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

THE MATTER OF

UMALO MUSSA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 031/2016

JUDGMENT

13 JUNE 2023

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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"), Justice Imani D. ABOUD, President of the Court and a national of Tanzania did not hear the Application.

In the Matter of:

Umalo MUSSA

Self-represented

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr Boniface N. LUHENDE, Solicitor General, Office of the Solicitor General;
ii. Ms Sarah D. MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General;
iii. Ms Nkasori SARAKIYA, Assistant Director, Human Rights, Attorney General's Chambers;
iv. Mr Abubakar MRISHA, Senior State Attorney, Attorney General's Chambers;
v. Ambassador Baraka LUVANDA, Head of Legal Unit, Ministry of Foreign Affairs and East Africa Cooperation;
vi. Mr Elisha SUKU, Foreign Service Officer, Ministry of Foreign Affairs and East Africa Cooperation; and

vii. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East Africa Cooperation.

After deliberation,

renders this Judgment:

I. THE PARTIES

1. Mr. Umalo Mussa (hereinafter referred to as "the Applicant") is a national of Tanzania who, at the time of filing the Application, was awaiting execution at the Butimba Central Prison in Mwanza Region, having been tried and convicted for the offence of murder and sentenced to death. The Applicant alleges a violation of his rights to a fair trial in connection with 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 "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 (hereinafter referred to as "the Declaration") by virtue of 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 withdrawal has no bearing on pending cases and new cases filed before the withdrawal comes into effect, one (1) year after the deposit, that is, on 22 November 2020.[1]

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

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that on 18 March 1995 at Karenge village, within the District of Karagwe in Kagera region, the Applicant and two (2) other persons, who were the Applicant's co-accused but are now deceased,[2] murdered Rwabuhaya Kilai and his wife Miburo Rwabuhaya.

4. On 29 June 2005, the High Court of Bukoba convicted the Applicant on two (2) counts of murder and sentenced him to death by hanging. The Applicant lodged an appeal against his conviction and sentence at the Court of Appeal sitting at Mwanza, which, on 21 May 2009, dismissed his appeal in its entirety.

5. According to the Applicant, thereafter, on 11 March 2014, he filed a notice of motion for review of the Court of Appeal's decision, which was still pending at the time he filed the Application before this Court on 8 June 2016.

B. Alleged violations

6. The Applicant alleges:

   i. Violation of his right to be heard, insofar as the High Court and Court of Appeal convicted him and confirmed the conviction, respectively, on the basis of a self-incriminating statement sworn under duress, which he had retracted.
   ii. Violation of his rights under Article 7(1)(a) and (d) of the Charter and Article 136(a) and 107(a) 2(b) of the Constitution of Tanzania, 1977 due to the delay in the determination of his application for review.
   iii. Violation of his right to defence under Article 7(1)(c) of the Charter by not being provided a legal counsel of his choice.

[2] The record of proceedings before the High Court shows that the Applicant's two (2) co-accused died before the trial proceedings commenced but their dates of death are not specified.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application, together with a request for provisional measures, was received at the Registry on 8 June 2016 and served on the Respondent State on 26 July 2016. The Application was notified to the Executive Council of the African Union and to the State Parties to the Protocol through the Chairperson of the African Union Commission on 8 September 2016.

8. The Parties filed their pleadings on the merits within the time set by the Court. The Applicant filed his submissions on reparations but the Respondent State did not file the response thereto, despite several extensions of time granted by the Court to do so. Pleadings were closed on 14 November 2019 and the Parties were duly notified.

9. On 7 October and 16 November 2022 and 25 January 2023, the Applicant was requested to file specific pertinent documents, within thirty (30) days of receipt thereof.[3] These are, the Application for Review in Criminal Application No. 2 of 2014 with proof that it was received at the relevant Court Registry and served on the Respondent State, and the Court of Appeal's Ruling in Criminal Application No. 8 of 2013 allowing the filing of the application for review out of time. The Applicant failed to do so.

IV. PRAYERS OF THE PARTIES

10. The Applicant prays the Court to:

    i. Find that it has jurisdiction to decide the application and that it meets the admissibility requirements.

[3] The Notices to file these documents were based on Rule 51(1) of the Rules of Court, which provides that: "The Court may, during the course of the proceedings and at any other time the Court deems it appropriate, call upon the parties to file any pertinent document or to provide any relevant explanation. The Court shall formally take note of any failure to comply."

ii. Order provisional measures in accordance with Article 27(2) of the Protocol and Rule 51(1) of the Rules[4] Due to extreme gravity on account of his being on death row.
iii. Find that the Respondent State violated his rights under Articles 7(1)(a), (c) and (d) of the Charter.
iv. Order that he be paid compensation for the period of his incarceration to be assessed on the basis of "the national ratio of a citizen's income per year".
v. Order his release to repair the prejudice he suffered.

