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

DEOGRATIUS NICHOLAUS JESHI

V

UNITED-REPUBLIC OF TANZANIA

APPLICATION NO. 017/2016

JUDGMENT

13 FEBRUARY 2024

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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:

Deogratius Nicholaus JESHI

Self-represented

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr. Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General.
ii. Ms. Vivian METHOD, State Attorney, Office of the Solicitor General; and
iii. Mr. Mark MULWAMBO, Principal State Attorney, Attorney General's Chambers.

After deliberation,

Renders this Judgment:

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

I. THE PARTIES

1. Deogratius Nicholaus Jeshi (hereinafter referred to as "the Applicant") is a Tanzanian national who, at the time of filing this Application, was incarcerated at Butimba Central Prison in Mwanza having been 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 the withdrawal took effect one year after its deposit, in the present case, on 22 November 2020.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that on 11 August 2003, the Applicant and two (2) others who are not part of this Application, stole items from the house of Professor Israel Katote in Kishao Village of Karagwe District, Kagera Region. In the course of the robbery, they killed him.

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

4. The Applicant and his accomplices were charged with murder and on 15 July 2010, the Applicant was convicted and sentenced to death by hanging by the High Court of Tanzania at Bukoba for the said murder.

5. On 7 March 2013, the Court of Appeal confirmed the Applicant's conviction and sentence. On 30 April 2013, the Applicant applied to the Court of Appeal for review of its judgment. On 28 February 2014, the Court of Appeal struck out the application for review for being lodged out of time. A subsequent request for extension of time to file an application for review was dismissed on 13 February 2015.

B. Alleged violations

6. The Applicant contends that the Respondent State violated his rights to non-discrimination, equality before the law, equal protection of the law and a fair trial protected under Articles 2, 3 and 7(1), respectively, of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was filed on 22 March 2016 and was served on the Respondent State on 3 May 2016.

8. On 3 June 2016, the Court issued an order for provisional measures *proprio motu* directing the Respondent State to stay the execution of the death sentence against the Applicant, pending a decision on the Application.

9. On 10 June 2016, the Application was transmitted to all State Parties to the Protocol and to all other entities listed in Rule 42(4) of the Rules.[3]

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

[3] Rule 35(3), Rules of Court, 2 June 2010.

11. 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 30 August 2018.

12. After several extensions of time, the Respondent State filed its Response to the Applicant's submissions on reparations on 5 August 2019.

13. On 2 October 2019, the Applicant filed a Reply to the Respondent State's response on reparations.

14. Pleadings were closed on 11 September 2023 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

15. The Applicant prays the Court to:

    i. Restore justice where it was overlooked and quash both the conviction and sentence imposed upon him and set him at liberty.
    ii. Order the Respondent State to pay reparations, 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.
    iii. Grant any other legal remedy it may deem fit and just in the circumstances of his application.

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

    i. Find that the Court is not vested with jurisdiction to entertain this Application.

ii. Find that the Application does not meet the admissibility requirements stipulated under Rule 40(5) of the Rules of Court and declare it inadmissible.[4]

iii. Find that the Application does not meet the admissibility requirements stipulated under Rule 40(6) of the Rules of Court and declare it inadmissible.[5]

iv. Dismiss the Application with costs.

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

i. Find that the Respondent State did not violate Article 2 of the Charter.

ii. Find that the Respondent State did not violate Article 3(1)(2) of the Charter.

iii. Find that the Respondent State did not violate Article 7(1)(c) and (d) of the Charter.

iv. Find that the Respondent State did not discriminate against the Applicant.

v. Dismiss the Application with costs for lack of merit.

vi. Dismiss the Applicant's prayer for reparations.

18. 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 do not confer jurisdiction on the Court to set the Applicant at liberty.

iii. Declare that the Respondent State did not violate the cited provisions of the Charter and that the Applicant was treated in accordance with the law by the Respondent State during the trail and appeal proceedings in its jurisdiction.

iv. Dismiss the Applicant's prayer for reparations.

[4] Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.
[5] Corresponding to Rule 50(2)(f) of the Rules of 25 September 2020.

v. Make any other Order this Court might deem right and just under the prevailing circumstances.

