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

KACHUKURA NSHEKANABO KAKOBEKA

V.

UNITED-REPUBLIC OF TANZANIA

APPLICATION NO. 029/2016

JUDGMENT

4 DECEMBER 2023

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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, and 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:

Kachukura Nshekanabo KAKOBEKA

Self-represented

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr. Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General;
ii. Ms. Jacqueline Kinyasi, Office of the Solicitor General;
iii. Ms. Sarah MWAIPOPO, Acting Deputy Attorney General and Director of the Constitutional Affairs and Human Rights Division, Office of the Attorney General;
iv. Ambassador Baraka H. LUVANDA, Head of the Legal Affairs Cell, Ministry of Foreign Affairs, East African Community and Regional and International Cooperation;

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

v. Ms. Nkasori SARAKIKYA, Deputy Director responsible for Human Rights, Principal State Attorney, Office of the Attorney General;
vi. Mr. Mark MULWAMBO, Principal State Attorney, Office of the Attorney General;
vii. Ms. Aidah KISUMO, Senior State Attorney, Office of the Attorney General;
viii. Mr. Elisha E. SUKA, Foreign Service Officer, Ministry of Foreign Affairs, East African Community, and Regional and International Cooperation; and
ix. Ms. Blandina KASAGAMA, Legal Counsel, Ministry of Foreign Affairs, East African Community and Regional and International Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Kachukura Nshekanabo Kakobeka (hereinafter referred to as "the Applicant") is a Tanzanian national. At the time of filing the Application, he was incarcerated at Butimba Central Prison, Mwanza, having being tried, convicted and sentenced to death for murder. He alleges violation of his rights during the proceedings before the national 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"), through 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 bearing on pending cases and new cases filed before 22

November 2020, which is the day on which the withdrawal took effect, being a period of one year after its deposit.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that on 17 September 2007, the Applicant allegedly murdered two women, one by strangulation and one by inflicting wounds with a sharp object. The Applicant was arrested on the same day.

4. On 26 June 2015, the Applicant was convicted of murder and sentenced to death by hanging by the High Court sitting in Karagwe.[3]

5. The Applicant then appealed to the Court of Appeal sitting at Bukoba which on 23 February 2016, dismissed the appeal in its entirety.[4]

B. Alleged violations

6. The Applicant contends that the Respondent State violated his rights to non-discrimination, to equality before the law, to equal protection of the law and to a fair trial, protected under Articles 2, 3, and 7(1) of the Charter respectively, through his conviction by the Court of Appeal based on doubtful evidence. The Applicant also alleges that the Respondent State violated his right to life, protected under Article 4 of the Charter, by imposing on him the death penalty.

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, § 38.
[3] Criminal Case No. 56/2008.
[4] Criminal Appeal No. 314/2015.

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.

8. On 8 September 2016, the Application was transmitted to all State Parties to the Protocol, the Chairperson of the African Union Commission, the Executive Council of the African Union through the Chairperson of the African Union Commission, and the African Commission on Human and Peoples' Rights.

9. The Parties filed their pleadings on merits within the time stipulated by the Court.

10. On 6 August 2018, at the request of the Court, the Applicant filed his submissions on reparations, which were served on the Respondent State on 24 August 2018.

11. After several extensions of time, the Respondent State, on 16 August 2019, filed its Response to the Applicant's submissions on reparations.

12. On 10 October 2019, the Court requested the Applicant to file his Reply thereto, if any, within thirty (30) days of receipt of the Respondent State's Response. The Applicant did not file a reply.

13. Pleadings were closed on 23 October 2023 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

14. The Applicant prays the Court to:

i. Declare that the Court is vested with jurisdiction to adjudicate over this matter;
ii. Declare that the Application meets the admissibility requirements;
iii. Declare that the Application be allowed;
iv. Order the Respondent State to bear the Costs of the Application ;
v. Find that the Respondent State violated his rights provided under Articles 2, 3, and 7(1) of the Charter;
vi. Find that the Respondent State violated his right to life by imposing on him the death penalty;
vii. Order the Respondent State to restore his liberty by releasing him from prison;
viii. Order the Respondent State to set aside the death sentence imposed on the Applicant and to remove him from death row;
ix. Order the Respondent State to pay him reparations, the amount of which is to be considered and assessed by this Court according to the period he spent in custody and the national ratio of the annual income of a citizen of the Respondent State.

