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

THE MATTER OF

CROSPERY GABRIEL

AND

ERNEST MUTAKYAWA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 050/2016

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, 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:

Crospery GABRIEL and Ernest MUTAKYAWA

Represented by:

Mr Hanningtone AMOL, Chief Executive Officer, East Africa Law Society, under the Court's *Pro Bono* Scheme.

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr. Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General;
ii. Ms. Sarah Duncan MWAIPOPO, Director of the Division of Constitutional Affairs and Human Rights, Office of the Solicitor General;
iii. Mr. Baraka LUVANDA, Ambassador, Head of Legal Unit, Office of the Solicitor General;

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

iv. Ms. Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Office of the Solicitor General;
v. Mr. Mark MULWAMBO, Principal State Attorney, Office of the Solicitor General; and
vi. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Crospery Gabriel and Ernest Mutakyawa (hereinafter referred to as "the Applicants") are Tanzanian nationals who were tried, convicted and sentenced to death for the offence of murder. At the time of filing this Application, the Applicants were detained at Butimba Central Prison, Mwanza. The Applicants allege a violation of their rights during proceedings before the domestic courts.

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

withdrawal has no bearing on pending and new cases filed before the withdrawal came into effect one (1) year after its deposit, in this case, on 22 November 2020.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that on 3 April 2009, the Applicants, together with four (4) other persons who are not part of the present Application, broke into the Twaha family home and assaulted some of the family members with machetes. One of the victims of the assault was a seven (7) year-old child, Muktari Twaha, who was severely injured and died on 5 April 2009 at Bukoba Regional Hospital.

4. On 20 February 2010, the Applicants were arrested and subsequently charged with murder before the High Court sitting at Bukoba. On 3 July 2014, the High Court found the Applicants guilty of murder and sentenced them to death by hanging. Four (4) of the Applicants' co-accused were acquitted.

5. Aggrieved by the decision of the High Court, the Applicants filed an appeal to the Court of Appeal sitting at Bukoba, which dismissed their appeal on 20 February 2015.

B. Alleged violations

6. The Applicants allege that the Respondent State violated their rights to non-discrimination; equality before the law and equal protection; life; dignity; and a fair trial protected under Articles 2, 3, 4, 5 and 7 of the Charter respectively. They specifically contend that the violations occurred because:

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, §§ 37-39.

i. The domestic courts did not consider the Applicants' evidence, nor did they give reasons for disregarding the evidence;
ii. The domestic courts contravened section 240 of the Respondent State's Criminal Procedure Act (hereinafter referred to as "CPA"), because the post mortem report of the deceased was improperly admitted as evidence;
iii. The domestic courts erred when they convicted the Applicants based on inconsistent and contradictory testimonies of witnesses whose credibility was questionable.
iv. The prosecution failed to prove its case beyond reasonable doubt.
v. The mandatory death penalty, as prescribed by the Respondent State's Penal Code, offends their right to dignity as enshrined in Article 5 of the Charter.
vi. The mandatory death penalty imposed on them violates their right to life, enshrined in the Universal Declaration of Human Rights and Articles 13(6)(d) and 14 of the Respondent State's Constitution.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was received at the Registry on 1 September 2016 and served on the Respondent State on 15 November 2016.

8. On 18 November 2016, the Court issued an order for provisional measures directing the Respondent State to refrain from executing the death penalty imposed on the Applicants until the conclusion of these proceedings.

9. The Respondent State filed its Response on 24 May 2017 and this was transmitted to the Applicants on the same day.

10. After several extensions of time, the Parties filed their other pleadings on the merits and reparations within the time granted by the Court.

11. Pleadings were closed on 23 August 2017, and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

12. The Applicants pray the Court as follows:

    i. Declare that the Court has jurisdiction to hear this matter;
    ii. Declare this Application admissible;
    iii. Grant the Applicants legal aid under Rule 31 of the Rules of the Courts and Article 10(2) of the Protocol of the Court;
    iv. Restore the Applicants' liberty by ordering their release them from prison;
    v. Order the Respondent State to pay reparations to the Applicants on account of moral damage suffered in the amount of $30,000.00 (Thirty Thousand United States Dollars);
    vi. Order the Respondent State to pay reparations to the Applicants for loss of income in the amount of $10,000.00 (Ten Thousand United States Dollars);
    vii. Order the Respondent State to pay reparations to each indirect victim on account of moral damage suffered in the amount of $8,000.00 (Eight Thousand United States Dollars); and
    viii. Order the Respondent State to amend its laws to ensure respect for the right to life under Article 4 of the Charter, by removing the mandatory death sentence for murder.

13. In relation to jurisdiction and admissibility, the Respondent State prays the Court to:

    i. Declare that the Court is not vested with jurisdiction to adjudicate the Application before it;
    ii. Find that the Application does not meet the admissibility requirements provided by Rules 40(5) of the Rules of the Court;
    iii. Find that, the Application does not meet the admissibility requirement provided by Rule 40(6) of the Rules of Court; and
    iv. Declare the Application inadmissible and dismiss it with costs.