11. As regards jurisdiction and admissibility, the Respondent State prays the Court to:

i. Find that the Court is not vested with the jurisdiction to adjudicate this Application.
ii. Find that the Application does not meet the admissibility requirements stipulated under Rule 40(5) and (6) of the Rules of the Court[5] or Article 56 and Article 6(2) of the Protocol.
iii. Declare the Application inadmissible.
iv. Dismiss the Application in accordance with Rule 38 of the Rules of the Court.

12. On the merits, the Respondent State prays the Court to:

i. Find that the Applicant was convicted based on the extra-judicial statement which he voluntarily made before the justice of peace.
ii. Find that the Applicant was not tortured or induced or forced by the police to make a statement.
iii. Find that the Respondent State did not violate Article 7(1)(a) and (d) of the Charter.
iv. Find that the Respondent State did not violate Article 13(6) and 107A(2)(b) of the United Republic of Tanzania Constitution, 1977.
v. Dismiss the Application for lack of merit.
vi. Dismiss the Applicant's prayers.

[4] Rule 59(1) of the Rules of Court, 1 September 2020.
[5] Rule 50(2)(e) and (f) of the Rules of Court 1 September 2020.

vii. Order the Applicant to bear the costs of this Application.

V. JURISDICTION

13. 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.

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

15. Based on the above-cited provisions, the Court must, in every application, conduct a preliminary assessment of its jurisdiction and dispose of objections thereto, if any.

16. In the present case, the Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will, thus, address (A) this objection before dealing with other aspects of its jurisdiction (B), if necessary.

A. Objection to material jurisdiction

17. Citing *Ernest Francis Mtingwi v. Malawi*, the Respondent State avers that the Court has no appellate jurisdiction to determine matters that have been determined conclusively by the Court of Appeal of Tanzania, in particular, the admission of an extra-judicial statement as evidence. Further, the Respondent State argues that the Court does not have jurisdiction to quash

the conviction, set aside the sentence and release the Applicant from prison. The Respondent State also submits that the Application does not raise any issue on the interpretation of the Charter, the Protocol or any relevant human rights instruments ratified by Tanzania. Rather, it raises legal and evidentiary issues that were dealt with by the domestic courts.

18. The Applicant opposes the objection by arguing that, although the Court is not an appellate court, it is vested with jurisdiction over the Application as it alleges violation of rights protected by the Charter. Citing *Alex Thomas v. Tanzani*a, the Applicant contends that the Court has jurisdiction to determine whether the treatment of the alleged legal and evidentiary anomalies by the domestic courts complies with the standards of the Charter.

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19. 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.[6]

20. The Court notes that the Respondent State's objection to its material jurisdiction is premised on three (3) grounds namely: (i) the Court vesting itself with appellate jurisdiction over matters determined by its domestic courts; (ii) the Court's powers to quash convictions and set aside the death penalty legally meted out on the Applicant; and (iii) the Application raising legal issues covered in its municipal laws rather than the Charter or ratified international human rights instruments, that have already been determined by its domestic courts. The Court will now address each of the grounds raised by the Respondent State in support of its objection.

[6] *Kalebi Elisamehe v. United Republic of Tanzania*, (judgment) (26 June 2020) 4 AfCLR 265, § 18.

21. Regarding the first ground**,** the Court recalls its jurisprudence that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[7] Rather, it retains the power to assess the propriety of domestic proceedings against the standards set out in international human rights instruments ratified by the State concerned.[8]

22. Therefore, the Court will neither be sitting as an appellate court nor be reviewing evidence adduced before the Court of Appeal in Tanzania by seeking to assess the domestic proceedings that resulted in the Applicant's conviction and sentence. The Court, therefore, dismisses the first ground of the Respondent State's objection.

23. Regarding the second ground, the Court affirms that in accordance with Article 27(1) of the Protocol, "if it finds that there has been violation of human or peoples' right", it can "make appropriate orders to remedy the violation, including the payment of fair compensation or reparation". Where it deems necessary, therefore, the Court can order reparations which relate to sentences meted out to a victim of violation of human or peoples' rights. The Court thus dismisses the second ground.

