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

MULOKOZI ANATORY

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 057/2016

JUDGMENT

5 SEPTEMBER 2023

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

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The Court composed of: Modibo SACKO, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Dennis D. ADJEI – Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"),[1] Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

Mulokozi ANATORY,

Self-represented

Versus

UNITED REPUBLIC OF TANZANIA,

Represented by:

i. Dr Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General;
ii. Ms Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General;
iii. Mr. Baraka LUVANDA, Ambassador, Head of Legal Unit, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation.
iv. Ms. Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Ministry of Justice and Constitutional Affairs, Attorney General's Chambers;

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

v. Mr. Mark MULWAMBO, Principal State Attorney, Ministry of Justice and Constitutional Affairs, Attorney General's Chambers
vi. Mr. Richard J. KILANGA, Senior State Attorney, Ministry of Justice and Constitutional Affairs, Attorney General's Chambers; and
vii. Ms. Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Mulokozi Anatory (hereinafter referred to as "the Applicant") who, at the time of his incarceration at Butimba Central Prison in Mwanza Region was nineteen years old, awaiting execution of a death sentence by hanging for the offence of murder. He alleges the violation of his right to a fair trial in connections with proceedings before the 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, on 29 March 2010, the Respondent State deposited the Declaration prescribed 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 applications from Individuals and Non-Governmental Organisations (hereinafter referred to as "NGOs"). On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no effect on pending and new cases filed

before the entry into force of the said withdrawal one (1) year after its deposit which, in the present case, is on 22 November 2020.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the Matter

3. It emerges from the records that the Applicant, Mulokozi Anatory, and two other accomplices, Batula William and Mwarabu, grotesquely murdered Shukuru Teleshphory on 17 January 2010 between Kigarama and Rutunguru village, Karagwe District in Kagera Region. They hit him with an iron bar on the back of his head, struck him with a stick on the stomach and dismembered his body by cutting out his tongue, an ear and his genitals.

4. Following the finding of the corpse, the matter was reported to the village authorities who apprehended the Applicant and his accomplices. During the apprehension, the mob attacked the offenders and beat the two accomplices to death while the Applicant was saved by the police who rushed him to the police station for processing, where he allegedly confessed to committing the crime.

5. The Applicant was charged and convicted of the offence of murder in Criminal *Case No. 58 of 2010*[3] on 6 March 2014 by the High Court of Tanzania at Bukoba. He subsequently appealed the decision to the Court of Appeal of Tanzania at Bukoba. On 23 February 2015, the Court of Appeal dismissed the appeal on the ground that it lacked merit thereby upholding both the conviction and sentence of the High Court.

6. In his Application filed on 15 September 2016 before this Court, the Applicant requested the Court to order provisional measures restraining the

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, §§ 37-39.
[3] Contrary to Section 196 of the Penal Code CAP 16.

Respondent State from executing the death penalty pending the determination of his case.

B. Alleged violations

7. The Applicant alleges that the Respondent State violated his rights, namely:

    i. The right to equality before the law and equal protection of the law, guaranteed under Article 3(1)(2) of the Charter;
    ii. The right to dignity, guaranteed under Article 5 of the Charter; and
    iii. The right to fair trial, guaranteed under Article 7 of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. The Application, together with a request for provisional measures, was filed before this Court on 15 September 2016 and served on the Respondent State on 15 November 2016.

9. On 18 November 2016, the Court issued an Order directing the Respondent to refrain from executing the death penalty against the Applicant, pending determination of the Application. Both parties were notified of the Order on 5 December 2016.

10. The Court also considered the Applicant's request for legal aid but did not grant it.

11. The Parties filed their pleadings on the merits after several reminders. The Respondent State did not file its submissions on reparations despite two reminders to that effect.

12. Pleadings were closed on 14 June 2017 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

13. The Applicant prays the Court to:

i. Declare the Application admissible;
ii. Grant him free legal representation;
iii. Find that his rights to be heard, to a fair trial and to legal representation were violated by the Respondent State;
iv. Find that the Respondent State has violated his right to full equality before the law and his right to equal protection of the law as protected by Article 3 of the Charter;
v. Find that the Respondent State has violated his right to a fair trial as protected by Article 7 of the Charter;
vi. Set aside the guilty verdict and the punishment imposed on him and, consequently order his release from prison;
vii. Issue an order for reparation; and
viii. Order such other measures or remedies as this Honourable Court may deem appropriate.

14. The Respondent State prays the Court to:

i. Dismiss the Application as it does not meet the admissibility requirements stipulated under Rule 40 of the Rules of Court and Article 6(2) of the Protocol;
ii. Dismiss the Application in accordance with Rule 38 of the Rules of the Court;
iii. Find that the Government of the United Republic of Tanzania did not violate the Applicant's rights protected by Article 3(1)(2), 5 and 7 of the Charter;
iv. Find that the confession by the Applicant was voluntarily and freely recorded;
v. Find that the Applicant's evidence of alibi was properly considered by the High Court and the Court of Appeal;
vi. Find that the prosecution proved the case against the Applicant beyond reasonable doubt;

vii. Find that the trial against the Applicant was fair;
viii. Dismiss the Application in its entirety for lack of merit; and
ix. Order the Applicant to pay the costs of this Application.