15. In its Response, with regard to jurisdiction and admissibility of the Application, the Respondent State prays the Court to:

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

16. With regard to the merits of the Application, the Respondent State prays the Court to:

[5] Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.
[6] Corresponding to Rule 48(1) of the Rules of 25 September 2020.

i. Find that the Respondent State did not violate the Applicant's rights provided under Article 2 of the Charter;
ii. Declare that the conviction of the Application was lawful;
iii. Hold that the Appeals before the High Court and Court of Appeal were properly and lawfully conducted;
iv. Hold that the Applicant continue to serve his sentence;
v. Dismiss the Application for lack of merit;
vi. Order the Applicant to bear the costs of this Application.

17. In Response to the Applicant's submissions on reparations, the Respondent State prays the Court to:

i. Dismiss the [Applicant's] prayers in their entirety;
ii. Declare that the interpretation and application of the Protocol and the Charter does not confer appellate criminal jurisdiction to the Court to acquit the Applicant;
iii. Declare that the Respondent State did not violate the Charter or the Protocol and that the Applicant was convicted in accordance with the law;
iv. Dismiss the Application;
v. Make any other Order this Court might deem right and just to grant under the prevailing circumstances.

V. JURISDICTION

18. 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.

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

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

21. In the present Application, the Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will first examine this objection before considering other aspects of its jurisdiction, if necessary.

A. Objection to material jurisdiction

22. The Respondent State argues that this Court has no appellate jurisdiction on matters of fact and law which have been definitively determined by the Court of Appeal, such as the identification of the Applicant and credibility of witnesses. The Respondent State, therefore, argues that this Court does not have jurisdiction to quash the conviction, set aside sentences and order the release of the Applicant from prison.

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23. The Applicant disputes the Respondent State's objection and asserts that the Court has full jurisdiction over this matter.

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24. The Court emphasises that its material jurisdiction is predicated on the Applicant's allegation of violations of human rights protected by the Charter or any other human rights instrument ratified by the Respondent State.[7] In

[7] *Diocles William v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 426, § 28; *Armand Guéhi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Kalebi Elisamehe v. United Republic of Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 265, § 18.

the instant matter, the Applicant alleges the violation of different rights protected under the Charter, specifically Articles 2, 3, and 7(1) of the Charter.

25. With regard to the objection, the Court recalls its established jurisprudence that it is not an appellate body with respect to decisions of national courts.[8] However, "this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned".[9] The Court would, therefore, not be sitting as an appellate court if it were to consider the Applicant's allegations. The Court, therefore, dismisses this objection and finds that it has jurisdiction to hear the instant Application.

26. The Court further notes the Respondent State's claim that it does not have jurisdiction to grant an order for release. In this regard, the Court recalls Article 27(1) of the Protocol which provides that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation." Therefore, the Court has jurisdiction to grant different types of reparations, including release from prison, provided that the alleged violation has been established.[10]

27. For these reasons, the Court dismisses the objection by the Respondent State and finds that it has material jurisdiction in this Application.

B. Other aspects of jurisdiction

28. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule

[8] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) AfCLR 190, § 14.
[9] *Kenedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Guéhi v. Tanzania, supra,* § 33.
[10] *Rajabu Yusuph v. United Republic of Tanzania*, ACtHPR, Application No. 036/2017 Ruling of 24 March 2022 (jurisdiction and admissibility), § 27.

49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

29. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further recalls that it has held that the withdrawal of a Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect.[11] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[12] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it. The Court, therefore, finds that it has personal jurisdiction to examine the present Application.

30. In respect of its temporal jurisdiction, the Court notes that the violations alleged by the Applicant occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the Court observes that the Applicant remains convicted on the basis of what he considers an unfair process. Therefore, it holds that the alleged violations can be considered to be continuing in nature.[13] For these reasons, the Court finds that it has temporal jurisdiction to examine this Application.

31. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court finds that it has territorial jurisdiction.

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[11] *Cheusi v. Tanzania* (judgment), *supra*, §§ 35-39.
[12] *Ingabire Victoire Umuhoza v. United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.
[13] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71-77.

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

VI. ADMISSIBILITY

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

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

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

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

United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

36. In the present Application, the Respondent State raises an objection to the admissibility of the Application based on non-exhaustion of local remedies. The Court will consider this objection before examining other conditions of admissibility, if necessary.

