

[14] *Mohamed Selemani Marwa v. United Republic of Tanzania*, ACtHPR, Application No. 014/2016, Judgment of 2 December 2021, § 61; *Amiri Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[15] *Mohamed Selemani Marwa v. United Republic of Tanzania*, ACtHPR, Application No. 014/2016, Judgment of 2 December 2021, §§ 64, 65; *Thobias Mang'ara Mango and Another v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 55.

51. In light of the foregoing, the Court dismisses the Respondent State's objection to the admissibility of the Application based on the alleged failure to file the same within a reasonable time.

B. Other conditions of admissibility

52. The Court notes that, from the record, the Application's compliance with the requirements in Article 56 sub-articles (1), (2), (3), (4) and (7) of the Charter, which are reiterated in sub-rules 50(2)(a), (b), (c), (d), and (g) of the Rules, are not in contention between the Parties. Nevertheless, the Court must ascertain that these requirements have been fulfilled.

53. In particular, the Court notes that the requirement laid down in Rule 50(2)(a) of the Rules is met since the Applicant's identity is known.

54. The Court also notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. The Application also does not contain any claim or prayer that is incompatible with the said provision of the Act. Therefore, the Court considers that the Application meets the requirement of Rule 50(2)(b) of the Rules.

55. The Court further observes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.

56. Regarding the condition stated in Rule 50(2)(d) of the Rules, the Court notes that the Application fulfils the said condition as it is not based exclusively on news disseminated through the mass media.

57. Finally, with respect to the requirement laid down in Rule 50(2)(g) of the Rules, the Court finds that the present Application does not concern a case

which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter. The Application therefore meets this condition.

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

VII. MERITS

59. The Applicant alleges the violation of his following rights:

i. Right to life protected under Article 4 of the Charter imposing the mandatory death penalty;
ii. Rights to a fair trial, to be tried without undue delay and to have effective representation protected under Article 7(1) of the Charter owing to the delay of proceedings in domestic courts, the lack of competent and experience counsel, and lack of adequate resources to counsel; and
iii. Rights to dignity, and to be free from cruel, inhuman and degrading treatment protected under Article 5 of the Charter for the provision of execution of the death sentence by hanging, detention in the death row, and lengthy detention before trial.

A. Alleged violation of the right to life

60. The Applicant avers that the mandatory death penalty violates the right to life as it violates the right to an individualized sentencing process given that it does not consider circumstances peculiar to both the offender and commission of the offence such as mental impairments as is the case of the Applicant. The Applicant alleges that due to the mandatory sentencing scheme implemented in the Respondent State, the court that sentenced him to death did not have an opportunity to consider crucial mitigating evidence,

including his history of child abuse, severe mental impairments, service to his country and successful adjustment to life in prison.

61. According to the Applicant, the mandatory death penalty prevented the sentencing court from considering the mitigating effect of his mental impairments while he suffered from debilitating post-traumatic stress disorder (PTSD) and traumatic brain injury. He contends that, while his mental disabilities reduce his moral culpability and disqualify him from the death penalty, the Respondent State's law is indifferent to his psychological disorder so long as he is deemed sane and fit to stand trial. The Applicant also submits that he has a long history of substance abuse namely, of alcohol and marijuana, which helped him cope with successive traumatic experiences. He submits that the sentencing court ignored the fact that he committed the offence when he was in a state of insanity as he had drunk hard liquor and smoked 'bhang' which affected his control.

62. The Applicant further avers that the evaluation of his state of health was conducted three (3) and a half years after the offence had been committed and was limited to a bare assessment of whether he met the legal threshold for sanity and fitness to stand trial. It is the contention of the Applicant that the medical report obtained by the sentencing court to evaluate his mental health fell short of best practices for psychiatric evaluations because it was incomplete and superficial. According to the Applicant, such deficiencies do not necessarily warrant exemption from criminal sanctions but diminish personal culpability given that the offender's capacity to understand and process information, to communicate and control impulses diminishes. The Applicant submits that as a person with multiple and severe mental disorders, he is exempted from the application of the death penalty.

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63. The Respondent State rebuts the Applicant's allegations and submits that as clearly stated under Sections 14(2) and 14(2)(b) of the Penal Code, intoxication can only be a defense to a criminal charge if by reason thereof

the person charged at the time of the offence did not understand what he was doing and "[t]he person charged was by reason of intoxication insane, temporary or otherwise, at the time of such act or omission".