V. JURISDICTION

19. 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.

20. 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."

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

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

A. Objection to material jurisdiction

23. The Respondent State argues that the present Application is inviting the Court to sit as an appellate court and ultimately revise the judgment of the Respondent State's Court of Appeal by re-assessing the evidence, quashing the conviction, setting aside the sentence and setting the Applicant at liberty. The Respondent State submits that this is not within the

jurisdiction of this Court. The Respondent State further argues that all the allegations raised before the Court had been already raised as grounds for appeal before its Court of Appeal. It is for these reasons that the Respondent State asserts that the Court is not vested with jurisdiction to adjudicate over the present matter.

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24. The Applicant disputes the Respondent State's claims and asserts that the Court has jurisdiction to entertain this matter because violations of rights protected by the Charter are alleged in the Application.

25. The Applicant further submits that although this Court is not an appellate body with respect to decisions of national courts, 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 in any other human rights instruments ratified by the State concerned. The Applicant submits that this is within the jurisdiction of the Court and, therefore, the Court may revise the judgment of the Respondent State's appellate court, evaluate the evidence, quash the conviction, set aside the sentence and set him at liberty.

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26. 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.[6] In the instant matter, the Applicant alleges violation of Articles 2, 3, and 7 of the Charter.

27. The Court recalls its established jurisprudence that it is not an appellate body with respect to decisions of national courts.[7] However, "this does not

[6] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) AfCLR 190, § 14.
[7] *Ibid.*

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".[8] The Court would, therefore, not be sitting as an appellate court if it were to consider the Applicant's allegations.

28. Accordingly, the Court dismisses the Respondent State's objection and holds that it has jurisdiction to hear the instant Application.

B. Other aspects of jurisdiction

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

30. 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 the Declaration does not have any retroactive effect and 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.[9] 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.[10] This Application having been filed before the Respondent State deposited its notice of withdrawal, is not affected by it. The Court, therefore, finds that it has personal jurisdiction to examine the present Application.

[8] *Kennedy Ivan v. United Republic of Tanzania,* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Guéhi v. Tanzania, supra,* § 33.
[9] *Cheusi v. Tanzania* (judgment), *supra*, §§ 35-39.
[10] *Ingabire Victoire Umuhoza v. United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

31. 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.[11] For these reasons, the Court finds that it has temporal jurisdiction to examine this Application.

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

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

VI. ADMISSIBILITY

34. 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".

35. 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."

36. 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:

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

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.

37. In the present Application, the Respondent State raises two objections to the admissibility of the Application. The Court will consider these objections before examining other conditions of admissibility, if necessary.

A. Objections to the admissibility of the Application

38. The first objection of the Respondent State relates to the requirement of exhaustion of local remedies and the second relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of local remedies

39. The Respondent State argues that the Applicant alleges violations of his rights enshrined in the Constitution of the Respondent State. However, the Respondent State submits that rights provided under Articles 12 to 29 of the Constitution are justiciable rights *vide* the Basic Rights and Duties

Enforcement Act. The Respondent State therefore contends that the Applicant had the available legal remedy of instituting a Constitutional Petition for the enforcement of his right to equality before the law and equal protection by the law, as provided by Article 13(1) of the Constitution, and the right to a fair trial provided under Article 13(6)(a) of the Constitution.

40. Based on the foregoing, the Respondent State claims that the admissibility requirement under Rule 40(5) of the Rules[12] is not met and that the Application should be declared inadmissible.

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41. The Applicant disputes the Respondent State's objection and claims that he exhausted all available remedies, as the Court of Appeal, the highest court in the Respondent State, decided on his appeal with finality.

42. The Applicant further notes that he was not under obligation to lodge a constitutional petition to enforce his rights.

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43. The Court notes that pursuant to Article 56(5) of the Charter, the provisions of which 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 of 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.[13]

44. The Court recalls its established jurisprudence that, where the criminal proceedings against an applicant have been determined by the highest

[12] Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.
[13] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

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.[14]

45. 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 7 March 2013. 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.[15]

46. Regarding the Respondent State's contention that the Applicant ought to have filed a constitutional petition, the Court has previously held that the Court of Appeal of Tanzania is the highest judicial organ within the Respondent State and that the constitutional petition procedure is an extraordinary remedy in the Respondent State that applicants are not required to exhaust.[16]

47. The Court, therefore, finds that local remedies are deemed to have been exhausted since the Court of Appeal upheld the Applicant's conviction and sentence.