A. Objection based on non-exhaustion of local remedies

37. The Respondent State argues that the Applicant did not exhaust all the local remedies available within its jurisdiction before filing the Application. The Respondent State asserts that the Applicant could have filed an application for review of the Court of Appeal's decision under Rule 66 of the Court of Appeal Rules, 2009. The Respondent State also claims that the Applicant had the remedy of filing a Constitutional Petition before the High Court for enforcement of his basic rights under the Basic Rights and Duties Enforcement Act.

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38. The Applicant disputes the Respondent State's objection and asserts that this Application has passed the test of admissibility and should be allowed.

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39. 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 shall fulfil the requirement of exhaustion of local remedies. The rule on exhaustion of local remedies 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.[14]

[14] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

40. The Court recalls its established jurisprudence that, where the criminal proceedings against an applicant have been determined by the highest appellate court, the Respondent State will be deemed to have had the opportunity to redress the violations alleged by the applicant to have arisen from those proceedings.[15]

41. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 23 February 2016. Therefore, the Respondent State had the opportunity to address the violations alleged by the Applicant arising from the Applicant's trial and appeals. The Court further notes that the Applicant's allegations form part of the "bundle of rights and guarantees" relating to the right to a fair trial which was the basis of the Applicant's appeals in domestic courts.16

42. Regarding the Respondent State's contention that the Applicant ought to have filed an application for review of the Court of Appeal's judgment, the Court has previously held that such an application for review is an extraordinary remedy within the Respondent State which applicants are not required to exhaust.[17]

43. Regarding the Respondent State's contention that the Applicant ought to have filed a constitutional petition, the Court has, similarly, held that that the constitutional petition procedure, within the Respondent State's judicial system, is an extraordinary remedy which applicants are not required to exhaust.[18] It would, moreover, be unreasonable to require the Applicant to file a new application regarding his fair trial rights to the High Court, which is a court lower than the Court of Appeal.[19]

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[15] *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76*; Mohamed Selemani Marwa v. United Republic of Tanzania*, ACtHPR, Application No. 014/2016 Judgment of 2 December 2021 (merits and reparations), § 45; *Rajabu Yusuph v. United Republic of Tanzania*, ACtHPR, Application No. 036/2017 Ruling of 24 March 2022 (admissibility), § 51.
[16] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 62.
[17] *Abubakari v. Tanzania* (merits), *supra*, § 78.
[18] *Thomas v. Tanzania* (merits), §§ 63-65.
[19] *Thomas v. Tanzania*, *ibid*, §§ 60-65.

44. The Court, therefore, finds that the Applicant has exhausted local remedies since the Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had upheld his conviction and sentence, following proceedings which allegedly violated his rights.

45. In light of the foregoing, the Court dismisses the Respondent State's objection based on non-exhaustion of local remedies.

B. Other conditions of admissibility

46. The Court observes that no objection has been raised with respect to the other admissibility requirements. Nonetheless, in line with Rule 50(1) of the Rules, it must satisfy itself that the Application is admissible before proceeding.

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

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

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 court documents from the domestic courts of the Respondent State in fulfilment of Rule 50(2)(d) of the Rules.

51. The Court observes that the final decision of the Court of Appeal of Tanzania was delivered on 23 February 2016 and the Applicant filed his Application before this Court on 8 June 2016. The Court finds a period of three (3) months and sixteen (16) days that was taken before filing his Application before this Court was manifestly reasonable and, therefore, the requirement in Rule 50(2)(f) of the Rules has been met.

52. Further, 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 provisions of the Charter, in compliance with Rule 50(2)(g).

53. The Court, therefore, finds that all the admissibility conditions have been met and that this Application is admissible.

VII. MERITS

54. The Court will consider, (A) the alleged violation of Article 7(1) of the Charter, before addressing, (B) the alleged violation of the right to life protected under Article 4 of the Charter, (C) the violation of the right to dignity guaranteed under Article 5 of the Charter, (D) the alleged violation of the right to non-discrimination protected under Article 2 of the Charter, and then, (E) the alleged violation of the right to equality before the law and to equal protection of the law, guaranteed under Article 3 of the Charter.

A. Alleged violation of the right to have one's cause heard

55. The Applicant alleges that the courts of the Respondent State convicted him based on doubtful evidence. He claims that his conviction was based on his

identification by only one person at the scene of the crime and that the evidence of this witness was not credible. He submits that the witness had claimed to be familiar with the Applicant before the incident, as he was a frequent visitor to the scene, but that the witness did not name him at the earliest time. The Applicant submits that the evidence tendered in court was based on suspicion, since, in fact, he claims he was a stranger in the area where the crime occurred.