14. On merits and reparations, the Respondent State prays the Court to find that it did not violate Articles 2, 3, 7(1)(d) of the Charter and to dismiss the

Application for lacking merits. It further prays the Court to dismiss all of the Applicants' prayers and to reject the Applicants' prayers for reparations. The Respondent State finally prays that the Applicants bear costs of this Application.

V. JURISDICTION

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

> 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

16. The Court further recalls that pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules."[3]

17. On the basis of the above-cited provisions, the Court must preliminarily establish its jurisdiction and dispose of objections thereto, if any.

18. In the present Application, the Court observes that the Respondent State objects to its material jurisdiction. The Court will thus first consider the said objection before examining other aspects of its jurisdiction, if necessary.

A. Objection to material jurisdiction

19. First, the Respondent State avers that the Court is not vested with the power to review or evaluate evidentiary matters adduced during the Applicants' trial before the domestic Courts. According to the Respondent State, the fact

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

that it has ratified the Charter and the Protocol and deposited the Declaration under Article 34(6) of the Protocol, does not confer jurisdiction on the Court to examine alleged evidentiary discrepancies during the domestic proceedings.

20. The Respondent State further points out that the Applicants appealed the decision of the High Court to the Court of Appeal, and the latter considered the records of the High Court before dismissing their appeal. Given the preceding, the Respondent State asserts that this Court cannot be moved to sit again as both a trial and an appellate court for issues that are within the jurisdiction of domestic courts. In support of its submissions, the Respondent State cites the Court's decision in *Ernest Francis Mtingwi v. Republic of Malawi.*

21. Regarding the alleged violation of Article 13(1) of its Constitution, the Respondent State submits that this Court is not vested with jurisdiction to rule on its actions or omissions, as the proper court vested with such jurisdiction is the High Court of Tanzania, as provided for under Article 30(3) of its Constitution and Section 4 and Section 9(1) of the Basic Rights and Duties Enforcement Act. The Respondent State therefore prays the Court to dismiss the Application for lack of jurisdiction.

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22. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine "all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."[4]

23. The Court observes that the Respondent State's objection coalesces around two arguments being, first, that the Court cannot sit as a trial court

[4] See, *Kalebi Elisamehe v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 265, § 18; *Gozbert Henrico v. United Republic of Tanzania*, ACtHPR, Application No. 056/2016, Judgment of 10 January 2022 (merits and reparations), §§ 38-40.

and, second, that the Court is not mandated to sit as an appellate court. Each of these arguments will now be addressed.

24. As regards the argument that the Court is being called to sit as a court of first instance, the Court reiterates its established position that it is not a court of first instance.[5] At the same time, however, it retains the power to assess the propriety of domestic proceedings, including a domestic court's assessment of evidential issues, as against the standards set out in the Charter and other international human rights instruments ratified by the State concerned.[6] The Court would, therefore, not be sitting as a trial court if it were to consider the Applicant's allegations in this Application. Resultantly, the first limb of the Respondent State's objection is dismissed.

25. In relation to the argument that the Court is being called to sit as an appellate court, the Court, again, recalls its established case law that although it is not an appellate body concerning decisions of national courts,[7] this does not preclude it from examining proceedings of the said courts to determine whether they were conducted in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned.[8] As such, the Court would not be sitting as an appellate court if it were to examine the allegations made by the Applicants. Consequently, the second limb of the Respondent State's objection is also dismissed.

26. Overall, therefore, the Court dismisses the Respondent State's objection and holds that it has material jurisdiction to consider the present Application.

[5] *Ernest Francis Mtingwi v. Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14.
[6] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Werema Wangoko Werema and Another v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29 and *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.
[7] *Mtingwi v. Malawi* (jurisdiction), *supra*, § 14.
[8] *Kennedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Guehi v. Tanzania* (merits and reparations), *supra*, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

B. Other aspects of jurisdiction

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

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

29. Regarding its temporal jurisdiction, the Court observes that the basis of the alleged violations, in this Application, is the Applicants' trial which was concluded with the Court of Appeal's judgment delivered on 20 February 2015. The Court of Appeal's decision, the Court observes, was delivered after the Respondent State had ratified the Charter and the Protocol. The Court thus holds that it has temporal jurisdiction in this Application.

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

[9] Rule 39(1) of Rules of Court, 2 June 2010.
[10] *Cheusi v. Tanzania*, *supra*, §§ 35-39.

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

VI. ADMISSIBILITY

32. Pursuant to Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter."

33. In line with Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."[11]

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

> Applications filed before the Court shall comply with all of the following conditions:
>
> a. Indicate their authors even 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 seised with the matter; and

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

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.