V. JURISDICTION

15. 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.

16. On the basis of Rule 49(1) of the Rules, the Court must, in every application, preliminarily, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.[4]

17. In the present Application, the Court observes that the Respondent State raises an objection to its material jurisdiction. The Court will therefore examine the said objection before considering other aspects of jurisdiction, if necessary.

A. Objection to material jurisdiction

18. The Respondent State avers that the mandate of the Court emanates from Article 3 of the Protocol which does not vest it with jurisdiction to adjudicate over matters of evidence and procedure decided and concluded by the Court of Appeal as the highest court of the Respondent State. The Respondent State further submits that the case against the Applicant was

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

proved beyond reasonable doubt and this Court is not an appellate Court to review the facts.

19. The Respondent State also submits that this Application is calling for this Court to sit as a court of first instance and to adjudicate over matters which the Applicant never raised during the trial. It is the Respondent State's contention that the Applicant only raised two grounds of appeal before the Court of Appeal which were dealt with and dismissed, namely, the trial Judge erred in law and fact in that he failed to direct the assessor and, the trial judge grossly erred in law and fact by basing his conviction on the caution statement.

20. The Respondent State finally contends that the mandate of this Court is to make declaratory orders and not to reverse the decisions of the Court of Appeal. According to the Respondent State, the Applicant is calling for this Court to act as an appellate court by reversing the decision of the Court of Appeal with regard to its finding on the matter of the cautioned statement on which the court already pronounced itself at pages 15-17 of its judgment.

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21. The Applicant on his part argues that Article 3, 5(3) of the Protocol, read together with Rule 26[5] of the Rules of the Court, gives this Court the power to deal with the violations of his fundamental human rights as guaranteed under the Constitution of the United Republic of Tanzania and also enshrined in Article 3, 5, 6, 7(1), 14 and 26 of the Charter. The Applicant further contends that the Respondent State, being a party to the Protocol and the Charter, and having also deposited the Declaration required under Article 34(6) of the Protocol, this Court has material jurisdiction to hear the present Application.

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[5] Rule 29 of the Rules of the Court, 25 September 2020.

22. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine "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".[6]

23. In the present Application, the Court notes that the Applicant has alleged violations of provisions of the Charter, specifically, Article 3(1)(2) of the Charter on the right to equality before the law and equal protection of the law; Article 5 of the Charter on the right to dignity and Article 7 of the Charter on the right to fair trial. The Court notes that these rights are protected by the Charter and the International Convention on Civil and Political Rights (hereinafter referred to as "ICCPR") to which the Respondent State is a party.

24. With regard to the objection that this Court would be sitting as a court of first instance if it were to adjudicate over matters which the Applicant never raised during his trial, namely the caution statement, this Court observes that one of the two grounds of appeal raised by the Applicant at the Court of Appeal was that the "trial judge grossly erred in law and fact by basing his conviction on the caution statement". As such it cannot be said that these matters are being raised before the Court for the first time as the Court of Appeal already pronounced itself on the same at pages 15-17 of the judgement. Consequently, the Respondent State's objection in this regard is dismissed.

25. Finally, on the objection to this Court sitting as an appellate court, it recalls its established case-law that although it is not an appellate body with respect to decisions of national courts,[7] this does not preclude it from examining proceedings of the said courts in order to determine whether they were conducted in accordance with the standards set out in the Charter or any

[6] See, for instance, *Cheusi v. Tanzania*, (judgment) *supra*, §§ 37-39; *Kalebi Elisamehe v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 265, § 18; *Gozbert Henrico v. United Republic of Tanzania*, ACtHPR, Application No. 056/2016, Judgment of 10 January 2022 (merits and reparations), §§ 38-40.
[7] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14.

other human rights instruments ratified by the State concerned."[8] As such, in the present Application, the Court would not be sitting as an appellate court, if it were to examine the allegations made by the Applicant simply because they relate to the assessment of evidentiary issues. Consequently, the Respondent State's objection in this regard is dismissed**.**

26. As a consequence of the foregoing, the Court finds that it has material jurisdiction to consider the present Application and dismisses the Respondent State's objection.

B. Other aspects of jurisdiction

27. The Court notes that its personal, temporal and territorial jurisdiction are not contested by the Respondent State. Nonetheless, in line with Rule 49(1) of the Rules,[9] it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

28. In relation to its personal jurisdiction, the Court recalls as indicated in paragraph 2 of the judgment, that the Respondent State is a party to the Protocol and deposited the Declaration under Article 34(6) of the Protocol with the Chairperson of the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.[10] This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court holds that it has personal jurisdiction.