24. In relation to the third ground, the Court recalls the provisions of Article 7 of the Protocol, by virtue of which it interprets and applies the provisions of the Charter and other human rights instruments ratified by the Respondent State. The Court will, therefore, determine the issues arising in the Application regardless of whether the Applicant has cited the correct provisions of the Charter and other human rights instruments ratified by the Respondent State.[9] The Court observes that in the instant case, the Applicant alleges that the Respondent State violated his right to a fair trial

[7] *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.

[8] *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.

[9] *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 32.

under Article 7 of the Charter. The Court, therefore, dismisses the third ground for the objection to its material jurisdiction.

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

B. Other aspects of jurisdiction

26. The Court notes that the Respondent State does not dispute the Court's personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,[10] it must ensure that all aspects of its jurisdiction are fulfilled before proceeding with the determination of the Application.

27. Regarding personal jurisdiction, the Court recalls, as indicated in paragraph 2 of this Judgment, that on 21 November 2019, the Respondent State deposited the instrument of withdrawal of the Declaration. The Court has held that such withdrawal does not apply retroactively. Therefore, it has no bearing on matters pending before the Court prior to filing of the instrument withdrawing the Declaration or new cases filed before the withdrawal took effect, one (1) year after the notice of withdrawal was deposited, that is, on 22 November 2020. Hence, the Court holds that it has personal jurisdiction in the present Application as it was filed before the withdrawal of the Declaration.

28. As regards its temporal jurisdiction, the Court notes that the relevant dates, in relation to the Respondent State, are those of entry into force of the Charter and the Protocol.

29. In the instant case, the Court notes that the violations alleged by the Applicant are based on the judgments of the High Court and Court of Appeal rendered on 29 June 2005 and 21 May 2009, respectively, that is, after the Respondent State had ratified the Charter and the Protocol. Furthermore,

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

the alleged violations are continuing, as the Applicant remains convicted and is awaiting execution of the death sentence imposed upon him by the High Court of Bukoba, on the basis of what he considers an unfair process.[11]

30. The Court also holds that it has territorial jurisdiction over this Application given that alleged violations occurred within the Respondent State's territory.

31. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. ADMISSIBILITY

32. In terms of 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".

33. Pursuant to Rule 49(1) and 50 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."

34. 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;

[11] *Mtikila v. Tanzania*, (merits), *supra*, § 84; *African Commission on Human and Peoples' Rights v. Kenya* (merits) (26 May 2017) 2 AfCLR 9, § 65; *Kennedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 29(ii).

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 seised 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, the Constitutive Act of the African Union or the provisions of the Charter.

35. The Court notes that the Respondent State raises two (2) objections to the admissibility of the Application. The first relates to the failure to exhaust local remedies and the second relates to whether the Application was filed within reasonable time.

A. Objection based on non-exhaustion of local remedies

36. The Respondent State argues that, contrary to Rule 40(5) of the Rules of the Court,[12] the Application was instituted prematurely. The Respondent State avers that the Applicant neither pursued the remedy of filing a constitutional petition before the High Court pursuant to Article 13(6) of the Constitution of Tanzania (1977) nor applied for the review of the Court of Appeal decision to redress the alleged violation of his right to be heard.

37. In the Reply, the Applicant contends that he exhausted local remedies before filing the Application. In his view, instituting a constitutional petition would be untenable considering that a single judge assigned to adjudicate

[12] Rule 50(2)(e) of the Rules of the Court, 1 September 2020.

constitutional petitions cannot overturn the Court of Appeal decision, which was determined by a three-judge bench. Further, the Applicant refutes the claim that the review remedy was not pursued since he filed a notice of motion for review of the Court of Appeal's decision, which was received by the "Registry of the Court of Appeal at Bukoba on 11 March 2014".

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38. The Court notes that, pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before it must fulfil the requirement of exhaustion of local remedies. The requirement aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.[13]

39. The Court has also stated in a number of cases involving the Respondent State that the remedies of filing a constitutional petition in the High Court and use of the review procedure in the Respondent State's judicial system are extraordinary remedies. Therefore, an Applicant is not required to exhaust these remedies prior to seizing this Court.[14]

40. The Court notes that the Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had, by its judgment of 21 May 2009 on the Applicant's appeal, upheld his conviction and sentence following proceedings which the Applicant alleges violated his rights. The Court therefore finds that the Applicant exhausted local remedies prior to filing the Application.

41. In view of the above, the Court dismisses the Respondent State's objection alleging that the Applicant did not exhaust local remedies.