56. In his Reply, the Applicant also contends that the trial and appellate courts did not consider his defence of *alibi*. Furthermore, the Applicant claims that the evidence relied upon to convict him was insufficient, considering that he was not found at the scene of the incident, that one of the persons who had allegedly seen him running in the village was never called as a witness and that no blood tests were conducted on the blood claimed to have been seen on the Applicant's body. The Applicant maintains that he was simply arrested because he was a stranger.

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57. The Respondent State disputes the allegations of the Applicant. It states that the Court of Appeal while determining the appeal, sat as an appellate court and not as a trial court. It further argues that the credibility of PW1 and the identification of the Applicant was among the grounds of appeal adequately addressed and finally determined by the Court of Appeal, as reflected in pages 4,5, 8 and 9 of its judgment. Specifically, the Respondent State refers to page 9 of the Court of Appeal's judgment which stated:

> Looking at the record we find PW1's testimony very elaborate. She knew the appellant. Even though she did not mention his name, but the description given and the fact that she identified him as Ana-Joyces's [sic] sister left no doubt as to who the appellant was. The ability to name the culprit at the earliest possible moment strengthened the credibility of the witness.

58. The Respondent State further contends that the Court of Appeal judgment was based on evidence which was proven beyond a reasonable doubt and that it therefore rightly upheld the conviction and sentence of the Applicant.

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59. Article 7(1) provides that "[e]very individual shall have the right to have his cause heard."

60. The Court has previously held that:

> … domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[20]

61. The above notwithstanding, the Court can, evaluate whether the manner in which domestic proceedings were conducted including the assessment of the evidence, was done in consonance with international human rights standards.

62. The record before this Court shows that the Court of Appeal exhaustively considered the evidence presented in the Applicant's case, including the credibility of the witnesses[21] and the defence of *alibi* raised by the Applicant.[22] The Court further considers that the Applicant has failed to demonstrate and prove that the manner in which the Court of Appeal evaluated the evidence revealed manifest errors requiring this Court's intervention.

[20] *Isiaga v. Tanzania* (merits), *supra*, § 65.
[21] See pages 4-6 and pages 8-12 of the judgment of the Court of Appeal (Criminal Appeal No. 314/2015).
[22] See page 6 and pages 12-13 of the judgment of the Court of Appeal (Criminal Appeal No. 314/2015).

63. The Court, therefore, dismisses the Applicant's allegation and finds that the Respondent State has not violated his right to be heard, protected under Article 7(1) of the Charter.

B. Alleged violation of the right to life

64. The Applicant alleges that the Respondent State in imposing on him the death penalty, sentenced him to an unconstitutional, inhuman and uncultured punishment in violation of his rights.

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65. The Respondent State disputes the Applicant's allegation and submits that that the issue of constitutionality of the death sentence in the country was one of the grounds of appeal advanced by the Applicant which was determined in the Court of Appeal. It further notes that the death penalty is provided for in the Respondent State's statutes as a punishment for murder. Specifically, the Respondent State refers to Section 197 of its Penal Code, which states as follows: "A person convicted of murder shall be sentenced to death".

66. The Respondent State also refers to the decision of its Court of Appeal in *Mbushuu alias Dominic Mnyaroje and Another v Republic* [1995] TLR 97, in which it was stated that: "… the death penalty as provided by s 197 of the Penal Code … is not arbitrary, hence a lawful law and it is reasonably necessary and it is thus saved by art 30(2) of the Constitution; the death penalty is, therefore, not unconstitutional."

67. The Respondent State further refers to Article 6 of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR") and contends that it is clear that the death penalty is not prohibited by the ICCPR, to which it is a party.[23] The Respondent State maintains that

[23] The Respondent State became a State Party to the ICCPR on 11 June 1976.

the ICCPR does not prohibit the death penalty, it prohibits the arbitrary deprivation of one's life and for states which have not abolished the death penalty, the ICCPR requires that the death penalty should be imposed only for the most serious crimes in accordance with national laws. The Respondent State further notes that the ICCPR requires that the death penalty be meted out in accordance with the law and pursuant to a final judgment rendered by a competent court.