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[8] *Mtingwi v. Malawi*, *ibid*; *Kennedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Armand Guehi v. Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.
[9] Rule 39(1) of Rules of Court, 2 June 2010.
[10] *Cheusi v. Tanzania* (judgment), *supra*, §§ 35-39.

29. Regarding temporal jurisdiction, the Court observes that the alleged violations took place after the ratification of the Charter, the Protocol and the depositing of the Declaration by the Respondent State.

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

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

VI. ADMISSIBILITY

32. 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."

33. 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."[11]

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

> Applications filed before the Court shall comply with all of the following conditions:
>
> a. Indicate their authors even though the latter requests anonymity;
> b. Are compatible with the Constitutive Act of the African Union and the Charter;

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

c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
d. Are not based exclusively on news disseminated through the mass media;
e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

35. The Respondent State raises objections to the admissibility of the Application, based on non-exhaustion of local remedies. The Court will therefore examine the said objection before considering other conditions of admissibility if necessary.

A. Objection to admissibility on ground of failure to exhaust local remedies

36. The Respondent State contends that as decided by this Court in *Urban Mkandawire v. Malawi* and *Peter Joseph Chacha v. Tanzania*, the Applicant has not met the admissibility requirement provided under Rule 40(5) of the Rules of Court, since the Applicant did not exhaust all local remedies prior to filing this Application before this Court. Further, citing the jurisprudence of the African Commission on Human and Peoples' Rights in *Article 19 v. Eritrea*, the Respondent State avers that the Applicant never made an attempt to exhaust local remedies before the domestic courts, which is also contrary to Article 56(5) of the Charter.

37. The Respondent State also avers that the Applicant did not raise the allegation that his conviction was based on circumstantial evidence before

the Court of Appeal. Additionally, he does not expound on the circumstantial evidence he alludes to before this Court. As an additional objection in this regard, the Respondent State contends that the Applicant is raising for the first time the defence of an alibi, whilst he had the opportunity to raise it during the proceedings before the High Court and Court of Appeal. According to the Respondent State, after the Court of Appeal decision, the Applicant had the possibility of requesting for a review under Rule 66 of the Court of Appeals Rules on the grounds that the decision was based on a manifest error which resulted in a miscarriage of justice.

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38. On his part, the Applicant maintains that he exhausted all the local remedies by filing an appeal against the decision of the High Court of Tanzania before the Appeal Court, which is the highest court of the country. He further submits that since the Court of Appeal had rendered a decision on his appeal, it would be unreasonable to require him to file a new application in respect of his right to a fair trial before the High Court which is a court of a lower rank in relation to the Court of Appeal.

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39. This 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 shall fulfil the requirement of exhaustion of local remedies, unless the same are unavailable, ineffective and insufficient or the domestic proceedings are unduly prolonged.[12] The rule of exhaustion of local remedies aims at providing states the opportunity to resolve cases of alleged human rights violations within their jurisdiction before an international human rights body is called upon to determine the state's

[12] *Peter Joseph Chacha v. United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 142-144; *Almas Mohamed Muwinda and Others v. United Republic of Tanzania*, ACtHPR, Application No. 030/2017, Judgment of 24 March 2022 (merits and reparations), § 43.

responsibility for the same.[13] Moreover, for local remedies to be exhausted, the Applicant must have presented before domestic courts, at least in substance, the claims that he raises before this Court.

40. The Court reiterates its jurisprudence where it has held that:

> ... where an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby afforded an opportunity to pronounce themselves on possible human rights breaches. This is because the alleged human rights violations form part of the bundle of rights and guarantees that were related to or were the basis of the proceedings before domestic courts. In such a situation it would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for such claims.[14]

41. The Court observes that the claims raised by the Applicant in this Application were also raised in substance at the national courts, given that he had also challenged the procedure leading to his conviction. The Respondent State thus had the opportunity to redress the alleged violations.

42. The Court further observes that in the instant Application, the Applicant's allegations about his conviction being based on circumstantial evidence and the defence of an alibi, revolve around issues relating to the proceedings before the domestic courts. Both the High Court and Court of Appeal considered the issue of circumstantial evidence and pronounced themselves on it. Additionally, the issue of the defence of alibi was raised by the Applicant but it was determined that the Applicant did not follow the applicable legal procedures for raising this defence. In any case, even if the

[13] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.
[14] *Jibu Amir alias Mussa and Another v. United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019, § 37; *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 60-65, *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Ernest Karatta, Walafried Millinga, Ahmed Kabunga and 1744 Others v. United Republic of Tanzania*, ACtHPR, Application No. 002/2017, Judgment of 30 September 2021 (merits and reparations), § 57.

issues alleged as being raised for the first time before the Court were not considered by the domestic courts, the latter ought to have been aware of them as they were precipitated by national proceedings.