35. The Court observes that the Respondent State objects to the admissibility of the Application based on the non-exhaustion of local remedies. The Court will, therefore, consider the said objection first before examining other admissibility requirements, if necessary.

A. Objection based on failure to exhaust local remedies

36. The Respondent State contends that the Applicants have not fulfilled the admissibility requirements provided under Rule 50(2)(e) of the Rules, as they did not exhaust all local remedies before filling this Application.

37. In support of its position, the Respondent State contends that the Applicants' failure to institute a constitutional petition before its High Court, under the Basic Rights and Duties Enforcement Act, is clear evidence that they have not afforded it the opportunity to address the allegations within the framework of its domestic legal system.

38. The Respondent State further contends that the Applicants did not raise any of the grievances, they raise before this Court as grounds of appeal before the Court of Appeal.

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39. The Applicants submit that they exhausted all local remedies by filing an appeal with the Court of Appeal. They also allege, without offering any proof, that they filed an application for review of the Court of Appeal's judgment but that no decision had been rendered on that.

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40. The Court notes that under 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 unless the same are unavailable, ineffective and insufficient or the domestic proceedings to pursue them are unduly prolonged.[12] The rule of exhaustion of local remedies, as the Court has consistently pointed out, 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]

41. In the instant case, the Court notes that the Applicants' appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when a judgment was rendered on 20 February 2015. Although the Applicants claim to have lodged an application for review of this decision, the procedure by which the Court of Appeal upheld their conviction and sentence is the final ordinary judicial remedy that was available to them. As the Court has previously held, the review procedure, as well as the constitutional petition procedure, as framed in the Respondent State, constitute extraordinary remedies that the Applicants were not required to exhaust before seizing this Court.[14]

42. In relation to the contention that the Applicants are raising some allegations for the first time, the Court reiterates its jurisprudence that:

> […] where an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby afforded an opportunity to pronounce themselves on possible human rights breaches. This is because the alleged human rights violations form part of the bundle of rights

[12] *Peter Joseph Chacha v. United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 142-144; *Almas Mohamed Muwinda and Others v. United Republic of Tanzania*, ACtHPR, Application No. 030/2017, Judgment of 24 March 2022 (merits and reparations), § 43.
[13] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.
[14] *Thomas v. Tanzania*, *supra*, §§ 60-62; *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44.

> and guarantees that were related to or were the basis of the proceedings before domestic courts. In such a situation it would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for such claims.[15]

43. In the instant Application, the Court finds that the Applicants' allegations form part of the "bundle of rights and guarantees" relating to the right to a fair trial that led to their appeal. Thus, there was no need for them to go back to the High Court.[16] As the Court has previously stated, the "bundle of rights and guarantees" applies, among others, in circumstances where (i) the issue to be bundled should be inherently connected to other issues that were expressly raised and adjudicated in the course of domestic proceedings;[17] or (ii) the said issue was or is deemed to have been known to the domestic judicial authorities.[18]

44. In the present Application, the Respondent State had the opportunity to address the possible human rights breaches raised by the Applicants when the matter was brought before the domestic courts. The allegations relating to the fairness of the trial and reliance on allegedly questionable evidence are all matters which fall within the bundle of rights and guarantees. The Applicants' grievances before this Court, naturally and implicitly, flow from the Applicants' complaints in the High Court and the Court of Appeal.

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

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[15] *Jibu Amir alias Mussa and Another v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 629, § 37; *Thomas v. Tanzania* (merits), *supra*, §§ 60-65, *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Ernest Karatta, Walafried Millinga, Ahmed Kabunga and 1744 Others v. United Republic of Tanzania*, ACtHPR, Application No. 002/2017, Judgment of 30 September 2021 (merits and reparations), § 57.
[16] *Thomas v. Tanzania* (merits), *supra*, § 60.
[17] *Onyachi and Njoka v. Tanzania* (merits), *supra*, § 54; *Viking and Nguza v. Tanzania* (merits), *supra*, § 53; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 46.
[18] *Thomas v. Tanzania* (merits), *supra*, § 60 and *Sadick Marwa Kisase v. United Republic of Tanzania*, ACtHPR, Application No. 005/2016, Judgment of 2 December 2021 (merits and reparations), §§ 38-39.

B. Other admissibility requirements

46. The Court notes that there is no contention regarding the Application's compliance with the requirements set out in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules. Nonetheless, it must satisfy itself that these requirements are met.

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

48. The Court notes that the Applicants' claims seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof is the promotion and protection of human and peoples' rights. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union. Therefore, the Court holds that the requirement of Rule 50(2)(b) of the Rules is met.