48. In light of the foregoing, the Court dismisses the Respondent State's objection based on non-exhaustion of local remedies and holds that local remedies were exhausted in the present Application.

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

[14] *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.
[15] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 62.
[16] *Ibid*, §§ 63-65.

49. The Respondent State claims that the Application was not filed within a reasonable time after local remedies had been exhausted.

50. The Respondent State recalls that the judgment of the Court of Appeal was delivered on 7 March 2011, while it deposited the Declaration on 9 March 2010, that is, after a period of one (1) year.

51. The Respondent State further submits that the Applicant's application for extension of time to file a review was concluded in the Court of Appeal on 13 February 2015, while the present Application was filed before this Court on 22 March 2016, that is, one (1) year, one (1) month and nine (9) days later, and without providing any reasons for the delay.

52. The Respondent State submits that this period is certainly beyond the accepted period of reasonable time as defined by international human rights jurisprudence, which considers six (6) months as reasonable time. Therefore, the Respondent State submits that this Application does not meet the admissibility requirement provided by Rule 40(6) of the Rules,[17] and that the Application should be declared inadmissible.

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53. The Applicant disputes the Respondent State's objection and submits that the Application was filed within a reasonable time after exhaustion of local remedies. He submits that the period to be considered should be between the moment the Court of Appeal dismissed the Applicant's application for extension of time to file a review and the filing of the Application before this Court. The Applicant also contends that this Court should take into account the particular circumstances of his case when considering the period of seizure, as the Court confirmed in its decision in *Norbert Zongo and Others v. Burkina Faso.*

[17] Corresponding to Rule 50(2)(f) of the Rules of 25 September 2020.

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54. Pursuant to Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, in order for an application to be admissible, it must be "submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

55. In the present case, the Court notes that between 7 March 2013 when the Court of Appeal dismissed the Applicant's appeal and 22 March 2016 when the Applicant filed the present Application, a period of three (3) years, and fifteen (15) days elapsed.

56. The Court further notes that Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, does not set a fixed time limit within which it must be seized. However, the Court has held that "the reasonableness of the time limit for referral depends on the particular circumstances of each case and must be determined on a case-by-case basis."[18]

57. In this regard, the Court has considered as relevant factors, the fact that an applicant is incarcerated,[19] their indigence, the time taken to utilise the procedures of the application for review at the Court of Appeal, or the time taken to access the documents on file,[20] the need for time to reflect on the advisability of seizing the Court and determine the complaints to be submitted.[21]

[18] *Beneficiaries of late Norbert Zongo and Others v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92; *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 56; *Thomas v. Tanzania* (merits), *supra*, § 73.
[19] *Diocles William v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52; *Thomas v. Tanzania*, *ibid*, § 74.
[20] *Nguza Viking and Johnson Nguza v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 61.
[21] *Zongo and Others v. Burkina Faso* (preliminary objections), *supra*, § 122.

58. From the record, the Court notes that the Applicant is a lay person, that he is self-represented in the proceedings before this Court and that he has been incarcerated since 18 August 2003.

59. The Court further notes that within the Respondent State's legal system, an applicant is not obliged, for purposes of determining exhaustion of domestic remedies, to file a petition for review of the Court of Appeal's decision. However, where one opts to avail oneself of this remedy, the Court takes the time expended in pursuing this remedy into account in determining whether or not an Application was filed within a reasonable time.[22]

60. In the present Application, the Court takes into consideration the fact that the Applicant filed an application for review of the Court of Appeal's decision on 30 April 2013, the fact that the Court of Appeal, on 28 February 2014, struck out the application for review for being lodged out of time and the fact that a subsequent request for extension of time to file an application for review was denied by the Court of Appeal on 13 February 2015.

61. In these circumstances, the Court finds that the period of three (3) years, and fifteen (15) days is reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules. The Court, therefore, dismisses the Respondent State's objection to the admissibility of the Application based on failure to file the Application within a reasonable time.