43. In the circumstances, the issues alleged as being raised for the first time before this Court should be considered as part of the "bundle of rights and guarantees" relating to the right to a fair trial that led to the Applicant's appeal. As such, the Applicant did not need to go back to the High Court, since the Respondent State already had the opportunity to address the possible human rights breaches before the domestic courts.[15]

44. Regarding the filing of a constitutional petition before the Respondent State's High Court, as provided for under Article 13 of the Respondent State's Constitution, the Court has consistently held that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust prior to seizing this Court.[16]

45. Consequently, the Court holds that local remedies were exhausted 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.

B. Other admissibility requirements

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

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

[15] *Thomas v. Tanzania* (merits), *supra*, § 60.
[16] *Thomas v. Tanzania*, *ibid*, §§ 60-62; *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44.

48. The Court 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. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union.

49. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

50. The Application is not based exclusively on news disseminated through mass media as it is founded on legal documents in fulfilment with Rule 50(2)(d) of the Rules.

51. In relation to filing the Application within a reasonable time, the Court notes that the Applicant filed his Application before this Court on 15 September 2016 after the Court of Appeal had dismissed his appeal on 23 February 2015, that is one (1) year, six (6) months and twenty-three (23) days after the dismissal. The issue, therefore, is whether the period between the exhaustion of local remedies and the referral to the Court constitutes a reasonable time within the meaning of Article 50(2)(e) of the Rules. Pursuant to the jurisprudence of the Court,[17] it considers that this time frame for filing an application before it is manifestly reasonable and in compliance with Rule 50(2)(f) of the Rules.

52. Furthermore, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the

[17] *Bernard Balele v. United Republic of Tanzania,* ACtHPR, Application No. 026/2016, Judgment of 30 September 2021 (merits and reparations); *Hamis Shaban alias Hamis Ustadh v. United Republic of Tanzania, ACtHPR*, Application No. 026/2015, Judgment of 2 December 2021 (merits and reparations), §§ 59-60*; Mussa Zanzibar v. United Republic of Tanzania, Application* No. 022/2016 Judgment of 26 February 2021 (merits and reparations), § 44.

provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.

53. The Court, therefore, finds that all the admissibility requirements of Rule 50(2)(b) of the Rules have been met and that this Application is admissible.

VII. MERITS

54. The Applicant alleges the violation of his rights to equality before the law and equal protection of the law guaranteed under Article 3(1)(2) of the Charter, the right to dignity guaranteed under Article 5 of the Charter and the right to a fair trial guaranteed under Article 7 of the Charter. The Court will now examine these allegations in turns.

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

55. The Applicant simply alleges that the Respondent State violated his right to be treated equally before the law and to be provided with equal protection before the law.

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56. The Respondent State on its part avers that Article 13(1) of the Constitution of the United Republic of Tanzania provides that all persons are equal before the law and are entitled without discrimination to protection and equality before the law. It further contends that there was no violation of the Applicant's rights provided under Article 3 of the Charter and Article 13 of the Constitution of the United Republic of Tanzania, 1977.

57. According to the Respondent State, the Applicant was charged with murder, and was presumed to be innocent. He was present at his trial, and was provided with free legal representation throughout the trial by two Advocates at the High Court and one Advocate at the Court of Appeal. He was also

afforded an opportunity through his counsel to cross examine the prosecution witnesses and to testify during the trial.

58. The Respondent State further avers that, to ensure equal protection before the law, the High Court proceedings were conducted in the presence of three Court Assessors. It therefore surmises that the Applicant's allegations that he was not treated equally or protected before the law lack merit and should be duly dismissed.

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59. Article 3 of the Charter guarantees the right to equal protection of the law and to equality before the law provides as follows:

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

60. In its jurisprudence, this Court has held that equality and non-discrimination are fundamental principles of international human rights law which everyone should enjoy without distinction.[18] The Court also reiterates that violation of the rights to equal protection of the law and non-discrimination presupposes that persons in a similar or identical situation have been treated differently.[19]

61. In the instant case, the Court observes that the Applicant simply states that the Respondent State violated his right to equal protection of the law and to equality before the law, without demonstrating how it did so. Notwithstanding this, records on file show that the Applicant was present at his trial and was represented by counsel before the High Court and Court of Appeal. Furthermore, a *voir dire*[20] was conducted to consider whether the caution statement was recorded voluntarily and he was given an opportunity through his counsel to cross examine the prosecution witnesses and to

[18] *APDH v. Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668 § 142.
[19] *Thomas v. Tanzania* (merits), *supra*, § 140 and *Isiaga v. Tanzania* (merits), § 85.
[20] This is a preliminary examination of a witness to ascertain the truth or admissibility of evidence held during a trial.

testify on his own behalf and, finally, that the trial was held in the presence of three assessors.

62. In *Minani Evarist v. United Republic of Tanzania,* the Court reiterated that "[g]eneral statements to the effect that [a] right has been violated are not enough. More substantiation is required."[21] Any alleged violation of Article 3 of the Charter, therefore, must be accompanied by adequate evidence to substantiate the allegation.[22]

63. Accordingly, the Court holds that the allegation has no basis as the Applicant has failed to demonstrate how his right to equality before the law and equal protection of the law was violated.