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

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

51. In relation to the requirement for filing Applications within a reasonable time, under Rule 50(2)(f), the Court recalls that neither the Charter nor the Rules specify the time frame within which Applications must be filed after exhaustion of local remedies. As per the Court's jurisprudence "… the reasonableness of the timeframe for seizure depends on the specific

circumstances of the case and should be determined on a case-by-case basis."[19]

52. Specifically, the Court notes that the decision of the Court of Appeal was rendered on 20 February 2015 while this Application was filed on 1 September 2016. The period at stake, therefore, is one (1) Year, six (6) months and twelve (12) days. It is this period that the Court must assess to determine reasonableness. Notably, in its jurisprudence, the Court has taken into consideration, among other factors, incarceration and being on death row with the resultant limited movement and limited access to information[20] and being lay without the benefit of legal assistance as being relevant in determining the reasonableness of time.[21]

53. In the present Application, given the Applicants' situation as lay and incarcerated persons who filed the Application before the Court without counsel's assistance, the Court finds that the period of one (1) year, six (6) months and twelve (12) days is reasonable within the meaning of Rule 50(2)(f).[22]

54. The Court also finds that 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 or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.

55. Given all the above, the Court, therefore, finds that all the admissibility requirements are met and finds the present Application admissible.

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[19] *Zongo and Others v. Burkina Faso* (merits), *supra*, § 92. See also *Thomas v. Tanzania* (merits), *supra*, § 73.
[20] *Igola Iguna v. United Republic of Tanzania*, ACtHPR, Application No. 020/2017, Judgment of 1 December 2022 (merits and reparations), §§ 37-38.
[21] *Thomas v. Tanzania* (merits), *supra*, § 73; *Jonas v. Tanzania* (merits), *supra*, § 54; *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.
[22] *Sébastien Germain Ajavon v. Republic of Benin*, ACtHPR, Application No. 065/2019, Judgment of 29 March 2021 (merits and reparations), §§ 86-87.

VII. MERITS

56. The Applicants allege, as detailed in paragraph six (6) of this Judgment, that the Respondent State violated their rights to non-discrimination; equality before the law and equal protection; life; dignity; and a fair trial protected under Articles 2, 3, 4, 5 and 7 respectively. The Court will now consider each of the Applicants' allegations.

A. Alleged violation of the right to a fair trial

57. In relation to the alleged violation of the right to a fair trial, the Applicants contend that the Respondent State violated their rights due to failure to consider their evidence and to provide reasons for the conclusions reached by the domestic courts; the domestic court's reliance on faulty identification evidence and the prosecution's failure to prove the case against the Applicants beyond reasonable doubt. The Court will individually address each of the alleged violations of the Applicants' right to a fair trial.

i. Alleged failure to consider exculpatory evidence

58. The Applicants argue that the High Court and the Court of Appeal ignored exulpatory evidence thereby rendering their trial unfair. They further aver that their right to a fair trial was violated by Respondent State insofar as the trial court failed to furnish them with reasons for disregarding and not considering their defence.

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59. The Respondent State refutes the Applicants' allegations and claims that the trial court, after the prosecution had presented its evidence, issued a ruling in accordance with its CPA, in which it held that there was enough evidence presented, which required the accused persons to defend themselves. After this, all the accused persons (including the Applicants) proceeded to present their case by giving testimony. The Respondent States submits, therefore, that both the High Court and the Court of Appeal

considered all relevant matters of evidence tendered before them before arriving at their conclusions.

60. The Respondent State further asserts that the judgments of the High Court and the Court of Appeal reveal why the Applicants' defence was rejected. Specifically, the Respondent State points out that the High Court accorded both the prosecution and the defence equal opportunity to present their cases and that the Applicants were convicted after the High Court had considered all matters of evidence.

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61. Article 7(1) of the Charter provides that "[e]very individual shall have the right to have his cause heard". Article 7 of the Charter, the Court recalls, provides guarantees that are, centrally, meant to ensure the realisation of the right to a fair trial.

62. The Court notes, however, that Article 7 of the Charter does not expressly provide for the right to a reasoned judgment. The Court further notes, however, that the Commission's Principles and Guidelines on the Right to a Fair Trial provide for "an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions" as a component of the right to a fair hearing.[23] The motivation of judicial decisions, stemming from the principle of proper administration of justice, therefore, makes it incumbent on the judge to clearly base his reasoning on objective arguments.

63. The Court also notes that in application of the above Guidelines, the Commission in *Kenneth Good v. Botswana* held that the right to a reasoned decision derives from the right to seize a competent national court as

[23] African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2001), Principles A(2)(i).

provided under Article 7(1)(a) of the Charter.[24] The European Court of Human Rights[25] and Inter-American Court of Human Rights[26] have also found a violation of the right to a reasoned decision on the basis of the corresponding provisions of their respective conventions, which they have the duty to interpret.