B. Other conditions of admissibility

62. 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.

[22] *Yassin Rashid Maige v. United Republic of Tanzania*¸ ACtHPR, Application No. 018/2017, Judgment of 5 September 2023 (merits and reparations), § 66; *Mohamed Selemani Marwa v. United Republic of Tanzania,* ACtHPR, Application No. 014/2016 Judgment of 2 December 2021 (merits and reparations), §§ 64-65.

63. 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.

64. The Court also notes that the Applicant's requests 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.

65. 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.

66. 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.

67. 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 provisions of the Charter, in compliance with Rule 50(2)(g) of the Rules.

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

VII. MERITS

69. The Court will consider, (A) the alleged violation of the Applicant's right to have his cause heard, protected under Article 7(1) of the Charter, before addressing, (B) the alleged violation of the right to non-discrimination,

protected under Article 2 of the Charter, (C) the alleged violation of the right to equality before the law and the right to equal protection of the law, protected under Article 3 of the Charter, (D) the violation of the right to life, protected under Article 4 of the Charter, and, finally, (E) the violation of the right to dignity, guaranteed under Article 5 of the Charter.

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

70. The Court observes, from the record, that the Applicant essentially raises two (2) grievances against the domestic courts, whose actions or omissions he claims violated his right to be heard as protected under Article 7(1) of the Charter. These grievances are:

    i. The evidence based on which he was convicted was not properly examined and evaluated; and
    ii. His application for review of the Court of Appeal's judgment was unjustly denied.

71. The Court will proceed to examine these two (2) grievances in light of Article 7(1) of the Charter.

i. Allegation that evidence was not properly examined and evaluated

72. The Applicant alleges that both the trial and appellate courts completely misapprehended the substance and quality of the evidence, resulting in an unfair conviction, considering that the evidence used to convict him was doubtful and lacked credibility.

73. Specifically, the Applicant claims that his conviction was based on a misdirection on points of law considering that it was based on an extra-judicial statement of the Applicant and the co-accused (P-8 and P-9), as well as on allegedly stolen articles (P-7), which were admitted and considered by the trial court and upheld by the Court of Appeal.

74. The Applicant also submits that the trial court misdirected itself on a point of law by overlooking the contradictions of the prosecution witnesses during the trial within a trial and admitting exhibit P-9 contrary to the procedure of admitting exhibits.

75. He further alleges that the court erred on a point of law by using exhibit P-9 to find an intention of the Applicant to commit an unlawful act, namely that of killing, rather than stealing. Accordingly, the court erroneously continued to hold that the Applicant fully participated in the killing of the deceased while there was no evidence for this claim.

76. The Applicant, moreover, contends that the court erred in law by using exhibit P-8, which is the confession statement of the co-accused, as the basis to convict the Applicant without other corroborative independent testimony.

77. Finally, the Applicant also claims that the court erred in law by admitting and using exhibit P-7 to convict the him while the ownership of the alleged stolen articles was not distinguished from other materials, and that there were no marks on the exhibits to certify that they were owned by the deceased, with the result that the evidence was not collaborated by other independent evidence.

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78. The Respondent State disputes the various allegations made by the Applicant. It submits that the Applicant was convicted based on nothing less than credible evidence which was properly considered by the trial court.

79. Specifically on the issue of the extra-judicial statement, the Respondent State refers to page 35 of the trial court's proceedings, where it emerges that the advocate for the second accused objected to the extra-judicial statement being tendered in Court as it was not given voluntarily and the second accused was not a free agent before the justice of the peace. The Respondent State also references page 36 of the trial proceedings record,

where the Judge ordered a trial within a trial to determine whether or not the extra-judicial statement was obtained voluntarily.

80. The Respondent State notes that on 21 June 2010, the trial court gave its ruling guided by three principles, namely, the burden of proof in criminal cases, the basis of admission of a confession and whether there is evidence of torture. It notes that after careful consideration, the trial court overruled the objection. It is also the Respondent State's submission that the trial court informed each party that they had the right to give evidence and call witnesses. It also notes that the Court of Appeal, as an appellate court, considered the extra-judicial statement and found that it was properly before the court and that the Applicant did not disassociate himself from the murder. It is, therefore, the Respondent State's submission that the extra-judicial statements were properly admitted in court as exhibits and considered by the trial court and the appellate court and that the Applicant was convicted based on well-established principles of law and credible evidence.