68. The Respondent State therefore contends that the Applicant (i) was convicted of murder which is one of the most serious crimes, (ii) was convicted by a competent court, and (iii) that he appealed to the Court of Appeal, which is the highest court in the Respondent State's judicial hierarchy, which dismissed his appeal.

69. The Respondent State also notes that the High Court and the Court of Appeal have been established by the Constitution and that they discharge their mandate in accordance with the Constitution of the Respondent State and other laws of the land, as per Article 107B of the Constitution, which reads as follows:

> In exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land.

70. It is for the above reasons, that the Respondent State submits that this allegation is frivolous and misconceived and should be dismissed for lack of merit.

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

72. The Court further notes Article 6 of the ICCPR, which states that:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

73. The Court observes that the death penalty must be treated as an exceptional measure reserved only for the most heinous of offences,[24] warranting a thorough examination of all available aggravating and mitigating circumstances. The sanctity of the right to life demands that the death penalty, should not be considered as a default option among criminal punishments.[25] However, if it is to be considered as such, it must be strictly limited to cases involving the most serious crimes, and all doubts regarding the culpability of the accused must be rigorously addressed and ruled out.

[24] *Mwita v. Tanzania* (judgment), *supra,* § 66.
[25] *Ghati Mwita v. United Republic of Tanzania*, Application No. 012/2019, Judgment of 1 December 2022 (merits), § 66.

This ensures that the gravity of the death penalty is commensurate with the gravity of the crime.

74. The Court further recalls its previous jurisprudence, where it held that "while Article 4 of the Charter provides for the inviolability of life, it contemplates deprivation thereof as long as such is not done arbitrarily. By implication, the death sentence is permissible as an exception to the right to life under Article 4 as long as it is not imposed arbitrarily."[26]

75. The Court further notes the Respondent State's reference to Section 197 of its Penal Code, which states as follows: "A person convicted of murder *shall* be sentenced to death" (emphasis added), meaning the mandatory imposition of the death penalty.

76. The Court recalls its well-established jurisprudence where it found that the mandatory imposition of the death penalty as provided for in Section 197 of the Respondent State's Penal Code constitutes an arbitrary deprivation of the right to life and, therefore, violates Article 4 of the Charter.[27]

77. In the present matter, the Court does not find any cogent reason to distinguish this case from its previous decisions.

78. The Court, therefore, holds that the Respondent State has violated Article 4 of the Charter due to the mandatory nature of the imposition of the death penalty on the Applicant, as provided for in Section 197 of its Penal Code, which constitutes an arbitrary deprivation of the right to life.

[26] *Ally Rajabu and others v. Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539 § 98.
[27] *Ally Rajabu and others v. Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539 § 114; *Amini Juma v. Tanzania,* ACtHPR, Application no. 024/2016 Judgment of 30 September 2021 (merits and reparations), § 130; *Gozbert Henerico v. Tanzania,* ACtHPR, Application no. 056/2016 Judgment of 10 January 2022 (merits and reparations) § 150; *Ghati Mwita v. Tanzania*, ACtHPR, Application no. 012/2019 Judgment of 1 December 2022 (merits and reparations), § 80.

C. Violation of the right to dignity

79. While the Applicant did not make any submissions on the right to dignity, the Court notes from the record that the Applicant was sentenced to death by hanging. The Court, in the circumstances reiterates its established jurisprudence that the execution of the death penalty by hanging constitutes a violation of the right to dignity under Article 5 of the Charter.[28]

80. The Court, therefore, finds that the Respondent State violated Article 5 of the Charter in relation to the method of execution of the death penalty, as meted out against the Applicant, that is, by hanging.

D. Alleged violation of the right to non-discrimination

81. The Applicant further alleges that the Respondent State violated his rights under Article 2 of the Charter.

*

82. The Respondent State disputes the Applicant's claims and submits that it did not violate his rights provided under Article 2 of the Charter.

***

83. The Court notes that, as a general legal principle, the burden to prove an alleged violation lies with the Applicant.[29] In the instant matter, the Court observes that the Applicant has not made specific submissions nor has he provided evidence that he was discriminated against in violation of Article 2 of the Charter.

[28] *Rajabu and Others v. Tanzania*, *ibid*, §§ 119-120; *Henerico v. Tanzania, ibid*, §§ 169-170; *Juma v. Tanzania, ibid*, §§ 135-136.
[29] *Sijaona Chacha Machera v. United Republic of Tanzania,* ACtHPR, Application No. 035/2017 Judgment of 22 September 2022 (merits), § 82. *Yassin Rashid Maige v. United Republic of Tanzania,* ACtHPR, Application No. 018/2017 Judgment of 5 September 2023 (merits and reparations) § 124.