64. In the present Application, the Court observes that the Applicants are questioning the manner in which the domestic courts, particularly the High Court assessed the evidence against them. In so far as the Applicants are inviting the Court to consider the manner in which domestic courts dealt with evidential matter, the Court recalls that it 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.[27]

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

66. In the present Application, the Court observes that the Applicants do not point to the specific evidence, adduced before the domestic courts, that was not considered. In the circumstances, the Court is unable to uphold their contention that domestic courts ignored exculpatory evidence in convicting them.

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[24] *Kenneth Good v. Botswana Communication* 313/05 (2010), AHRLR 43 (ACHPR 2010) §§ 162, 175. Also see *Albert Bialufu Ngandu v. Democratic Republic of Congo*, Communication 433/12 (19th Extra-ordinary Session, 16 to 25 February 2016), §§ 58-67.
[25] *Baucher v. France*, ECHR (2007); *K.K. v. France*, ECHR, 10/10/2013, Application No. 18913/11, § 52.
[26] *Barbani Duarte and Others v. Uruguay*, 13/10/2011, §§ 183-185.
[27] *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65.

67. Equally, although the Applicants allege that no reasons were given by the domestic courts for disregarding their defences, the record reveals that the Applicants principally sought to rely on the defence of *alibi*. The record also confirms that the High Court fully considered the Applicants' *alibis* and dismissed them after finding them unplausible. It is also notable that the High Court's findings were upheld by the Court of Appeal in their entirety. The Court finds that, in its assessment of the Applicants' *alibis*, the trial court demonstrated an awareness of the required burden and standard of proof for establishing an *alibi*. The trial court also provided reasons for disregarding the *alibis*.

68. Accordingly, the Court holds that the Applicants have failed to demonstrate how the domestic courts disregarded their evidence or failed to provide reasons for disregarding their defences before convicting them.

69. In light of all the above, the Court thus dismisses the Applicants' allegation of a violation of Article 7(1) of the Charter.

ii. Alleged violation due to the admission of evidence relating to identification

70. The Applicants submit that the visual identification relied upon by the domestic courts to convict them was erroneous. They aver that the victims who testified as witnesses could not properly identify them as the alleged crime and attack took place at night and, therefore, the conditions for identification were not conducive.

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71. The Respondent State argues that the trial court was aware of the dangers of relying on the prosecution's identification evidence and properly attuned itself to these dangers, all the more so as the crime took place at night. It submits that the domestic courts treatment of the identification evidence was in line with the settled legal position in its jurisdiction. Specifically, the Respondent State submits that that the trial court took into account the

distance of the observation, the time of observation and the fact that the victims were familiar with the Applicants and their voices. It also points out that the trial court found that the prosecution witnesses were credible and that, over and above the identification evidence, there was corroborating evidence implicating the Applicants.

72. According to the Respondent State, the domestic courts convicted the Applicants after a thorough and appropriate examination of all the evidence. The Respondent State maintains, therefore, that the Court should defer to the finding of the domestic courts in circumstances where duly established procedures laid down by the laws of the land were adhered to.

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73. The Court further underscores that domestic courts enjoy a margin of appreciation in evaluating the probative value of evidence presented before them. As an international human rights court, therefore, the Court cannot take this role from the domestic courts.[28]

74. As the Court has previously observed, a fair trial requires that the imposition of a sentence in a criminal offence, and in particular, a heavy prison sentence, should be based on strong and credible evidence.[29] Specifically in relation to visual identification, the Court has pointed out that when a conviction is based on this type of evidence, all circumstances of possible mistaken identity should be ruled out and the identity of the suspect should be established with certitude. This is also the accepted principle in the Respondent State's jurisprudence.[30] The result is that evidence of visual identification should be corroborated by other circumstantial evidence and must be part of a coherent and consistent account of the crime scene.[31]

[28] *Abubakari v. Tanzania* (merits), *supra*, §§ 26 and 173.
[29] *Abubakari v. Tanzania, ibid*, § 174.
[30] *Matter of Waziri Amani v. The Republic* (1980) TLR 250.
[31] *Isiaga v. Tanzania* (merits), *supra*, § 68.

75. In the instant case, the record shows that the High Court convicted the Applicants, partly, on the basis of evidence of visual identification based on the testimonies of two prosecution witnesses, who were victims of the crimes. The record confirms that these witnesses knew the Applicants prior to the commission of the crime as the Applicants were neighbours who worked in the victims'/witnesses' house.

76. The record demonstrates that the High Court analysed the circumstances under which the prosecution witnesses claimed to have identified the Applicants, including the lighting at the crime scene and the length of time the witnesses had the Applicants under observation. It was following this assessment that the High Court decided to ignore the testimony of some of the prosecution witnesses while admitting the testimony of others. The judgment of the High Court also demonstrates that the trial judge was fully aware of the importance of certitude in identification evidence before the court could rely on the same. The High Court's findings were, subsequently, fully endorsed by the Court of Appeal.