64. In view of the foregoing, the Court dismisses the allegation that the Respondent State violated the Applicant's rights to equality and equal protection of the law guaranteed under Article 3(1) and (2) of the Charter.

B. Alleged violation of the right to dignity

65. The Applicant avers that his conviction was based on a caution statement which he later retracted. He further avers that he repudiated the caution statement because it was "induced by violence" and recorded involuntarily, after he was slapped, punched, beaten up and threatened. Moreover, during the *voir dire* conducted by the High Court to ascertain whether the statement was recorded voluntarily, he informed the court that he was beaten up by both the mob before he was arrested and while at the police station with a "kirungu [Truncheon]". He submitted at the trial that during his arrest, he sustained injuries all over his body, including his head and face, which were inflicted by the people who arrested him.[23]

[21] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 140; *George Maili Kemboge v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 369, § 51.
[22] *Minani Evarist v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 75.
[23] See record of proceedings at the *voire dire* held at High Court, page 51.

66. The Applicant further submits that during the *voir dire*, the High Court did not take into account all relevant factors, such as the fact that the statement was recorded while he was admitted at the hospital, after having been attacked by a mob bent on killing him. As such he was not "a free agent on recording the statement".

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67. The Respondent State avers that the Applicant was treated during his trial in accordance with the Constitution and laws of the land. it further avers that if at all his right to dignity was violated, he was supposed to have raised this before the domestic courts. Therefore, this allegation should be dismissed for lack of merit

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68. Article 5 of the Charter, which the Applicant alleges has been violated, 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, in human or degrading punishment and treatment shall be prohibited.

69. The Court reiterates its jurisprudence that in determining whether the right to dignity has been violated, three main factors must be considered. First, Article 5 has no limitation clause. The prohibition of indignity manifested in cruel, inhuman and degrading treatment is thus absolute. Second, the prohibition must be interpreted to extend to the widest possible protection against abuse, whether physical or mental. Finally, personal suffering and indignity can take various forms, the assessment of which will depend on the circumstances of each case.[24]

[24] *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 88.

70. In the instant case, the Court notes that the Applicant is challenging the validity of the caution statement admitted by the High Court as evidence because, according to him, it was involuntarily recorded after he had been threatened, beaten and coerced into recording it at the police station. The Court finds that the Applicant does not provide any evidence to prove the allegation of torture or intimidation by the police authorities. In fact, records on file indicate that on 11 February 2014, the High Court held the *voir dire* to determine whether the Applicant freely recorded the caution statement or was forced to do so using threat and violence.

71. On 17 February 2014, the High Court ruled that the caution statement was recorded voluntarily by the Applicant and thereafter, admitted it as part of the evidence. In coming to this conclusion, the court considered the Applicant's assertions that he only signed the form which was written for him without knowing its contents, after he had been slapped and punched. The court observed that the specific details provided in the caution statement and the narration of the planning and execution of the murder was very specific and could only have been known by the Applicant. The court also considered the fact that if the police wanted to frame the Applicant, then the statement would have indicated that the Applicant personally carried out the murder rather than implicating the two deceased accomplices. Furthermore, the court considered the short period of time it took the Applicant to record the statement at the police station before he was transferred to the hospital for medical treatment and, finally, it considered the grateful demeanor of the Applicant towards the police for rescuing him from the mob which was set on killing him as it did to the two accomplices. In view of all the above, the court concluded that the Applicant was not beaten by the police but rather by the mob and that the caution statement was voluntarily recorded.

72. This Court observes that the record of proceedings at the High Court show that the Applicant alleged that he had been beaten by both the mob and at

the police station.[25] However, during the cross examination by the assessors, the Applicant reported that "There were many people at the scene of the incident. They were more than three hundred people. They were attacking us".[26] In view of all the above considerations, the Court finds that the Applicant's claims have not met the threshold of satisfying the three criteria mentioned above.

73. The Court observes that although the Applicant did not allege the violation of the right to life, he was convicted of murder and sentenced to death by hanging. The Court in its previous jurisprudence[27] has acknowledged the global trends towards the abolition of the death penalty, represented, in part, by the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[28] At the same time, however, it notes that the death penalty remains on the statute books of some States and that no treaty on the abolition of the death penalty has gained universal ratification.[29] As regards the Second Optional Protocol to the ICCPR, the Court notes that as at 28 June 2023, ninety (90) State Parties out of the one hundred-seventy-three (173) State Parties to the ICCPR have ratified it.[30]

74. Given the framing of Article 4 of the Charter, and the broader developments in international law in relation to the death penalty, the Court has held that this type of punishment should exceptionally be reserved only for the most heinous of offences committed in seriously aggravating circumstances. However, since the circumstances for which the death penalty may be