84. In these circumstances, the Court finds that there is no basis to find a violation and therefore holds that the Respondent State did not violate Article 2 of the Charter.

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

85. The Applicant also alleges that the Respondent State violated his rights guaranteed by Article 3 of the Charter which provides for the right to equality before the law and the right to equal protection of the law.

*

86. The Respondent State disputes the Applicant's claims and submits that it did not violate the Applicant's rights provided in the Charter and that he was convicted in accordance with the law.

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87. The Court reiterates, as earlier stated, that the burden of proof for a human rights violation lies with the Applicant. In the instant Application, the Applicant alleges that the Respondent State violated his rights under Article 3(1) and (2) of the Charter, without expounding the basis thereof.

88. In these circumstances, the Court finds that the Applicant has failed to prove the alleged violation and holds that the Respondent State did not violate Article 3 of the Charter.

VIII. REPARATIONS

89. 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."

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

91. The Court reiterates that the onus is on the Applicant to provide evidence in support of their allegation.[30] With regard to moral damages, the Court has consistently held that it is presumed and that the requirement of proof is not strict.[31]

92. The Court also restates that the measures that a State can take to remedy a violation of human rights includes: restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, considering the circumstances of each case.[32]

93. As this Court has earlier found, the Respondent State violated the Applicant's right to life and dignity, guaranteed under Article 4 and 5 of the Charter, with regard to mandatory imposition of the death penalty and by the use of hanging as the method of execution. The Court, therefore, finds that the Respondent State's responsibility has been established. The prayers for reparations will, therefore, be examined against these findings.

[30] *Kennedy Gihana and Others v. Republic of Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139; See also *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, § 15(d); and *Elisamehe v. Tanzania* (judgment), *supra*, § 97.
[31] *Rajabu and Others v. Tanzania* (merits and reparations), *supra*, § 136; *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 55; *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119; *Norbert Zongo and Others v. Burkina Faso* (reparations), § 55.
[32] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also, *Elisamehe v. Tanzania* (judgment), *supra*, § 96.

A. Pecuniary reparations

i. Material prejudice

94. The Applicant claims pecuniary reparations for material prejudice, the amount of which is to be considered and assessed by this Court according to the period the Applicant spent in custody and the national ratio of the annual income of a citizen of the Respondent State.

*

95. The Respondent State submits that this claim for pecuniary reparations has no basis, as the Applicant has not established the nexus between the alleged violations and the harm he suffered.

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96. The Court notes that for reparations for material prejudice to be granted, there must be a causal link between the violation established by the Court and the prejudice caused and there should be a specification of the nature of the prejudice, and proof thereof.[33]

97. In the instant case, the Court notes that the Applicant has not established the link between the violation found and the alleged pecuniary harm. Rather, the Applicant's claims are directly linked to his conviction and incarceration, which this Court did not find unlawful.

98. The Court, consequently, dismisses the Applicant's claims for pecuniary reparations for material prejudice.

[33] *Kijiji Isiaga v. United Republic of Tanzania*, ACtHPR, Application No. 032/2015, Judgment of 25 June 2021 (reparations), § 20.

ii. Moral prejudice

99. The Applicant made a general prayer for reparations without making specific submissions on pecuniary reparations for moral prejudice. Nevertheless, as established in this judgment, the Applicant suffered several violations which inherently involve moral prejudice. The Court further observes that in the instant Application, as the Applicant is in detention awaiting execution of the death sentence, he has inevitably suffered prejudice from the established violations. These violations result from the very imposition of the mandatory death sentence as well as the method of execution of the death sentence, namely by hanging.

100. In light of the foregoing, the Court holds that the Applicant is entitled to moral damages as there is a presumption that he has suffered some form of moral prejudice as a result of the above-mentioned violations. The Court has previously held that the assessment of quantum in cases of moral prejudice must be done in fairness, taking into account the circumstances of the case.[34] The practice of the Court, in such instances, is to award lump sums for moral prejudice.[35]

101. The Court has also previously held that a judgment finding violation of rights protected under the Charter forms part of reparations.[36] In the instant case, the Court found a violation of Articles 4 and 5 of the Charter. The Court holds that such findings constitute substantial reparation as it significantly addresses the main breach alleged by the Applicant.