77. In the circumstances, the Court finds that the procedures adopted by domestic courts in assessing the identification evidence did not violate Article 7(1) of the Charter, specifically or any international human rights standards, generally.

78. The Court, therefore, dismisses the allegation that the domestic courts erroneously relied upon evidence of visual identification in convicting the Applicants.

iii. Failure by the prosecution to prove the case against the Applicants

79. The Applicants allege that their rights were violated because the prosecution failed to prove the case against them beyond reasonable doubt.

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80. The Respondent State avers that the standard of proof in criminal cases is one beyond reasonable doubt and that the burden lies on the prosecution to prove its case beyond reasonable doubt, which happened before the trial court. It further submits that this is why the decision of the trial court was upheld by the Court of Appeal of Tanzania.

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81. The Court notes that the Applicants make a general statement to the effect that the prosecution failed to prove the case against them beyond reasonable doubt. The Applicants, however, do not demonstrate how the prosecution failed to prove its case beyond reasonable doubt. On the contrary, the record demonstrates that the High Court was fully aware that the Applicants bore no burden to prove their innocence. It is clear, therefore, that the High Court applied the correct standard and burden of proof in convicting the Applicants.

82. Consequently, the Court dismisses the Applicants' allegations and holds that the Respondent State did not violate their rights under Article 7(1) of the Charter.

iv. Allegations relating to admission of post-mortem report into evidence

83. The Applicants allege that their rights were violated insofar as the post-mortem report which was relied on to convict them was improperly admitted into evidence, in contravention of section 240(3) of the Respondent State's CPA.

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84. The Respondent State submits that the Applicants' argument on this point is misconceived and could be attributed to "sheer legal ignorance." It also points out that during the preliminary hearing, two (2) exhibits were admitted into evidence without objection by the Applicants or their counsel. These were the sketch plan of the crime scene and the post-mortem report. The

Respondent State submits that the post-mortem report was admitted merely to confirm the death of the deceased and that the Applicants' conviction was premised on other evidence adduced by the prosecution. Accordingly, it prays the Court to dismiss the Applicants' allegations.

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85. The Court takes judicial notice of section 240(3) of the Respondent State's CPA, which lays down the procedure for admitting medical reports in criminal trials.[32] The Court notes from the record that the Applicants', who were represented by counsel, never requested the Court to summon and examine the author of the post-mortem report. Further, it emerges from the Application that the Applicants do not elaborate how the admission of the post-mortem report led to a violation of their right to a fair trial. Additionally, the Court notes, again from the record, that the post-mortem report was not cited as a basis for the Applicants' conviction by the High Court.

86. The Court thus finds the Applicants' allegations relating to the admission of the post-mortem report to be without basis. It thus dismisses these allegations and finds that the Respondent State has not violated Article 7(1) of the Charter.

87. Overall, therefore, the Court dismisses all of the Applicants' allegations relating to the alleged violation of the right to a fair trial under Article 7(1) of the Charter.

B. Alleged violation of the right to life

88. The Applicants contend that the Respondent State's capital punishment regime violated their right to life enshrined in the Universal Declaration of

[32] Section 240(3) – "Where a report referred to in this section is received in evidence the court may, if it thinks fit, and shall, if so requested by the accused person or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused person of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection".

Human Rights. They also aver that the Respondent State violated Articles 13(6)(d) and 14 of its Constitution due to the capital punishment regime. They submit, therefore, that the Respondent State violated their right to life as enshrined under Article 4 of the Charter.

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89. The Respondent State avers that the High Court and the Court of Appeal did not breach Articles 13(6)(d) and 14 of its Constitution insofar the Court of Appeal is the final authority in dispensing justice in its jurisdiction as per Article 107A (1) of the Constitution. It further argues that the punishment for the offence of murder is provided for by statute, under Section 197 of the Penal Code and that the Court of Appeal, has upheld the constitutionality of the death penalty as provided for by its Constitution.

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90. The Court notes 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".

91. The Court recalls the well-established international human rights case-law on the criteria to apply in assessing the arbitrariness of a death sentence,[33] that is, whether the death sentence is provided for by law, whether the sentence was passed by a competent court and whether due process was followed in the proceedings leading to the death sentence.

[33] See *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria*, Communications 137/94 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), §§ 1-10 and § 103; *Forum of Conscience v. Siena Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), § 20.; See Article 6(2), ICCPR; and *Eversley Thompson v. St. Vincent & the Grenadines*, Comm. No. 806/1998, U.N. Doc. CCPR/C70IO/806/1998 (2000) (U.N.H.C.R.), 8.2; See also, *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, § 104.

92. In relation to the first criterion, the Court notes that the death sentence is provided for in Section 197 of the Respondent State's Penal Code.[34] The criterion is thus met in the present case.