64. It is the submission of the Respondent State that having critically examined the evidence and circumstances of the matter, the sentencing court was satisfied that the Applicant knew what he was doing and knew that doing so was wrong. According to the Respondent State, the conduct of the Applicant before, during and after the killings was not the conduct of a person who was temporally insane and did not understand what he was doing. The Respondent State further submits that the Applicant, on both occasions when he committed the killings, ordered the bodies to be thrown into the river, asked his accomplices to stir the water in order to dissolve the victims' blood and warned the said accomplices not to reveal the events to anyone otherwise they would suffer the same fate as the deceased persons. The Respondent State avers that these actions of the Applicant show that he was sane before, during and after the killings and intended to destroy all evidence.

65. The Respondent State, therefore, prays this Court to find that the Applicant's allegations are misconceived, void of merit and dismiss them accordingly.

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66. The issue for consideration is whether by sentencing the Applicant to death without taking into account special circumstances of his case, the sentencing court violated the right to life protected under Article 4 of the Charter.

67. Article 4 of the Charter provides :

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

68. As this Court held in the matter of *Ally Rajabu and Others v. United Republic of Tanzania*, imposition of the mandatory death penalty constitutes a violation of the right to life under Article 4 of the Charter as it contravenes the right to a fair trial.[16] The Court recalls that its findings in the *Rajabu* judgment made a general determination to the effect that encroachment on the right to life is arbitrary in instances where the law takes away from the sentencing authority any leeway to consider circumstances peculiar to the Applicant or the commission of the offence.[17] Notably, the Applicant in the *Rajabu* matter did not actually advance the specific circumstances which the sentencing judge failed to examine but only made a case of the mandatory death penalty not comporting with the right to a fair trial for lack of judicial discretion to consider circumstances peculiar not only to the accused but also to the actual commission of the offence. This reasoning was equally applied in *Amini Juma v. Tanzania*, which is a decision subsequent to the *Rajabu* judgment but in respect of similar issues.[18]

69. The Court notes that, in the initial Application, the Applicant's allegation was that the sentencing court failed to consider the specific fact that he was under the effect of some narcotic substance at the time of the offence. However, submissions made in the amended pleadings tend to raise the level of attenuating circumstances by demonstrating that the Applicant specifically suffered permanent insanity, but also that the report on his state of health was superficial, and other details were not taken into account by the sentencing judge.

70. In view of the Applicant's submissions as a whole, the issue at stake boils down to the special circumstances of this case namely as to whether the Applicant's right to life was violated because domestic courts did not take into account all aspects of the defence of insanity while sentencing him to

[16] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §§ 104-114. See also, *Amini Juma v. United Republic of Tanzania*, ACtHPR, Application No. 024/2016, Judgment of 30 September 2021, §§ 120-131.
[17] *Ally Rajabu v. Tanzania*, §§ 109-114.
[18] *Amini Juma v. Tanzania*, §§ 116-131.

death. It follows that, the Applicant in the present case seeks a determination from this Court as to whether the failure by domestic courts to consider circumstances herein specified amounts to a breach of fair hearing and consequently of the right to life. This Application is therefore to be distinguished from *Rajabu* as the present case provides an empirical opportunity to assess whether specific circumstances were actually advanced by the Applicant, which domestic courts failed to examine while applying the death sentence.

71. Noteworthy, in its response to the initial Application, the Respondent State submitted that the trial court and appellate court did not sustain the Applicant's defence of insanity because the latter did not meet the standard required by law and that it was proven beyond reasonable doubt that the Applicant was sane and knew what he was doing when committing the offences.

72. It emerges from the record that the main point of contention between the Parties on the issue under determination is the failure of domestic courts to consider the Applicant's defence of insanity; and reliability of the health report that formed the judicial position of the sentencing court. In this respect, this Court recalls its position in *Gozbert Henerico v. United Republic of Tanzania*[19] where it found that the failure of the High Court to consider the medical evaluation report of the Applicant's mental health status, constituted a grave procedural irregularity that resulted in a violation of the Applicant's right to a fair trial**,** as guaranteed under Article 7(1) of the Charter.