81. On the issue of criminal intent, the Respondent State further refers to page 18 of the trial proceedings record to the effect that the trial court considered the unlawful act which was stealing, rather than killing. However, it also submits that the trial court held that the accused had common intention to steal but, in the course, committed the offence of murder.

82. On the issue of corroboration, the Respondent State also refers to the trial court's instructions to the assessors, at pages 7 and 8, where the judge instructed the assessors to consider whether the confession was corroborated, that a conviction of a person should not be based solely on a confession of a co-accused, and that it must be supported by some other independent evidence. The Respondent State further submits that the trial court properly warned itself of the dangers of convicting on uncorroborated evidence, and rightfully so. It refers to court's statement according to which it was convinced that there was evidence to corroborate the statement.

83. The Respondent State also notes that the Court of Appeal concluded after evaluating all the evidence that the case against the Applicant was overwhelming.

84. The Respondent State claims that there was sufficient evidence to convict the Applicant during the trial. It maintains that after considering all the exhibits that were admitted in court, and after evaluating the quality of evidence, the assessors, who are not jurists but are representative of the Applicant's peers in the society, firstly, found that the Applicant was guilty of murder followed by legal reasoning of the trial judge.

85. The Respondent State further argues that the Court of Appeal considered all the evidence raised by the defence counsel on the three grounds of appeal. Specifically, it notes that the Court of Appeal considered those grounds that challenged the extra-judicial statement used to establish common purpose, founding conviction on a statement of a co-accused, and the failure of the Applicant to cross-examine PW 3 regarding the properties found at his residence, and that the Court of Appeal concluded that there was sufficient evidence to convict the Applicant for the offence of murder.

86. For these reasons, the Respondent State submits that the allegations by the Applicant have no merit and should be dismissed.

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

88. 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.[23]

89. The above notwithstanding, the Court can evaluate whether the manner in which domestic proceedings were conducted, including the conduct of proceedings as well as the assessment of the evidence, was done in consonance with international human rights standards.[24]

90. It emerges from the record that, subsequent to an objection by Counsel for the Applicant, the trial court conducted a trial within a trial.[25] Those proceedings were aimed at considering the objection raised by the Applicant to the Prosecution's reliance on his extra-judicial statement which, he averred, was obtained under torture.[26] After hearing both parties, and after a thorough examination of their submissions, as well as of related facts, the High Court dismissed the Applicant's objection upon finding that the Applicant made the statement freely and voluntarily and that his statement was nothing but the truth.[27]

91. This Court further notes that the Court of Appeal equally considered whether the trial court properly admitted the Applicant's extra-judicial statement and held that the High Court could not be faulted for deciding as it did.[28] The Court of Appeal, therefore, dismissed the Applicant's appeal on that single ground.[29]

92. Considering the foregoing, it cannot be said that the domestic courts of the Respondent State ignored the Applicant's objection or failed to consider the propriety of his extra-judicial statement in arriving at his conviction. The claim is therefore unfounded.

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[23] *Isiaga v. Tanzania* (merits), *supra*, § 65.
[24] *Ibid*, § 66.
[25] See *The Republic v. Deogratias Nicholaus Jeshi, Josephat Mkwano, and Audax Felician*, Criminal Session No. 113/2004, Ruling of 22 June 2010.
[26] *Ibid*, pages 1-2.
[27] *Ibid*, pages 3-8.
[28] See *Deogratias Nicholaus and Joseph Mukwano v. The Republic*, Court of Appeal of Tanzania at Mwanza, Criminal Appeal No. 211 of 2010, Judgment of 7 March 2012, pages 14-17.
[29] *Ibid*, page 18.

93. The record before this Court shows that the trial and appellate courts exhaustively considered the evidence and allegations presented in the Applicant's case. The Court, therefore, considers that the Applicant has failed to demonstrate and prove that the manner in which the trial and appellate proceedings were conducted or how the evidence was evaluated revealed manifest errors requiring this Court's intervention.