93. Regarding the second criterion, the Court observes that the Applicants' contention is not that the courts of the Respondent State lacked jurisdiction to conduct the processes that led to the imposition of the death penalty on them. The Court further notes that the Applicants contend rather, that, the High Court could only impose the death sentence because it is provided for in the law as the mandatory sentence for murder. In any event, this Court observes that the High Court is the competent Court in the Respondent State to deal with offences that carry a death penalty. It has both appellate and original jurisdiction to adjudicate on criminal and civil matters as provided for under Section 3(2)(a) of the Criminal Procedure Act and Article 107(1)(a) of the Respondent State's Constitution. In the circumstances, the sentence was imposed by a competent court. It follows that this second requirement is equally met.

94. In relation to the third criterion, the Court recalls that *in Ally Rajabu and Others v. United Republic of Tanzania*, it held that the death penalty can only be imposed in accordance with the norms and standards required in a fair trial.[35] In this regard, the Court held that "any penalty must be imposed by a tribunal that is independent in the sense that it retains full discretion in determining matters of fact and law."[36] The Court finds that, by taking away the discretionary power of a judicial officer to impose a sentence on the basis of proportionality and the individual circumstances of a convicted person, the mandatory death sentence falls foul of the requirements of due process in criminal proceedings.[37]

[34] "A person convicted of murder shall be sentenced to death".
[35] *Rajabu and Others v. Tanzania, ibid*, § 98.
[36] Ibid, § 107.
[37] *Ibid*, § 110.

95. In the instant case, the Court finds that the mandatory imposition of the death penalty, as provided for in Section 197 of the Respondent State's Penal Code, and as automatically applied by the High Court in the case of the Applicants, does not uphold fairness and due process. This amounts to an arbitrary deprivation of the right to life.

96. As previously stated by the Court,[38] the mandatory death penalty is a violation of the right to life and should thus be expunged from the laws of the Respondent State. [39]

97. In relation to the mandatory death penalty as applied in the Respondent State, the Court finds it apposite to note that the trial judge in the Applicants' trial was aware of the limitations imposed on him by Section 197 of the Respondent State's Penal Code. He expressed himself thus:

> … the only punishment for murder is death sentence. This kind of sentence has been subject of criticism by many people including lawyers, human rights groups etc. I do not need to say much about it but as the country is in the process of having a new constitution, I think it is the right time to think of an alternative punishment for those who commit offences which attract the sentence of death.

98. The Court notes that the sentiments expressed by the trial judge speak to the same fundamental problems that it has found with the mandatory regime for the death penalty in the Respondent State.

99. For the reasons stated above, the Court,finds that the Respondent State violated Article 4 of the Charter by imposing the mandatory death penalty on the Applicants.

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[38] *Ibid*, §§ 104-114. See also, *Amini Juma v. United Republic of Tanzania*, ACtHPR, Application No. 024/2016, Judgment of 30 September 2021, §§ 120-131; *Henerico v. Tanzania, supra*, § 160.
[39] *Ghati Mwita v. United Republic of Tanzania* (merits and reparations), ACtHPR, Application No. 012/2019, Judgment of 1 December 2022, § 65.

C. Alleged violation of the right to dignity

100. The Applicants allege that the Respondent State violated their right to dignity by the mandatory imposition of the death penalty and also due to the prescribed method of execution in the Respondent State, which is hanging.

101. The Respondent State submits that the Applicants' submission has no merit and should be dismissed. It also submits that there is no "evidence nor do the Applicants allege that their dignity was violated by the state apparatus during investigation, restraint or in the execution of their sentence."

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102. The Court notes that Article 5 of the Charter provides:

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

103. The Court recalls that the question of execution by hanging, in the Respondent State, has previously been dealt with.[40] Given that there is no information to suggest that the legal situation in the Respondent State has changed, the Court finds that it must simply reiterate its previous findings on this matter. As previously stated, the implementation of the death penalty by hanging is "inherently degrading" and "encroaches upon dignity in respect of the prohibition of […] cruel, inhuman and degrading treatment".[41]

[40] *Rajabu and Others v. Tanzania*, *ibid*, §§ 119-120; *Henerico v. Tanzania, ibid*, §§ 169-170; *Juma v. Tanzania, ibid*, §§ 135-136.
[41] *Rajabu v. Tanzania* (merits and reparations), *supra*, §§ 119-120.

104. The Court, therefore, finds that hanging as a method of executing the death penalty is a violation of the right to dignity under Article 5 of the Charter.

105. In the circumstances, the Court, therefore, holds that the Respondent State violated Article 5 of the Charter.

D. Alleged violation of the right to non-discrimination

106. The Applicants allege that the manner in which the Respondent State's courts conducted their trial was a serious violation of their fundamental rights under Article 2 of the Charter.