[13] *African Commission on Human and Peoples' Rights v. Kenya* (merits), *supra*, §§ 93-94.
[14] See *Thomas v. Tanzania* (merits), *supra*, § 65; *Abubakari v. Tanzania* (merits), *supra*, §§ 66-70; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44.

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

42. The Respondent State submits that the Application was not filed within reasonable time in accordance with Rule 40(6) of the Rules of the Court[15] on four (4) grounds. First, the Respondent State avers that the application for review "which was attached by the Applicant was not filed in the Court of Appeal Registry, no proof of service was shown by the Applicant, the application was not endorsed by the Registrar, no stamp to prove that the application was received by the Respondent State, further that the application number was not given by the Court". Second, "the notice for application for review was filed after five (5) years contrary to Rule 66 of the Rules of the Court of Appeal, which prescribes that the notice of motion for review should be filed within sixty (60) days from the date of the judgment". Third, the Application before the African Court was filed after seven (7) years, contrary to the African Commission on Human and Peoples' Rights' (African Commission) decision in *Majuru v. Zimbabwe*, which establishes that filing an application after a period of six (6) months is unreasonable. Fourth, by virtue of filing the present Application, the Applicant proved that his incarceration did not impede his access to the Court.

43. In his Reply, the Applicant argues that there is no provision in the Rules of the Court on the time-limit for filing an application. Rather, reasonable time is determined on a case-by-case basis. The Applicant further contends that he filed the Application within reasonable time considering that his application for review is yet to be determined conclusively. He also avers that his incarceration on death row restricted his capacity to follow up on the hearing of the same and to access the Court of Appeal and this Court.

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[15] Rule 50(2)(f) of the Rules of the Court, 1 September 2020.

44. The Court notes that the issue for determination is whether the time taken by the Applicant to seize the Court is reasonable within the meaning of Article 56(6) of the Charter read together with Rule 50(2)(f) of the Rules.

45. Pursuant to Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, an application 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." These provisions do not set a time-limit within which the Court must be seized.

46. In connection with the first ground of the objection, namely, the application for review was never filed and served on the Respondent State, the Court notes that there is a contradiction in the Respondent State's position since on the one hand, it contests the filing and service of the application for review and, on the other hand, it acknowledges that the application was filed, albeit out of time.

47. On 7 October and 12 November 2022 and 25 January 2023 the Court requested the Applicant to file documents indicating that the Court of Appeal granted him leave to file his application for review out of time and that the said application was filed and served on the Respondent State. The Applicant failed to do so. In view of these circumstances, the Court finds that the Applicant's claim that the application for review was pending at the time the Application was filed before this Court has not been proven.

48. The Court notes, regarding the second ground of the objection, that, in any event, compliance with time limits regarding domestic proceedings is irrelevant to assessing reasonableness of time for filing Applications before this Court. The Court finds, therefore, that the Respondent State's argument that the Applicant ought to have filed the notice of motion for review of the Court of Appeal's judgment on his appeal within sixty (60) days is immaterial to the determination of the reasonableness of time taken to file the Application before this Court.

49. Furthermore, as regards the third ground, in line with its established case-law, the Court has held that the case-by-case approach applied in the African Commission's decision of *Majuru v. Zimbabwe*[16] is the applicable one, and not the six-month standard.[17] Therefore, the Respondent State's argument that the filing of an Application before this Court more than six (6) months after exhaustion of local remedies constitutes unreasonable time, cannot be sustained.

50. In the instant case, the Court notes that the Applicant exhausted local remedies on 21 May 2009, when the Court of Appeal sitting at Mwanza rendered its judgment dismissing his appeal. This should be the date used to reckon the time it took the Applicant to file the Application. However, it was only after 29 March 2010 when the Respondent State deposited the Declaration accepting the Court's jurisdiction under Article 34(6) of the Protocol that the Applicant was able to file the Application. Ordinarily, the period to be considered for the assessment of timeliness in filing the Application should be six (6) years, two (2) months and nineteen (19) days, which is the period between 29 March 2010, the date of deposit by the Respondent State of the Declaration, and 8 June 2016, the date of filing the Application.

51. The Court notes, however, that the period between 2007 and 2013 was the Court's formative years. As the Court has previously held, during the said period, members of the public, let alone persons in the situation of the Applicant in the present case, could not be presumed to have been sufficiently aware of the Court's existence so as to file their applications soon after exhaustion of local remedies.[18] Consequently, the period to be assessed for compliance with the requirement for filing the Application within reasonable time, is that between 2013, when the public would be

[16] See, Communication 308/2005 (2008) AHRLR (ACHPR 2008).
[17] *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, §§ 52-53.
[18] *Sadick Marwa v. United Republic of Tanzania*, ACtHPR, Application No. 005/2016, Judgment of 2 December 2021, § 52.

expected to have become aware of the Court, and 2016, the year the Application was filed, which is a period of three (3) years.