[25] See page 24 of the Record of Proceedings at the High Court.
[26] See page 55 of the Record of Proceedings at the High Court.
[27] *Ghati Mwita v. United Republic of Tanzania*, ACtHPR, Application No. 012/2017, Judgment of 1 December 2022 (merits and reparations), §§ 64-66.
[28] *Amini Juma v. United Republic of Tanzania*, ACtHPR, Application No.024/2016, Judgment of 30 September 2021 (merits and reparations), § 122 and *Ally Rajabu and Others v. United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations), § 96. Notably, the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.
[29] For a comprehensive statement on developments in relation to the death penalty, see, United Nations General Assembly Moratorium on the use of the death penalty – Report of the Secretary General 8 August 2022.
[30] https://indicators.ohchr.org/

appropriate cannot be categorised with exactitude, the determination of incidents of crimes warranting the imposition of the death penalty must be left to domestic courts to decide on a case-by-case basis.

75. In the instant case, the Court finds that the Applicant was tried, convicted and sentenced in accordance with international human rights standards for an offence that was criminalised under the domestic laws. He was also provided with all the guarantees to ensure a fair trial. As such, there is no reason to question the grounds for the decisions of the domestic courts. Given the preceding, the Court finds that the Applicant's sentence to death was imposed on a most heinous offence committed by the Applicant.

76. Consequently, the Court finds that the Respondent State did not violate the Applicant's right to dignity guaranteed under Article 5 of the Charter.

C. Alleged violation of the right to a fair trial

77. Under this allegation, the Applicant avers that:

i. The Respondent State used circumstantial and repudiated evidence to convict him.
ii. He was subjected to violence by the police to force him to record the caution statement.
iii. The prosecution did not prove the case beyond reasonable doubt.
iv. The defence of alibi was not considered by the High Court and the Court of Appeal.

78. The Court observes that the Applicant used similar arguments for the allegations reflected under paragraph 75(i), (ii) and (iii) above, that the Respondent State used circumstantial and repudiated evidence and a caution statement that was forcefully recorded through use of violence to convict him, without proving his guilt beyond a reasonable doubt. These three allegations will therefore be considered jointly. Suffice it to note that some of the submissions made by the Parties in this regard are also made

under the alleged violation of the right to dignity, above. The Court will now consider the three (3) allegations jointly, before proceeding to examine the allegation of non-consideration of the defence of an alibi.

i. Allegation that the case was not considered beyond a reasonable doubt

79. The Applicant avers that the evidence submitted by the Respondent State during his trial was based on a caution statement that was recorded under duress since he was forced to record it while receiving treatment at the hospital after having been attacked by a mob.

80. The Applicant submits that he was convicted not only on the basis of circumstantial evidence and a repudiated caution statement but also because he was suspected of being a habitual thief. He alleges that if the courts **"**had investigated properly**"**, they would have established facts to illustrate that the case was not proved beyond a reasonable doubt and would not have convicted him of such a serious offence like murder that carries the death penalty.

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81. In relation to the reliance on circumstantial evidence, the Respondent State avers that the caution statement was recorded voluntarily, is true and is supported by the evidence provided by the arresting police officer, PW4, D 7759 D/CPL Ahmed, who reported that "It was the same date i.e., 29.01.2010 when we were at the hospital, he told me how the whole incident started and what happened. I realised that what he was telling me was important so I decide**d** to record his statement so that it helps in the future. I told him that I wanted to record his statement. He said that he was willing."[31]

82. The Respondent State submits that the confession by the Applicant satisfied the requirement under Section 27 of the Evidence Act [Cap 6 R.E. 2002],

[31] See at page 11 of the judgment of the High Court/ page 96 of the Court of Appeal Record (Attached to the Application)

since it was made voluntarily and this was proved by the prosecution beyond a reasonable doubt. Furthermore, the court satisfied itself that it was not induced by any threat, promise or other prejudice.[32] **I**t asserts that the caution statement was recorded in compliance with Section 54(1) of the Criminal Procedure Act [Cap 20 R.E 2002] which obliges a police officer to notify the arrested person of his right to call an advocate, relative or friend to be present when recording the statement, which PW4 did. That the Applicant was notified of this right but declined to have anyone present and after the statement was recorded by PW4, it was read back to him and he agreed to sign it.

83. The Respondent State argues that the Applicant's decision to retract/repudiate his own statement at the trial was an afterthought because it vividly explains how the grotesque murder was planned and executed. In any case, it submits, that a retracted confession can be safely relied upon as was held by the Court of Appeal of Tanzania in the case of *Hassan Juma Kanenyera and Others v. Republic* [1992] TLR, 100. The Respondent State further argues that just because the statement was recorded at a hospital does not diminish the fact that it was recorded voluntarily since the Applicant was not forced or induced to record it as determined by the High Court when the *voire dire* was held. As such this allegation should be dismissed for lack of merit.