73. This Court notes that, in the instant matter, the High Court considered the Applicant's defence of insanity by examining the medical report produced by the Isanga Mental Institution; and decided to set aside the said report on the ground that it was tendered by PW5, Dr Mbatia, who did not prepare it. However, the High Court also considered the defence of insanity in light of

[19] *Gozbert Henerico v. Tanzania* (merits and reparations), § 160.

testimonies of prosecution witnesses, and found that there was cogent evidence to convict the Applicant. Noteworthy, circumstances considered by the trial court included the fact that the acts of killing of the deceased persons were carried out at two different times within the same day; and the Applicant on each occasion, instructed his accomplies to conceal the evidence. On the basis of these considerations the High Court, taking into account the *actus reus and mens rea* of the Applicant, concluded that it is evident that he knew what he was doing when committing the crimes.

74. The Court further observes that the Court of Appeal upheld the reasoning and findings of the High Court, and dismissed the appeal for lack of merit. It is against these considerations that the domestic courts dismissed the Applicant's defence of insanity.

75. This Court does not ignore the fact that other factors were also adduced by the Applicant which he claims should have been taken into account by domestic courts. In respect to the said issues, the Court notes that the trial court and Court of Appeal examined the submissions and evidence before them. Having done so, both courts arrived at the conclusion that the evidence considered was enough and substantial to make the conviction stand even when the impugned medical report was set aside.

76. In light of the above, this Court considers that, in convicting the Applicant, the domestic courts not only exercised the judicial discretion to consider the specific circumstances and situation of the Applicant; but also undertook a proper assessment of the said circumstances mainly the Applicant's defence of insanity.

77. Having said that, this Court recalls that the determinative factor in assessing fairness regarding arbitrary deprivation of life under Article 4 of the Charter, is not only whether the trial court was left with the discretion to receive and consider submissions related to the specific situation of the Applicant and circumstances of the offence. The key element in this regard is rather whether the judicial officer was able to exercise discretion in taking into

account the above stated situation and circumstances while deciding on the sanction to be imposed in cases of murder. The short answer is no. On the issue of discretion, this Court observes that, whatever the outcome of the examination of the circumstances of the case, after entering a conviction, the High Court in the present case would have still had no option but to impose the death penalty as the sole sanction provided for under Article 197 of the Penal Code. Conversely, had the High Court been persuaded by the Applicant's defence of insanity in the present matter, and the law provided for other sanctions for murder depending on the circumstances pleaded in the case, the factor of judicial discretion would have been met and legality upheld under Article 4 of the Charter.

78. In light of the above, the Court considers that the requirement of judicial discretion was not observed in the present Application, and as a consequence finds that the Respondent State violated the right to life protected under Article 4 of the Charter.

B. Alleged violation of the right to a fair trial

79. The Applicant alleges that his rights to a fair trial have been violated in respect of the time he spent in custody awaiting trial; and regarding the lack of provision of legal representation during the process. The Court notes that the Applicant alleges the violation of Article 7 of the Charter, as well as Articles 7, 9, and 14 of the ICCPR. However, in light of its case-law, the Court will examine this allegation solely under Article 7(1) of the Charter which will be interpreted in light of supplementing elaboration found in the ICCPR's provisions. [20]

i. Alleged violation of the right to be tried without undue delay

80. The Applicant alleges that the fact that he was held in pre-trial detention for six (6) years and a half prior to his trial constitutes a violation of his right to

[20] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 73.

be tried without undue delay. According to the Applicant, such time in respect of both conviction and sentencing was unreasonable because the case was not complex and the delay was attributable to the Respondent State. In substantiating his allegation, the Applicant states that, after his arrest on 20 December 2003, it took the State Attorney almost two (2) years to charge him, one (1) year for the medical report ordered by the Court to be completed, two (2) years to hold the prelimary hearing after charges were filed, two (2) more years without explanation before the case was set for hearing, and, in all, six (6) and a half years after arrest before the prosecution called its first witness.

81. The Respondent State did not make any submission in respect of this allegation.

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82. Pursuant to Article 7(1)(d) of the Charter, every individual shall have "the right to be tried within a reasonable time …".

83. This Court has established that, in assessing whether justice was dispensed as prescribed under Article 7(1(d) of the Charter, factors to be considered should include the complexity of the case, the behaviour of the Parties, and that of the judicial authorities who must exercise due diligence especially where the Applicant faces severe penalties.[21] What the Court is called to determine in the instant case is whether the period of six (6) and a half years that lapsed from the Applicant's arrest before his trial commenced is reasonable.