52. The Court recalls its jurisprudence that "… 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."[19] In view of this, the Court has taken into consideration circumstances such as incarceration and being on death row with the resultant limited movement and limited flow of information,[20] being lay without the benefit of legal assistance[21] and lack of awareness of the existence of the Court.[22] Nevertheless, these circumstances must be proven.

53. In the present Application, the Court notes that the Applicant is not only incarcerated but has been on death row since his conviction and sentencing in 2005 with the resultant limitation in movement and flow of information, which, this Court has held in previous similar instances, could cause delays in filing applications.[23] The Court finds that this situation negates the fourth ground of the Respondent State's objection, namely, that the Applicant cannot claim that he was impeded in accessing the Court, as the issue is the timeliness thereof. The Court also notes that the Applicant is self-represented before this Court.

54. In view of these circumstances, the Court finds that the period of three (3) years that it took the Applicant to file the present Application is reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

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[19] *Norbert Zongo and Others v. Burkina Faso* (merits), *supra*, § 92. See also *Thomas v. Tanzania* (merits), *supra*, § 73.
[20] *Igola Iguna v. United Republic of Tanzania*, ACtHPR, Application No. 020/2017, Judgment of 1 December 2022, §§ 37-38.
[21] *Thomas v. Tanzania* (merits), *supra*, § 73; *Jonas v. Tanzania* (merits), *supra*, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[22] *Ramadhani v. Tanzania* (merits), *ibid*, § 50; *Jonas v. Tanzania* (merits), *ibid*, § 54.
[23] *Thomas v. Tanzania* (merits), *supra*, § 73; *Jonas v. Tanzania* (merits), *supra*, § 54; *Ramadhani v. Tanzania* (merits), *supra*, § 83; *Iguna v. Tanzania*, *supra*, § 39.

55. Accordingly, the Court dismisses the Respondent State's objection to the admissibility of the Application based on failure to file the Application within reasonable time.

C. Other admissibility requirements

56. The Court notes that there is no contention regarding compliance with the requirements set out in Rule 50(2) (a), (b), (c), (d) and (g) of the Rules. This notwithstanding, it must satisfy itself that the Application fulfils these requirements.

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

58. The Court also notes that the Applicant's claims seek to protect his rights guaranteed under the Charter. It also notes that one of the objectives of the Constitutive Act of the African Union as stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court, therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter and thus meets the requirements of Rule 50(2)(b) of the Rules.

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

60. The Court also finds that 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.

61. The Court also holds that the Application does not raise any matter or issues previously settled by the Respondent State in accordance with the principles of the Charter of the United Nations or the Constitutive Act of the AU as required under Rule 50(2)(g) of the Rules.

62. Therefore, 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 declares the Application admissible.

VII. MERITS

63. The Applicant alleges the violation of his fair trial rights namely (A) the right to be heard, (B) the right to be tried within a reasonable time and (C) the right to defence.

A. Alleged violation of the right to be heard

64. The Applicant makes two (2) claims regarding the right to have his cause heard, namely, that (i) the High Court wrongfully admitted into evidence the Applicant's self-incriminating statement, which he retracted and (ii) the Court of Appeal erred in law and fact by failing to consider his defence that the extrajudicial statement was made under duress.

65. The Respondent State disputes both claims, and asks the Court to subject them to strict proof. With regard to the first claim, the Respondent State argues that, following the Applicant's counsel's objection to the admission of the self-incriminating statement as evidence, the High Court conducted a trial within a trial and determined that the Applicant made the statement voluntarily. Following this finding, the High Court admitted the statement into evidence. This finding was affirmed by the Court of Appeal.

66. In relation to the second claim, the Respondent State reiterates that the Applicant made the self-incriminating statement voluntarily as confirmed by the High Court and the Court of Appeal. Further, the Applicant did not report any incident of torture to the justice of peace, who recorded his statement.

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67. Article 7(1) of the Charter stipulates that "Every individual shall have the right to have his cause heard."