102. The Court, in the judicial exercise of its discretion, awards the Applicant moral damages in the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300,000).

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[34] *Juma v. Tanzania* (judgment), *supra,* § 144; *Viking and Another v. Tanzania* (reparations), *supra,* § 41 and *Umuhoza v. Rwanda* (reparations), *supra,* § 59.
[35] *Zongo and Others v. Burkina Faso* (reparations), *supra*, §§ 61-62 and *Guehi v. Tanzania* (merits and reparations), *supra,* § 177.
[36] *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (judgment) (14 June 2013) 1 AfCLR 34, §§ 45; *Cheusi v. Tanzania*, *supra*, 173; *Guehi v. Tanzania*, *ibid*, 194.

B. Non-pecuniary reparations

i. Restoration of liberty

103. The Applicant prays the Court to order the Respondent State to restore his liberty by releasing him from prison.

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104. The Respondent State contests the Applicant's prayer for release from prison. It submits that this Court is not an appellate court and it does not have criminal appellate jurisdiction whatsoever, to quash the decision of the Respondent State's national courts and acquit prisoners from prison.

***

105. The Court recalls its position in *Gozbert Henerico v. United Republic of Tanzania* where it held that:

> The Court can only order a release if an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice.[37]

106. The Court notes its findings in the present Application that the provision for the mandatory imposition of the death sentence in the Respondent State's legal framework violates the right to life protected in Article 4 of the Charter and that the method of execution of the death sentence by hanging violates the rights to dignity protected under Article 5 of the Charter. However, the Court notes that the violations did not impact on the Applicant's guilt and

[37] *Henerico v. Tanzania* (merits and reparations), *supra,* § 202; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 84; *Minani Evarist v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402, § 82 and *Juma v. Tanzania* (judgment)*, supra,* § 165.

conviction, but only on the sentencing, to the extent of the mandatory nature of the penalty. Furthermore, nothing on record suggests that the Applicant's arrest or conviction was based on arbitrary considerations and that his continued imprisonment would occasion a miscarriage of justice.[38]

107. The Court finds that the commission of the offence as adjudicated by domestic courts has remained unaffected in the proceedings before this Court.

108. Given the foregoing, the Court holds that an order for release of the Applicant is not warranted. The prayer is consequently dismissed.

ii. Removal from death row

109. The Applicant prays the Court to order the Respondent State to set aside the death sentence imposed on him and to remove him from death row.

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110. The Respondent State maintains that it has not violated the Applicant's rights and, therefore, requests the Court to dismiss the Applicant's request for reparations.

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111. Having found that the mandatory imposition of the death sentence on the Applicant violates Article 4 of the Charter, the Court deems it fit to order that the death sentence be set aside and the Applicant be removed from death row. The Court further orders the Respondent State to take all necessary measures within one (1) year of the notification of this Judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death

[38] *William v. Tanzania* (merits), *supra*, § 101.

sentence and upholds the discretion of the judicial officer, following the amendment of the law, as previously ordered by the Court.

iii. Guarantees of non-repetition

112. The Applicant further prays the Court to grant other orders and reliefs that it may deem fit and just in the circumstances of the Applicant.

*

113. The Respondent State equally requests this Court grant any other order it may deem right and just to grant under the prevailing circumstances.

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114. The Court has previously, in matters similar to this, ordered the Respondent State to undertake all necessary measures to remove within six (6) months of the notification of this Judgment the provision for the mandatory imposition of the death sentence from its laws.[39] The Court, therefore, reiterates this in the instant case.

115. Regarding the Court's finding that the method of execution of the death penalty by hanging is inherently degrading,[40] the Court orders the Respondent State to undertake all necessary measures to remove, within six (6) months, "hanging" from its laws as the method of execution of the death sentence.[41]

[39] *Ally Rajabu and others v. Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539 § 163; *Amini Juma v. Tanzania,* ACtHPR, Application no. 024/2016 Judgment of 30 September 2021 (merits and reparations), § 170; *Gozbert Henerico v. Tanzania,* ACtHPR, Application no. 056/2016 Judgment of 10 January 2022 (merits and reparations) § 207; *Ghati Mwita v. Tanzania*, ACtHPR, Application no. 012/2019 Judgment of 1 December 2022 (merits and reparations), § 166.
[40] *Rajabu and Others v. Tanzania*, ibid, § 118.
[41] *Chrizant John v. United Republic of Tanzania,* ACtHPR, Application no. 049/2016, Judgment of 7 November 2023 (merits and reparations), § 155.