84. Regarding the complexity of the case, the Court notes that, from the Respondent State's response to the initial pleadings, and records of domestic proceedings, it is evident that the case was relatively ordinary. The matter did not demand extensive investigation as evidence was mainly made up of witness statements including those of two co-accused who were

[21] *Gozbert Henerico v. Tanzania* (merits and reparations), § 82; *Amini Juma v. Tanzania*, *op. cit.*, § 104; *Armand Guehi v. Tanzania* (merits and reparations), §§ 122-124.

initially charged with the Applicant. Although it took a year for the medical report to be produced, it is notable that both trial and appeal courts set it aside, and conviction was based largely on post-mortem examinations and witness statements, which were all available within months of the arrest. Besides, at the preliminary hearing, the Applicant had already expressed his intent to proffer a defence of insanity.

85. The Court further observes that the Applicant did not act in any manner or make any request that contributed to the delay. Counsel for the Applicant rather consistently drew the attention of the judicial authorities on the fact that the accused had been in custody for too long, and the case suffered significant delay. Conversely, the Respondent State did not specifically address this issue in its response to the initial Application, nor did the prosecution justify the delays as emerging from domestic proceedings. Notably, in justifying the delay of three (3) years to consider the Applicant's request for review the Respondent State advances the argument of contraints of the cause list of the Court of Appeal. The Respondent State avers that applications for review, are heard based on the principle of first in, first out. It follows that while there is no evidence that the Applicant contributed to the delay, the same cannot be said of the Respondent State's judicial authorities.

86. Finally, as far as due diligence is concerned, this Court notes the Applicant alleges a delay of more than six (6) years. The Court observes that authorities of the Respondent State did not provide any explanation for the periods of two (2) years that elapsed before the prosecution filed the charges and one (1) year to produce the medical report at a state institution. There is also no justification for the period of a few more years adjournments on prosecution request to summon witnesses and contact a medical expert three (3) and four (4) years respectively after the charges were filed. These delays, and the lack of justification do not portray due diligence as required under Article 7(1)(d) of the Charter and the above referenced case-law of this Court.

87. Consequently, the Court finds that the Respondent State has violated the Applicant's right to be tried within a reasonable time guaranteed under Article 7(1)(d) of the Charter.

ii. Alleged violation of the right to have effective representation

88. The Applicant alleges that his attorneys did not have adequate time or facilities to prepare his defence, and one of them laboured under a conflict of interest having defended two co-accused of the Applicant at an earlier stage of the same case. According to the Applicant, state-provided attorneys in the Respondent State are poorly paid and, in the present case, could not afford the costs of travel to the prison. Additionally, his second appointed counsel was inexperienced as he had been called to the bar only a year before his appointment. He also avers that the Respondent State denied him access to his attorneys; time, funds and facilities to conduct full investigation into his social and health history and funds to summon witnesses. The Applicant also avers that his lawyers did not identify or call any defence witnesses and that he had only two brief meetings with them before the trial.

89. In its response to the initial Application, the Respondent State submits that the Applicant was defended by state-appointed counsel before the High Court and the prosecution witnesses were cross-examined. The Respondent State further submits that the Applicant entered his defence and exercised his right to appeal, and the allegations, therefore, lack merit and should be dismissed.

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90. Article 7(1)(c) of the Charter provides that every individual shall have "the right to defence, including the right to be defended by counsel of his choice".

91. The Court recalls that the above stated right should be understood not strictly as having to choose one's own counsel but more importantly that

legal assistance should be effective even though provided under a state-organised legal scheme.[22] In particular, the Court has previously held that effective representation should be one that provides counsel with sufficient time and means to prepare an adequate defence at all stages right from the arrest of the individual, without any interference.[23] However, the quality of defence and nature of instructions between the client and counsel is not within the responsibility of the Respondent State which may intervene only when manifest failures are brought to its attention.[24] Given that the Applicant was provided with counsel appointed by the Respondent State, the relevant issue is whether the said assistance was effective.