68. The Court recalls its case-law that since it is not an appellate court "as a matter of principle, it is up to national courts to decide on the probative value of a particular piece of evidence."[24] It is empowered to assess how national court evaluated such evidence as against international human rights instruments.[25] Notably, among the guarantees of the right to a fair trial is that a harsh prison sentence following a conviction of a certain criminal offence should be based on strong and credible evidence.[26] The Court will consider, in turn, the two grounds related to the issue of evidence that the Applicant raises.

i. On the High Court's admission of the self-incriminating statement into evidence

69. The Court observes from the records that the crux of the Applicant's defence at the High Court and the only ground of appeal before the Court of Appeal was the admission of the extra-judicial statement into evidence. This Court therefore has to assess whether the national courts' admission of this evidence was in compliance with the Applicant's right to be heard under Article 7(1) of the Charter.

[24] *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65.
[25] *Abubakari v. Tanzania* (merits), § 173.
[26] *Ibid*, § 174.

70. The Court notes that the record of the trial proceedings shows that from the onset of the trial on 13 June 2000, the Applicant objected to the extra-judicial statement being tendered as evidence. This prompted the High Court to conduct a trial within a trial.

71. During the trial within a trial, the Applicant testified that he was arrested on 20 March 1995 and that after that, he was beaten by '*sungusungu*'[27] He was then taken to the District Court on 23 March 1995 which ordered that he be held on remand. The Applicant further testified that instead of being remanded in prison as per the District Court's orders, he was taken to a police station where the police officers beat him and coerced him to confess. The police officers then took him to the justice of the peace on 24 March 1995 where he confessed to having committed the crime. The Applicant stated that he agreed to confess because he was under the impression that, by doing so he would be moved from police custody and be remanded in prison.

72. The justice of peace (PW1), also testified during the trial within a trial that, before recording the statement it was ensured that the Applicant was confessing to the crime voluntarily and complemented by the following actions: a physical examination of the Applicant for any fresh wounds or bruises; cautioning the Applicant that his statement could be used against him in court and communicating the same in Kiswahili, which the Applicant understands. Hence, the extra-judicial statement was entered as evidence at the trial before the High Court.

73. The Court observes that the High Court also addressed the contention as to whether the Applicant signed the confession. Again, the High Court was satisfied with the testimony of PW1 that the Applicant signed the statement in her presence after she read it out to him. Moreover, in addressing the anomaly of keeping the Applicant in police custody instead of taking him to prison, the Court notes that after the trial within a trial, the High Court ruled

[27] A vigilante group or informal security force.

that: "*Other discrepancies i.e., non-sending the accused to prison does not go to the issue of voluntariness. That is too remote*." Hence, the self-incriminating statement was entered as evidence at the trial before the High Court.

74. Following the admission into evidence of the self-incriminating statement, the High Court resumed the main trial. The Court notes that the High Court dismissed the oral evidence of two prosecution witnesses (PW2 and PW3) due to the inconsistencies in their testimonies. Therefore, of the three (3) prosecution witnesses' testimony, the High Court only relied on that of (PW1), the justice of peace, who corroborated the voluntariness of the Applicant's extra-judicial statement.

75. In addition, the High Court relied on documentary evidence, being the post-mortem report of the two (2) victims of the murder incident and the Applicant's medical examination report of 22 March 1995, showing he was not bruised. This evidence was adduced without objections either by the prosecution or the Applicant.

76. The Court therefore finds that there is nothing on record to sustain the Applicant's claim that the High Court's admission into evidence of his self-incriminating statement was inconsistent with his right to have his cause heard.

ii. On the alleged error of law and fact by the Court of Appeal

77. On the Applicant's second claim, the Court observes that the Applicant proffered one ground of appeal, that is, the failure of the High Court to observe that his conviction was based on a repudiated confession, without ascertaining whether or not the same was made voluntarily.

78. The Court notes that, the Court of Appeal affirmed that the statement admitted into evidence by the High Court was a lawfully obtained confession. This is because it revealed material aspects of the murders such as the weapons used in the killings, which were confirmed by the

victims' post-mortem reports that were tendered at the High Court. There were also the uncontested facts, including the fact that the Applicant knew that his arrest was in connection with the murder of the two (2) victims, and that the Applicant and his co-accused's escape from the crime scene connoted an intention to kill.

79. The Court of Appeal also assessed whether the Applicant's confession was made voluntarily. On the claim of torture especially, the Court of Appeal was of the view that the Applicant did not inform the justice of peace that he was tortured while in police custody, and neither did the justice of peace find any bruises on his body during the physical examination. The Court of Appeal concluded that the statement was not procured through torture and the same was truthful as corroborated by the justice of peace's testimony before the High Court.