iv. Publication

116. None of the Parties made any submissions in respect of the publication of this judgment.

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117. The Court further considers that, for reasons now firmly established in its practice, and in the peculiar circumstances of this case, publication of this judgment is necessary. Given the current state of law in the Respondent State, threats to life associated with the mandatory death penalty persist in the Respondent State. Furthermore, the Court has not received any indication that necessary measures have been taken for the law to be amended and aligned with the Respondent State's international human rights obligations. The Court thus finds it appropriate to order publication of this judgment within a period of three (3) months from the date of notification.

IX. ON THE REQUEST FOR PROVISIONAL MEASURES

118. The Applicant, in his Application, had requested the Court to make use of its powers under Article 27(2) of the Protocol to order provisional measures.

119. The Respondent State asserts that this Court does not have jurisdiction to order provisional measures against the Respondent State because first of all the punishment of death penalty is constitutional, in line with the Respondent State's laws and also in conformity with Article 6 of the ICCPR. Secondly, the Respondent State maintains that this Court does not have jurisdiction to order provisional measures against it, since this Court does not have jurisdiction to set aside the death penalty imposed on the Applicant by the domestic courts. For these reasons, the Respondent State submits that the request lacks merit and should be dismissed.

***

120. The Court notes from the record that the Applicant did not specify the provisional measures that he requests. In any event, 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

121. The Applicant prays that the costs of this Application be borne by the Respondent State.

122. The Respondent State prays that costs be borne by the Applicant.

***

123. The Court notes that Rule 32(2)[42] of the Rules of Court provides that: "unless otherwise decided by the Court, each party shall bear its own costs, if any".

124. The Court does not find any justification to depart from the above provisions in the circumstances of the case, and therefore rules that each Party shall bear its own costs.

XI. OPERATIVE PART

125. For these reasons:

THE COURT,

[42] Rule 30(2) of the Rules of Court, 2 June 2010.

Unanimously,

On jurisdiction

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

On admissibility

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

On merits

v. *Holds* that the Respondent State did not violate the Applicant's right to be heard under Article 7(1) of the Charter;
vi. *Holds* that the Respondent State did not violate the Applicant's right to non-discrimination under by Article 2 of the Charter;
vii. *Holds* that the Respondent State did not violate the Applicant's right to equality before the law and to equal protection of the law, under Article 3(1) and (2) of the Charter;

By a majority of eight (8) for, and two (2) against,

viii. *Holds* that the Respondent State violated the Applicant's right to life under Article 4 of the Charter, in relation to the mandatory imposition of the death penalty, which removes the discretion of the judicial officer;
ix. *Holds* that the Respondent State violated the Applicant's right to dignity under Article 5 of the Charter, in relation to the method of execution of the death penalty, that is, by hanging.

Unanimously,

On reparations

Pecuniary reparations

x. *Dismisses* the Applicant's prayer for damages for material prejudice;
xi. *Awards* the Applicant Tanzanian Shillings Three Hundred Thousand (TZS 300,000) for moral damage;
xii. *Orders* the Respondent State to pay the amount indicated under subparagraph (xi) free from taxes within six (6) months, effective from the notification of this judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

xiii. *Dismisses* the Applicant's prayer to quash his conviction and order his release from prison;
xiv. *Grants* the Applicant's prayer to set aside the death sentence imposed on him and to remove him from death row;
xv. *Orders* the Respondent State to take all necessary measures within six (6) months of the notification of this Judgment, to remove the mandatory imposition of the death penalty from its laws;
xvi. *Orders* the Respondent State to take all necessary measures within one (1) year of the notification of this Judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death sentence and which upholds the discretion of the judicial officer;
xvii. *Orders* the Respondent State to take all necessary measures within six (6) months of the notification of this Judgment, to remove

"hanging" from its laws as the method of execution of the death sentence;

xviii. *Orders* the Respondent State to publish this judgment, within a period of three (3) months from the date of notification, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the judgment is accessible for at least one (1) year after the date of publication.

On implementation and reporting

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

On the request for provisional measures

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

On costs

xxi. *Orders* that each Party shall 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(3) of the Rules, the Declarations of Justice Blaise TCHIKAYA and Justice Dumisa B. NTSEBEZA are appended to this Judgment.

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