92. As it emerges from the record that, while the Applicant avers that his lawyers only met with him very briefly on two occasions prior to his trial, he was represented during the conviction and sentencing proceedings both before the trial and appeal courts. Furthermore, and in respect of the submission that lack of time did not permit counsel to investigate his personal, social and health history, the Applicant does not adduce evidence that authorities of the Respondent State restrained counsel in any manner. In any event, the Applicant does not demonstrate a case of failure by the Respondent State to consider a request for more time before and after the commencement of the proceedings. Notably, the fact that the trial was delayed by more than six (6) years, and requests were made by the lawyers for expedited proceedings, presented an opportunity for counsel to seek for time and means to undertake greater and more thorough investigation as they wished. In such circumstances, this Court considers that the allegation is not sufficiently substantiated, and, therefore, dismisses the same.

93. The Applicant also claims that the second appointed counsel lacked the experience and specialisation to adequately represent him because he

[22] *Gozbert Henerico v. Tanzania* (merits and reparations) §§ 107-114; *Amini Juma v. Tanzania*, *op. cit.*, §§ 91-98.
[23] *Gozbert Henerico v. Tanzania* (merits and reparations), § 109.
[24] *Ibid*, § 108.

specialised in land law, and joined the bar only a year before he was appointed.

94. The Court observes that, having been afforded legal representation in domestic proceedings, the Applicant was at liberty to raise the lack of experience and expertise of the state-appointed counsel both before the trial and appellate courts. In making this claim in the present Application, the Applicant ought to have also substantiated the lack of experience or expertise by proving how counsel failed to discharge specific duties falling within their mandate.

95. In such circumstances, this Court does not have the required elements to undertake the necessary assessment of the claims made in the present Application. The allegation is accordingly dismissed.

96. Regarding the issue whether counsel laboured under conflict of interest, it emerges from the proceedings before domestic courts that counsel initially appointed in this case had first represented the Applicant and two co-accused during the preliminary hearing. However, when the charges were dropped against the two co-accused, the same lawyer rejoined the Applicant's defence team.

97. This Court considers that its findings regarding the issue of experience and expertise of appointed-counsel apply in respect of the claim that is being examined here. A serious claim such as that of conflict of interest ought to be backed with evidence, which is lacking in the present Application. The mere fact that appointed-counsel was retained after charges against the Applicant's co-accused were dropped cannot be sufficient to establish a conflict of interest. Especially in an instance where the state appointed-counsel was selected from a pre-determined roster under an established legal aid scheme, evidence of specific unethical or similar behaviour is needed to be proved to make a successful case of conflict of interest. In the circumstances, this Court finds that such case has not been made. The allegation is therefore dismissed.

98. Finally, the Applicant also raises the issue of lack of effective representation in this matter regarding funds availed to state-appointed counsel. The Court observes that the Applicant refers to the amount of United States Dollars Thirty (USD 30) – which is the equivalent of Tanzanian Shillings Sixty-Nine Thousand (TZS 69,000)[25] – as what counsels receive for the entire case.

99. The Court notes that, in the present case, the Applicant does not provide evidence for the figures stated such as any official document or statements of practising attorneys who had in the past laboured as state-appointed counsel in cases of murder. Furthermore, a meritorious claim would have been one that advances the specific amounts which were paid to counsel in the present Application in order for this Court to be in a position to assess whether funds availed by the Respondent State meet the standards of appropriate legal representation within the meaning of Article 7(1)(c) of the Charter. Absent such substantiation, the claim cannot stand.

100. The Court notes that the Applicant also claims that his lawyers were not allowed to cross examine defence witnesses. Noting further that the claim is in relation to the defence of insanity which was duly considered by domestic courts, and having concluded as it did in respect of the other claims, this Court does not find it determinant to examine the same.

101. In light of the above, the Court finds that the Respondent State has not violated the Applicant's right to an effective legal representation protected under Article 7(1)(c) of the Charter in respect of the conflict of interest, lack of experience, and inadequate funding of state-appointed counsel.

C. Alleged violation of the rights to dignity, and to be free from cruel, inhuman or degrading treatment

[25] As at the rate of TSZ 2,300 for USD 1.

102. The Applicant alleges that his rights protected under this provision of the Charter have been violated because he was held in pre-trial dentention for more than six (6) years, held in the death row, and experienced deplorable conditions of confinement.

103. The Respondent State does not make specific submissions on this issue.

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104. The Court notes that the Applicant alleges a violation of Article 5 of the Charter in respect of the following: i) the length of his pre-trial detention, which resulted in a degrading treatment; ii) his detention in the death row; and iii) the deplorable conditions of confinement which he experienced.