80. The Court notes further that the Court of Appeal referred to its jurisprudence, which dictates that reliance on a confession where there is no corroboration is subject to strict requirements. These are, ascertaining whether the statement was voluntarily made, whether it was truthfully made and whether corroboration was unavailable.[28] The Court of Appeal applied these criteria to the facts of the case involving the Applicant and satisfied itself that the Applicant was properly convicted on the basis of a confession he made voluntarily.

81. The Court, therefore, holds that there is nothing on record to show that the Court of Appeal of the Respondent State denied the Applicant the opportunity to challenge his conviction and sentence.

82. Therefore, regarding the proceedings before the High Court and the Court of Appeal, the Court finds that domestic courts' treatment of the extra-judicial statement and claim of torture do not reveal non-compliance with the standards set out in the Charter.

[28] *Tuwamoi v. Uganda* [1967] EA 84 at page 91. "Point of law is this: this court is entitled to convict an accused on a retracted/repudiated confession if it satisfied after taking into account material points of the case that what has been stated in the statement is nothing but the truth."

83. Consequently, the Court finds that the Respondent State did not violate the Applicant's right under Article 7(1) of the Charter.

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

84. The Applicant alleges that by neither listing for determination nor determining the application of review of the Court of Appeal's judgment, the Court of Appeal sitting at Bukoba violated his right to appeal protected under Article 7(1)(a) of the Charter corresponding "to Article 136(a) and 107(a) 2(b) of the Constitution of Tanzania, 1977". The Applicant alleges his application for review at the Court of Appeal, which he filed on 10 March 2014, was still pending when he filed the Application before this Court on 8 June 2016, that is, a delay of more than two (2) years.

85. The Respondent State submits that the allegation lacks merit for three (3) reasons. Firstly, the notice of motion for review of the Court of Appeal's decision was filed out of time, contrary to Rule 66(3) of the Rules of the Court of Appeal in Tanzania. Secondly, the Applicant does not prove that the Respondent State was served with the application for review. Lastly, the determination of applications for review depends on the court calendar and budget.

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86. Article 7(1)(d) of the Charter provides for "the right to be tried within a reasonable time by an impartial court or tribunal."

87. The Court refers to its decision in *Wilfred Onyango Nganyi and Others v. Tanzania*, where it held that "… there is no standard period that is considered reasonable for a court to dispose of a matter. In determining whether time is reasonable or not, each case must be treated on its own merits."[29]

[29] *Nganyi and Others v. Tanzania* (merits), *supra*, § 135.

88. In assessing the reasonableness of the length of domestic proceedings, the Court takes into account the conduct of the Applicant and the due diligence of the Respondent State in disposing of the proceedings.[30] The Court has emphasised that "there rests a special duty upon authorities of domestic courts to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay."[31]

89. The Respondent State contests the Applicant's claim that he filed the application for review within time in the Registry of the Court of Appeal and served the said application on the Respondent State.

90. As noted in paragraph 9 of this Judgment, the Applicant failed to provide evidence that the Court of Appeal granted him leave to file the application for review out of time. He also failed to provide evidence that, after being granted such leave, he actually filed the application for review before the Registry of the Court of Appeal and duly served it on the Respondent State as required under the Court of Appeal Rules.[32]

91. The Court notes therefore that, the Applicant has not provided it with evidence or information that would enable it to assess whether there was indeed a delay in the listing and determination of his application for review.

92. In view of this, the Court therefore dismisses the Applicant's claim that there was a delay in the scheduling and determination of his application for review. The Court therefore finds no violation of the Charter has been established in this regard.

93. The Court has previously held that it does not apply domestic law in determining whether the State is in compliance with the Charter or any other

[30] *Ibid*, §§ 134 and 136.
[31] *Ibid*, § 153.
[32] Rules 66 (3) and (4) of the Court of Appeal Rules, 2009, provide that:
(3) The notice of motion for review shall be filed within sixty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review.
(4) Copies of the notice of motion for review shall be served on the other party or parties as the case may be within fourteen days from the date of filing. The party filing the notice shall file proof of service with the court.

human rights instrument it has ratified. The Court, therefore, finds it unnecessary to determine whether the provisions of the Respondent State's Constitution cited by the Applicant were violated.

C. Alleged violation of the right to defence

94. The Applicant alleges that the Respondent State violated his right to counsel of his choice protected under Article 7(1)(c) of the Charter.