84. Citing its own jurisprudence in the Court of Appeal case in *Goodluck Kyando v. Republic* [2006], the Respondent State surmises that the prosecution proved its case beyond reasonable doubt since all the prosecution witnesses were credible and reliable and therefore, there was no need to disbelieve their testimony. Moreover, the law does not prohibit conviction based on circumstantial evidence if it leads to the conclusion that it is the accused person who committed the offence he has been charged with. The Respondent State surmises that the Applicant was not convicted solely on the circumstantial evidence alone but on the caution statement as well

[32] See page 16 of the Court of Appeal judgment the Court stated that; - "like the learned trial judge we are satisfied that the appellant gave the statement voluntary".

which was corroborated by the evidence of PW1, one Liberius Pastory.[33] For these reasons, the Respondent State contends, this allegation should be dismissed for the lack merit.

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85. The Court observes that the issues raised by the Applicant i.e., the Respondent State's use of repudiated circumstantial evidence to convict him without proving his case beyond a reasonable doubt relate to the right to have one's cause heard, in particular Article 7(b) and (c) of the Charter and Articles 14(2) and Article 14(3)(e) of the ICCPR.

86. Article 7(b) and (c) of the Charter provide that:

> "Every individual shall have the right to have his cause heard. This comprises:
>
> b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
> c. The right to defence, including the right to be defended by counsel of his choice.

87. Article 14(2) of the ICCPR provides that:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"

88. Article 14(3)(e) of the ICCPR, provides that:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

[33] At page 11/12 and 97/98 of the Court of Appeal Record also at pages 12/13 of the judgment of the High Court.

89. As already noted in paragraph 79 above, the Parties submitted the same arguments made under the alleged violation of the right to dignity. In view of this, the Court will not belabour the consideration of this claim. It suffices to state that the records reveal that the Court of Appeal of Tanzania ascertained through a *voir dire,* that the Applicant's caution statement was recorded freely without the use of force and this was collaborated by witness statements. The *voir dire* resulted into the caution statement being admitted as part of the evidence.

90. This Court previously held in the Matter of *Mohamed Abubakari v. United Republic of Tanzania*, that a fair trial requires that where a person faces a heavy prison sentence, that person must be convicted on strong and credible evidence.[34]

91. The Court notes that, as records on file illustrate, the evidence relied upon by the High Court was the caution statement, collaborated testimonies from 4 witnesses and 3 exhibits including the Medical Examination Report as well as the Applicant's testimony. This Court further notes that both the High Court and the Court of Appeal concluded that there was sufficient evidence to prove beyond a reasonable doubt that the Applicant committed the crime for which he was charged.

92. The Court observes from the records that the issue of circumstantial evidence provided by PW1 was duly analysed by the High Court.[35] The High Court observed that the contradictions raised by the Applicant regarding the date of disappearance and date of death of the deceased called into question his singular knowledge of the events leading to the murder and cast doubt on his innocence, in essence implicating him. The Court also observes that the allegation that the case was not proved beyond a reasonable time because of the Applicants previous record as a thief is not justified because it was never brought up during the trial. Consequently, this Court finds that the Applicant has failed to demonstrate how the Respondent

[34] *Abubakari v. Tanzania* (merits), *supra*, §§ 191-192.
[35] See page 14 to 16 of the High Court Judgment.

State erroneously convicted him on the basis of his previous record as a thief and on circumstantial evidence considered, beyond a reasonable doubt.

93. As a consequence, this Court holds that the Respondent State did not violate the Applicant's right to fair trial as enshrined under Article 7(b) and (c) of the Charter, read jointly with Articles 14(2) and Article 14(3)(e) of the ICCPR, with respect to the prosecution and conviction of the Applicant.

ii. Allegation of the non-consideration of the defence of alibi

94. The Applicant avers that the Respondent State did not comply with the requirement of Section 194(4), (5) and (6) of the Criminal Procedure Act [Cap 20 R.E 2002] to consider his defence of an alibi when he was introduced it in court.

95. He further avers that at the time of his arrest, he was actually attending the funeral service of the deceased and not at the scene of the crime of the murder.

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96. The Respondent State argues that Section 194(4), (5) and (6) of the Criminal Procedure Act [Cap 20 R.E 2002] provide the conditions which an accused person must be comply with if he wants to rely on the defence of alibi.[36] It submits that the Court of Appeal of Tanzania in the case of *Sijali Juma Kocho v. Republic* [1994] TLR 206, held that: "Prior notice of the defence of alibi is required under the law." However, the Applicant did not comply with Sections 194(4), (5) and (6) of the Criminal Procedure Act. During the preliminary hearing on the 25 November 2011 the Applicant and

[36] 194(4) where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case, 194(5) where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the prosecution is closed and 194(6) if the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the evidence.

his Advocate did not state that they would rely on the defence of alibi. The Advocate only informed the court that he intended to put the Applicant on the stand and nobody else."[37]

97. The Respondent State avers that the rationale behind submitting a notice of a defence of alibi is to enable the prosecution to investigate such defence, to get to the truth of the allegations and to provide the prosecution with ample time to ascertain the whereabouts of an accused if he claims he was elsewhere and not at the crime scene. It avers that the prosecution closed its case on 17 February 2014 and the Applicant proceeded with his defence. It is only then that he informed the Court that he was at Kigarama Village on the day of the incident and that he intended to summon one witness who was admitted at a hospital.[38] The Respondent State disputes the Applicant's arguments that he was at Kigarama village on 17 January 2010, when the crime occurred because this was an afterthought. In any case, the Applicant was required to call a witness to prove where he was on the day the crime occurred. It is for these reasons that the allegations should be dismissed for lack of merit.