94. The Court, therefore, dismisses the Applicant's allegations and finds that the Respondent State did not violate his right to be heard, protected under Article 7(1) of the Charter.

ii. Allegation that the Applicant's application for review was unjustly denied

95. The Applicant claims that the Court of Appeal heard, but did not grant, the application for review of the judgment, which violated his rights.

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96. The Respondent State disputes this allegation and submits that his application for extension of time to file a revision was considered and dismissed in accordance with procedures established by law. The Respondent State, therefore, submits that this allegation lacks merit and should be dismissed.

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97. From the record, the Court notes that the Respondent State's Court of Appeal considered the Applicant's application for extension of time to file an application of review of the Court of Appeal's decision but dismissed it because it considered that the Applicant was **"**seeking for an extension of time […] not on genuine reasons under Rule 66(1) [of the Court of Appeal Rules] but as a disguised way to move the Court to sit on appeal over its own final judgment".[30]

[30] *Deogratias Nicholaus and Joseph Mukwano v. The Republic*, Court of Appeal of Tanzania at Bukoba, Criminal Application No. 1 of 2014, Ruling of 13 February 2015, page 8.

98. The Court notes, in particular, in the ruling by the Respondent State's Court of Appeal, that the Court of Appeal considered that "an application for extension of time to apply for review […] must disclose sufficient cause or good ground as per rule 66(1) of the 2009 Court of Appeal rules" and that that "[n]o such good cause predicated on Rule 66(1) of the Rules has been shown here".[31] The Court of Appeal, accordingly, held that "as the applicants have failed to cross the legal threshold set by prevailing jurisprudence, but are seeking an extension of time because they were only dissatisfied with the Court's decision", For this reason, it rejected the application and dismissed it in its entirety.[32]

99. This Court, furthermore, notes that there is nothing on the record to support the Applicant's claim that the conduct of the Respondent State's Court of Appeal led to a violation of his right to be heard.

100. In these circumstances, the Court finds that the Respondent State did not violate the Applicant's right to be heard, as protected under Article 7(1) of the Charter.

B. Alleged violation of the right to non-discrimination

101. The Applicant alleges that the Respondent State violated his right to non-discrimination protected under Article 2 of the Charter.

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102. The Respondent State disputes the Applicant's claims and asserts that at no time was he discriminated against, in violation of Article 2 of the Charter. The Respondent State further claims that the Applicant was properly subjected to the criminal procedure of the Respondent State and that he was not targeted for his race, ethnic grouping, colour, sex, language, religion, political or any other opinion, national and social origin, fortune,

[31] *Ibid*, page 7.
[32] *Ibid*, page 8.

birth or status but rather prosecuted on probable cause for an offence he had committed according to existing laws. The Respondent State, therefore, submits that the allegation lacks merits and should be dismissed.

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103. The Court notes that the burden of proof for a human rights violation lies with the Applicant. In the instant matter, the Court observes that the Applicant does not make specific submissions or provides evidence that he was discriminated against in violation of Article 2 of the Charter.[33]

104. 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 the Applicant's right to non-discrimination protected under Article 2 of the Charter.

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

105. The Applicant alleges that the conduct of the courts in 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.

*

106. The Respondent State disputes the Applicant's claims and submits that it did not violate the Applicant's rights provided in the Charter. Furthermore, the Respondent State submits that the Applicant never raised the issue of being discriminated in the trial court or even in his appeal before the Court of Appeal. The Respondent State further contends that the Applicant does not state in his Application how he was discriminated against and by whom.

[33] *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.

It, therefore, submits that this is an afterthought and that his argument is not substantiated.

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

108. 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 his rights to equality before the law and equal protection of the law protected under Article 3 of the Charter.

D. Violation of the right to life

109. The Applicant did not make any submissions on the right to life. However, the Court notes from the record that the Applicant was mandatorily sentenced to death under a law that does not allow the judicial officer any discretion. The Court, in these circumstances, reiterates its finding in its previous decisions that the imposition of the mandatory death penalty is a violation of the right to life under Article 4 of the Charter.[34]

110. The Court, therefore, holds that the Respondent State violated the Applicant's right to life protected under Article 4 of the Charter by imposing the mandatory death penalty on the Applicant.