105. Article 5 of the Charter provides as follows:

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

i. On the length of the Applicant's pre-trial detention resulting in a degrading treatment

106. The Applicant alleges that the six (6) and a half years that he waited in prison prior to his trial violated his right not to be subjected to degrading treatment as he experienced anxiety, depression and fear of execution.

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107. The Court considers that its earlier findings in respect of the Applicant's right to be tried without undue delay apply to the claim under consideration here.

The Court recalls that, as held in *Henerico v. Tanzania,*[26] the Respondent State bears the duty to act on judicial matters with due diligence and expediency when the case is not complex, and the Applicant is in custody, and does not contribute to delays.[27] The Court further notes that delays in proceedings involving serious crimes and facing – "well founded fear" of – the death sentence are likely to cause anxiety and psychological distress, and constitute inhuman and degrading treatment.[28]

108. Reference to the record reveals that the Respondent State justified the delays mainly by advancing the practice of "first in first out" which is observed in domestic courts. This Court considers that factors pertaining to the operations of domestic courts should be justified with details on how they apply to the circumstances of the Applicant.[29] In the present case, the Applicant being in custody and charged with murder which carries the death penalty, docket management constraints put forward by the Respondent State do not sufficiently justify why his trial only commenced after more than six (6) years after his arrest.

109. Having affirmed the finding of undue delay, this Court stresses the causal link between such delay and alleged suffering of the Applicant. As established earlier in this judgment, the Applicant was charged two (2) years after his arrest. Having pleaded not guilty by reason of insanity, he had to wait one (1) more year for the medical report to be produced, and about three (3) years due to adjournments on prosecution request to summon witnesses and contact a medical expert. In the circumstances, the average person would suffer anxiety and depression as they deal with the uncertainty inherent in the waiting. Notably, in this case, it appears that the Applicant entertained not just "well founded fear" but certainty of execution.

[26] See also *Armand Guehi v. Tanzania* (merits and reparations), § 124.
[27] *Gozbert Henerico v. Tanzania*, *op. cit.*, § 86.
[28] *Al Saadon v. United* Kingdom, ECHR, Application no. 61498/08, Judgment of 2 March 2010, §§ 136, 137; *Bayarri v. Argentina* IHRL 3060 (IACHR 2008) Judgment of 30 October 2008, §§ 81-87.
[29] *Ibid*, 88.

110. The Court, therefore, finds that the Respondent State violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter regarding the length of time spent in pre-trial detention.

ii. On the Applicant's detention in the death row

111. The Applicant avers that the length of his detention after being sentenced to death caused him anxiety and psychological anguish, which constitute a violation of his right. According to the Applicant, the *de facto* moratorium adopted by the Respondent State does not mitigate the risk of the death row phenomenon as execution may resume at any time, and conditions of detention further compound the associated psychological torture.

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112. The Court recalls that, as it has held in the earlier cited *Rajabu* judgment, death row has the inherent potential to cause an adverse impact on an individual's psychological state due to the fact that the person involved may be executed at any time.[30] The Court has taken the view, in several rulings on provisional measures involving the Respondent State, that the existing moratorium does not provide the certainty required to safeguard the right to life when it comes to the death penalty.[31]

113. The Court also considers the fact that, as at the filing this Application in 2016, the Applicant had been on the death row for at least six (6) years running from his sentencing in 2010. As at the date the present judgment, the Applicant's time on death row is twelve (12) years, and this landmark should be taken into account given the earlier finding of this Court that the

[30] *Ally Rajabu v. Tanzania* (merits and reparations), §§ 148-150.
[31] See *John Lazaro v. United Republic of Tanzania* (provisional measures) (18 March 2016) 1 AfCLR 593, §§ 16-18; *Evodius Rutechura v. United Republic of Tanzania* (provisional measures) (18 March 2016) 1 AfCLR 596, §§ 16-18; *Cosma Faustin v. United Republic of Tanzania* (provisional measures) (18 March 2016) 1 AfCLR 652, §§ 16-18.

mandatory death penalty breaches the right to life and therefore does not comport with the legal obligations of the Respondent State.

114. Having established the anguish caused to the Applicant by his lengthy detention, this Court does not deem it necessary to consider the death row claim any further only to link the ensuing harm with the "ever present shadow of death".[32]

115. The Court also finds that a thorough examination of the claim on deplorable conditions of confinement is not warranted as it intrinsically seeks to buttress the central claim that the Applicant indeed suffered and may still be suffering inhuman and degrading treatment.