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98. The Court observes that the issue raised regarding the Court's failure to consider the Applicants defence of alibi relates to the right to have one's cause heard under Article 7 of the Charter, which provides that:

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

99. The Court has previously held in *the Abubakari* case cited earlier, that an alibi is an important element of evidence for one's defence, which should be

[37] At page 7/8 of the Court of Appeal Record.
[38] At page 49 and 50 of the Court of Appeal Record.

thoroughly examined, prior to a guilty verdict being declared.[39] Furthermore, that where an alibi of defence is established with certainty, it can be decisive on the determination of the guilt of the accused.[40]

100. A perusal of the records on file indicates that counsel for the Applicant informed the Court, during the preliminary hearing on 25 November 2011, that he intended to call only one witness, who was the accused himself. Subsequently, during the main trial, the Applicant informed the court that he intended to summon one witness, who was admitted at the hospital. However, his counsel informed the court that he would be summoning the doctor who treated the Applicant and filled in the PF3 form. Counsel observed that the doctor was not on the list of witnesses provided during the preliminary hearing and prayed the courts indulgence to summon him. The prayer was granted and an order issued by the Court.

101. This Court observes that the trial court considered the Applicant's request to examine witnesses whose names were not listed on the list of witnesses to be examined during the pre-liminary hearing. The court made an order that the witness proposed by Applicant's counsel should be summoned to provide testimony and he did so. Since the Applicant was being represented by counsel, it is presumed that counsel was apprised of the facts and the case and acted in his client's best interest. Furthermore, the Applicant did not complain the counsel was acting contrary to his wishes. This Court also observes that the Respondent State has a well-established law, i.e., Section 194(4), (5) and (6) of the Criminal Procedure Act [Cap 20 R.E 2002] of Tanzania, that provides for the use of the defence of alibi within its domestic system, which the Applicant did not utilise. Records on file reveal that the Applicant did not provide any justification as to why he did not comply with the laid-out procedures and timelines in raising his defence of alibi, and neither did his lawyer.

[39] *Abubakari v. Tanzania* (merits), *supra*, §§ 191-192.
[40] *Ibid*, § 191.

102. Consequently, the Court holds that the Respondent State did not violate the Applicants' right to defence as enshrined in Article 7(c) of the Charter with respect to the use of the defence of alibi and thus dismisses the allegation.

VIII. REPARATIONS

103. The Applicant prays the Court to quash both the conviction and sentence and issue an order for reparation.

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104. The Respondent State did not submit on reparations.

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105. Article 27(1) of the Protocol stipulates that "If 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."

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

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

IX. COSTS

108. The Applicant did not make any prayers with regard to the costs.

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109. The Respondent State prayed the Court to order the Applicant to pay the costs of this Application.

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110. Rule 32(2) of its Rules of the Court provides that “unless otherwise decided by the Court, each party shall bear its own costs.

111. The Court finds no reason to depart from this provision. Consequently, it rules that each party shall bear its own costs.

X. OPERATIVE PART

112. For these reasons:

THE COURT,

Unanimously

On jurisdiction

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

On admissibility

iii. *Dismisses* the objection based on non-exhaustion of local remedies;
iv. *Declares* the Application admissible.

On merits

Unanimously:

v. *Finds* that the Respondent State did not violate the Applicant's rights to the right to equality before the law and equal protection of the law protected under Article 3(1) and (2) of the Charter;
vi. *Finds* that the Respondent State did not violate the Applicant's right to fair trial as enshrined under Article 7(b) and (c) of the Charter and Articles 14(2) read jointly with Article 14(3)(e) of the ICCPR, with respect to the Applicant's prosecution and conviction;
vii. *Finds* that the Respondent State did not violate the Applicants' right to defence as enshrined in Article 7 of the Charter with respect to the use of the defence of alibi.

By a majority of Seven (7) for, and Three (3) against, Judges Blaise TCHIKAYA and Dumisa B. NTSEBEZA, jointly dissenting and Judge Chafika BENSAOULA having issued a declaration,

viii. *Finds* that the Respondent State did not violate Article 5 on the right to dignity as guaranteed under Article 5 of the Charter as a result of the conviction.

On reparations

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

On costs

x. *Orders* each Party to bear its own costs.

Signed:

Modibo SACKO, Vice-President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the joint Dissenting Opinion of Judge Blaise TCHIKAYA and Dumisa B. NTSEBEZA and the Declaration of Judge Chafika BENSAOULA are appended to this Judgment.

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