[34] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §§ 104-114; *Amini Juma v. United Republic of Tanzania,* ACtHPR, Application no. 024/2016, Judgment of 30 September 2021 (merits and reparations), §§ 120-131; *Gozbert Henerico v. United Republic of Tanzania,* ACtHPR, Application no. 056/2016, Judgment of 10 January 2022 (merits and reparations), § 160.

E. Violation of the right to dignity

111. Similarly, although the Applicant did not make any submissions on the right to dignity, the Court also notes from the record that the Applicant was sentenced to death by hanging. The Court, therefore, 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.[35]

112. For that reason, the Court holds that the Respondent State violated the Applicant's right to dignity protected under Article 5 of the Charter in relation to the method of execution of the death penalty, that is, by hanging.

VIII. REPARATIONS

113. Article 27(1) of the Protocol provides that "If the Court finds that there has been violation of a human or peoples' rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

114. Having found that the Respondent State did not violate any rights alleged by the Applicant, the Court dismisses the Applicant's prayers for reparations.

115. The Court recalls, however, that it has found that the Respondent State violated the Applicant's right to life and to dignity, guaranteed under Articles 4 and 5 of the Charter, in relation to the mandatory imposition of the death penalty by hanging.

116. The Court, therefore, orders the Respondent State to take all necessary measures, within six (6) months of the notification of this Judgment, to

[35] *Rajabu and Others v. Tanzania*, *ibid*, §§ 119-120; *Henerico v. Tanzania, ibid*, §§ 169-170; *Juma v. Tanzania, ibid*, §§ 135-136.

remove the provision for the mandatory imposition of the death sentence from its laws.[36]

117. The Court further orders the Respondent State within one (1) year of the notification of this Judgment, to take all necessary measures 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.[37]

118. Regarding the Court's finding that the method of execution of the death penalty by hanging is inherently degrading,[38] the Court orders the Respondent State to take all necessary measures to remove "hanging" from its laws as the method of execution of the death sentence, within six (6) months of the notification of this Judgment.[39]

119. 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 the law in the Respondent State, threats to life associated with the mandatory death penalty persist in the Respondent State. 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.

[36] *Rajabu and Others v. Tanzania*, *ibid*, § 163; *Juma v. Tanzania, ibid*, § 170; *Henerico v. Tanzania, ibid*, § 207; *Ghati Mwita v. United Republic of Tanzania*, ACtHPR, Application no. 012/2019, Judgment of 1 December 2022 (merits and reparations), § 166.
[37] *Rajabu and Others v. Tanzania*, *ibid*, § 171 (xvi); *Juma v. Tanzania, ibid*, § 174 (xvii); *Henerico v. Tanzania, ibid*, § 217 (xvi); *Mwita v. Tanzania*, *ibid*, § 184 (xviii).
[38] *Rajabu and Others v. Tanzania*, *ibid*, § 118.
[39] *Chrizant John v. United Republic of Tanzania,* ACtHPR, Application no. 049/2016, Judgment of 7 November 2023 (merits and reparations) § 155.

IX. COSTS

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

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

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122. The Court notes that Rule 32(2) of the Rules of Court provides that: “unless otherwise decided by the Court, each party shall bear its own costs, if any”.

123. 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.

X. OPERATIVE PART

124. For these reasons:

THE COURT,

Unanimously,

On jurisdiction

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

On admissibility

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

On merits

v. *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;
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

x. *Dismisses* the Applicant's prayers for reparations.
xi. *Orders* the Respondent State to take all necessary measures, within six (6) months of the notification of this Judgment, to remove the mandatory death penalty from its laws;
xii. *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 upholds the discretion of the judicial officer;
xiii. *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;

xiv. *Orders* the Respondent State, within a period of three (3) months from the date of notification, to publish this judgment 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;

xv. *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 costs

xvi. *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 Judge Blaise TCHIKAYA and of Judge Dumisa B. NTSEBEZA are appended to this Judgment.

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