116. Given the above, the Court finds that the Respondent State has violated the right not to be subjected to inhuman or degrading treatment protected by Article 5 of the Charter in respect of being kept in the death row.

VIII. REPARATIONS

117. The Applicant prays the Court to:

i. Grant him moral damages;
ii. Vacate the death sentence and grant him a new trial that comports with the fair trial guarantees in the Charter;
iii. In the alternative, direct the Respondent State to set aside the death sentence and grant him a resentencing hearing;
iv. Order the Respondent State to amend its law to ensure the respect for life; and
v. Order the Respondent State to take appropriate measures to remedy the violations within a reasonable time, and inform the Court within six (6) months of the judgment of the measures taken to implement the latter

[32] See *Soering v. United Kingdom*, ECHR, Judgment of 7 July 1989, Series A, Vol. 161, § 42.

118. The Respondent State in its submission prayed the Court to:

i. Find that it does not have jurisdiction to order the release of the Applicant; and
ii. Dismiss the Applicant claim for reparation as he is not entitled to any reparation.

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119. Article 27 for the protocol provides that: “if the Court finds that there has been violation of a human or people’s rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

120. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full prejudice suffered. Finally, the Applicant bears the onus to justify the claims made.[33]

121. As this Court has earlier found, the Respondent State violated the Applicant’s rights to life, a fair trial, and not be subjected to inhuman and degrading treatment protected under Articles 4, 7, and 5 of the Charter respectively. Based on these findings, the Respondent State’s responsibility has been established, and the prayers of the Parties will be examined thereon.

122. As stated earlier, an applicant bears the burden of providing evidence to support his/her claims for material prejudice. The Court has also previously

[33] *Amini Juma v. Tanzania* (merits and reparations), § 141; *Armand Guehi v. Tanzania* (merits and reparations), § 15; *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31.

held that the purpose of reparations is to, as much as possible, place the victim in the situation prior to the violation.[34] The Court has further held, with respect to moral prejudice, that it exercises judicial discretion in equity in determining the award.[35] In such instances, the Court has adopted the practice of awarding lump sums.[36]

A. Pecuniary reparations

123. The Court notes that the Applicant prays the Court to grant him moral damages for the prejudice that ensued from the violation of his rights. As established in this judgment, the Applicant suffered several violations which inherently involve moral prejudice. These include imposition of the mandatory death penalty, a lengthy pre-trial detention, the death row, all of them compounded by overall inhuman and degrading circumstances.

124. In similar instances, this Court has found that such circumstances unequivocally warrant moral damages which it has, in equity, assessed to the tune of Tanzanian Shillings Four Million (TZS 4,000,000) to Tanzanian Shillings Five Million (TZS 5,000,000).[37] The Court finds that there is no peculiar reason to depart from this range of awards in the present Application. However, in respect of circumstances and substantive findings of this Court, the present Application shares greater similarities with that of *Gozbert Henerico v. Tanzania*. Against these considerations, the Court awards the Applicant moral damages and therefore grant the Applicant moral damages to the tune of Tanzanian Shillings Seven Million (TZS 7,000,000).

[34] *Amini Juma v. Tanzania, ibid*, § 143.
[35] *Amini Juma v. Tanzania, ibid*, § 144; *Armand Guehi v. Tanzania*, *ibid*, § 181; *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119.
[36] *Amini Juma v. Tanzania, idem*; *Armand Guehi v. Tanzania*, *ibid*, § 177.
[37] *Amini Juma v. Tanzania, ibid*, §§ 152-158; *Gozbert Henerico v. Tanzania, ibid*, §§ 185-189.

B. Non-pecuniary reparations

125. The Applicant prays the Court to vacate the death sentence; grant him retrial and order the Respondent State to amend the provision of its law on the mandatory death sentence to ensure respect for life.

126. Noting that the Applicant also makes prayers in relation to the Respondent State's law providing for the mandatory death sentence, and in 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. Amend the law to ensure respect for life

127. The Applicant prays the Court to order that the Respondent State should amend its law to ensure the respect for life.