95. The Respondent State did not make any submissions regarding this allegation.

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

97. 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 any one charged with a serious criminal offence, the right to be automatically assigned counsel free of charge whenever the interests of justice so require.[33] The Court has also previously held that, the obligation to provide free legal assistance to persons facing serious charges, which carry a heavy penalty, applies to both the trial and appellate stages.[34]

98. While the Applicant has not substantiated this claim, the Court notes, from the records, that the Applicant was represented by Mr. Katabalwa and Mr. Rweyemamu at the High Court, and by Mr. S. Kahangwa[35] at the Court of Appeal. The Court also notes that all three (3) counsel were provided at the Respondent State's expense. Further, the Court observes that nothing on

[33] *Thomas v. Tanzania* (merits), *supra*, § 124.
[34] *Idem*; *Nganyi and Others v. Tanzania* (merits), *supra*, § 183.
[35] These are the names of Counsel as they appear on the record.

record shows that there was any objection raised before the national courts relating to whether these counsels carried out their duties to the detriment of the Applicant's right to defence.[36]

99. The Court, therefore, finds that the Respondent State did not violate Article 7(1)(c) of the Charter.

100. Having held that the Respondent State did not violate the rights of the Applicant, the Court notes, from the record, that the Applicant was mandatorily sentenced to death. The Court, in the circumstances reiterates its finding in its previous cases[37] that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State.

VIII. REPARATIONS

101. 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."

102. The Applicant prays for an order that he be paid compensation for the period of his incarceration to be assessed on the basis of "the national ratio of a citizen's income per year". He also prays the Court to order his release to repair the prejudice he suffered due to the Respondent State not affording him the counsel of his choice.

103. The Respondent State did not respond to the Applicant's submissions on reparations despite being served with the said submissions on 20 August

[36] *Evodius Rutechura v. United Republic of Tanzania*, ACtHPR, Application No. 004/2016, Judgment of 26 February 2021 (merits and reparations), § 75.
[37] *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; *Gozbert Henerico v. United Republic of Tanzania*, ACtHPR, Application No. 056/2016, Judgment of 10 January 2022, § 160.

2018, with thirty (30) day extensions on 27 September 2018, 20 December 2018, and 15 February 2019 respectively.

104. In the instant case, the Court has established that the Respondent State did not violate any of the Applicant's rights as alleged.

105. In view of the foregoing, the Applicant's prayers for reparations are dismissed.

IX. ON THE REQUEST FOR PROVISIONAL MEASURES

106. The Court recalls that the Applicant prayed for provisional measures "due to extreme gravity on account of his being on death row". The Respondent State did not respond to this prayer.

107. The Court holds that this decision on the merits renders the request for provisional measures moot. Consequently, it is no longer necessary to rule on the request for provisional measures.

X. COSTS

108. The Applicant did not make specific prayers as to costs.

109. The Respondent State prays that the Court orders the Applicant to bear the costs of the Application.

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

111. The Court orders that, in the circumstances of this case, each Party shall bear its own costs.

XI. OPERATIVE PART

112. For these reasons:

THE COURT,

On jurisdiction

Unanimously,

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

On admissibility

By a majority of Seven (7) for, and Three (3) against, Justice Ben KIOKO, Justice Tujilane R. CHIZUMILA and Justice Dennis D. ADJEI dissenting,

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

On merits

By a majority of Six (6) for, and One (1) against, Justice Chafika BENSAOULA dissenting, and Justices Ben KIOKO, Tujilane R. CHIZUMILA and Dennis D. ADJEI having dissented on admissibility,

v. *Finds* that the Respondent State did not violate the Applicant's right to be heard under Article 7(1) of the Charter with regard to convicting the Applicant on the basis of his confession;
vi. *Finds* that the Respondent State did not violate the Applicant's right under Article 7(1) of the Charter by allegedly delaying in determining the application for review of the Court of Appeal's judgment;

vii. *Finds* that the Respondent State did not violate the Applicant's right to defence under Article 7(1)(c) with regard to providing the Applicant a Counsel of his choice.

Unanimously,

On reparations

viii. *Dismisses* the Applicant's prayers for reparations.

On the request for provisional measures

ix. *Finds* that the request for provisional measures is moot.

On costs

x. *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 Joint Dissenting Opinion of Justice Ben KIOKO, Justice Tujilane R. Chizumila and Justice Dennis D. ADJEI; the Dissenting Opinion of Justice Chafika BENSAOULA; and the Separate Opinion of Justice Blaise Tchikaya, Vice President, are appended to this Judgment.

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