128. The Court recalls that, in previous judgments dealing with the mandatory death penalty involving the same Respondent State, it had ordered that the concerned provisions be removed from the Penal Code in line with its international obligations.[38] Judicial notice is taken 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. Identical orders were also issued in two other judgments delivered in 2021, and 2022, none of which has been implemented thus far.

129. In the circumstances, the main reason in the previous cases remains most current regarding this Application, which is that persons in the same situation remain at the paramount risk of being executed or facing the mandatory death sentence. Given the critical importance of the order, the Court therefore finds it appropriate to restate the same in the present Application, and orders the Respondent State to repeal the provision for the mandatory death sentence in its Penal Code.

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

ii. Restitution

130. The Applicant prays the Court to vacate the death sentence and grant him a new trial that conforms with the fair trial guarantees of the Charter.

131. In the *Rajabu* judgment cited earlier, this Court held that, because it encroaches on judicial discretion in respect of sentencing, imposition of the mandatory death penalty requires a rehearing on sentence as an adequate remedy.[39] The Court had also, in the same decision, found that the sentence can only be re-examined to the extent of its mandatory nature given mainly that the finding of violation does not affect the Applicant's guilt and conviction.[40]

132. Although the present Application has peculiarities in respect of the facts, and situation of the Applicant, the findings of the Court in respect of the right to life are ultimately on all fours with those in the *Rajabu* case. It follows that while the prayer to vacate the sentence is valid in the light of the findings in this judgment, such request should be understood as aiming to set aside the mandatory death penalty but not to provide a blank exemption from sanction, whereas the commission of the offence as adjudicated by domestic courts has remained unaffected in the proceedings before this Court.

133. This Court finds it only befitting to adopt the same remedial approach, and therefore decides to direct 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.

[39] *Ally Rajabu v. Tanzania*, *ibid*, § 158.
[40] *Idem*.

iii. Publication

134. The Parties did not make any request in respect of publication.

135. However, the Court considers that, for reasons now firmly established in its practice, and in the peculiar circumstances of this case as set out earlier, publication of this judgment is warranted. Notably, threats to life associated with the mandatory death penalty remain alive in the Respondent State, there has been no sign as to whether measures are being taken for the law to be amended, and the guarantees provided in the Charter and before this Court are still required to protect rights-holders. The Court thus finds it fit to make an order for publication.

iv. Implementation and reporting

136. The Applicant prays the Court to order the Respondent State to take appropriate measures to remedy the violations within a reasonable time, and inform the Court within six (6) months of the judgment of the measures taken to implement the latter.

137. Reasons stated in respect of the publication apply regarding the prayers on timeframe for implementation and reporting. Regarding implementation, the Court further notes that in its previous judgments issuing the order to repeal the provision on the mandatory death penalty as earlier recalled, the Respondent State was directed to implement within one (1) year.[41] Given the non-compliance established earlier in this judgment, the Court considers that restating the same timeframe in the present Application would not do justice to the paramount urgency to have the harming provision removed. Against these considerations, the Court decides to set the time for implementation at six (6) months from the date of the present judgment.

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

138. As far as the prayer for reporting is concerned, the Court considers that it is required as a matter of judicial practice. With a 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, 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 be of six (6) months in the circumstance.

139. The Court notes that the Respondent State has not implemented the orders in any of the said cases for which the deadline has expired. 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 repeal the mandatory death penalty and provide alterantives thereto.

IX. COSTS

140. In their submissions both Parties pray the Court to order that the other Party pays the costs.

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

142. In the instant case, the Court decides that each Party shall bear its own costs.

X. OPERATIVE PART

143. For these reasons:

THE COURT

Unanimously:

On Jurisdiction

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

On Admissibility

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

On Merits

v. *Finds* that the Respondent State has violated the right to life protected under Article 4 of the Charter in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;
vi. *Finds* that the Respondent State has violated the Applicant's right to be tried without undue delay protected under Article 7(1)(d) of the Charter;
vii. *Finds* that the Respondent State has violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter in relation to the lengthy pre-trial detention, detention in the death row, and confinement.

On Reparations

Pecuniary reparations

viii. *Grants* Tanzanian Shillings Seven Million (TZS 7,000,000) to the Applicant for moral damage that ensued from the violations found;

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

Non-pecuniary reparations

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

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

xii. *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;

xiii. *Orders* the Respondent state to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On Costs

xiv. *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 Judge Blaise TCHIKAYA is appended to this Judgment.

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