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107. The Respondent State argues that both the High Court and the Court of Appeal fairly evaluated all the evidence against the Applicants before establishing their guilt. It submits that the Applicants' conviction was based on the fact that the prosecution witnesses were found to be credible and hence believed by the High Court. It thus prays the Court to finds that the Applicants' allegations lack merit and dismiss them accordingly.

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108. Article 2 of the Charter provides as follows:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

109. In *African Commission on Human and Peoples' Rights v. Republic of Kenya* the Court stated thus:[42]

[42] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) *supra*, §§ 137-138.

> Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.
>
> … The scope of the right to non-discrimination extends beyond the right to equal treatment by the law and also has practical dimension in that individuals should in fact be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status.

110. In so far as proving a violation of Articles 2 of the Charter is concerned, the Court observes that in *George Maili Kemboge v. United Republic of Tanzania*, that "[g]eneral statements to the effect that [a] right has been violated are not enough. More substantiation is required."[43] Any alleged violation of Articles 2 of the Charter, therefore, must be backed by adequate evidence to substantiate the allegation.[44]

111. In the present Application, the Court finds that the Applicants make a general averment without offering any proof to substantiate their allegations. Resultantly, the Court dismisses their allegations of a violation of the right to non-discrimination protected under Article 2 of the Charter.

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

112. In the their Reply to the Respondent State's Response, the Applicants pray that the Court find that the Respondent State "did violate the Applicants' rights provided under Article 3 of the African Charter on Human and Peoples' Rights." Apart from this general allegation, however, the Applicants offer no

[43] (merits) (11 May 2018) 2 AfCLR 369, § 51.
[44] *Minani Evarist v. United Republic of Tanzania* (merits) (21 September 2018) 1 AfCLR 402, § 75.

substantiation as to how the Respondent State's conduct violated their rights under Article 3 of the Charter.

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113. The Respondent State's submissions did not address the Applicants' allegations under Article 3 of the Charter.

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114. Article 3 of the Charter provides that: "1. Every individual shall be equal before the law; 2. Every individual shall be entitled to equal protection of the law."

115. In its jurisprudence, the Court has constantly reiterated that the *onus* is on an Applicant alleging a violation of Article 3 to demonstrate how the Respondent State's conduct infringed the guarantees of equality and equal protection of the law such as to justify a finding of a violation of the provision.[45]

116. In the present case, the Applicants have made no effort to demonstrate how the Respondent State violated Article 3 of the Charter but have instead made a general averment. As the Court has constantly restated, general allegations to the effect that a right has been violated are not sufficient to found a violation.[46]

117. In the circumstances, the Court finds that the Respondent State has not violated Article 3 of the Charter.

[45] *Thomas v. Tanzania* (merits), *supra*, § 140.
[46] *Cheusi v. Tanzania* (judgment), *supra*, 129.

VIII. REPARATIONS

118. The Court notes that Article 27(1) of the Protocol stipulates that "[i]f the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

119. As per the Court's jurisprudence, for reparations to be granted, the Respondent State should first be found responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Finally, where granted, reparations should cover the full damage suffered.

120. Furthermore, the onus is on the Applicant to provide evidence in support of his/her allegations.[47] With regard to moral damages, the Court has consistently held that it is presumed and that the requirement of proof is not strict.[48]

121. The Court also restates that the measures that a State can take to remedy a violation of human rights include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, considering the circumstances of each case.[49]

122. In the present Application, the Court has found that the Respondent State violated the Applicants' right to life and right to dignity as guaranteed under Articles 4 and 5 of the Charter, respectively. The Court, therefore, finds that the Respondent State's responsibility has been established. The Applicant

[47] *Kennedy Gihana and Others v. Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139; See also *Reverend Christopher R. Mtikila v. 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* (merits and reparations), *supra*, § 97.

[48] *Rajabu and Others v. Tanzania* (merits and reparations), *supra*, § 136; *Guehi v. Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119; *Zongo and Others v. Burkina Faso* (reparations), *supra*, § 55

[49] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also, *Elisamehe v. Tanzania,* (merits and reparations), *supra*, § 96.

are, therefore, entitled to reparations commensurate with the extent of the established violations.

A. Pecuniary reparations

123. The Applicants claim pecuniary and non-pecuniary reparations for themselves as victims of human rights violations.

i. Material prejudice

124. The Applicants submit that they owned businesses and other sources of income that were affected by their conviction and imprisonment. They specifically allege that they were engaged in farming activities with each of them earning at least Three Hundred and Fifty Thousand Tanzanian Shillings (TSH350 000) per month. They assert that the sum claimed hereunder is to compensate them since their businesses collapsed due to their imprisonment.

125. Separately, , the Applicants also claim, without providing any supporting particulars, the sum of Ten Thousand United States Dollars (US$10,000) as lost income.

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126. The Respondent State simply prayed the Court to dismiss the Applicants' claims.

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127. The Court recalls that in respect of material prejudice, it has always required Applicants to prove not just their loss but also the connection between the loss and the alleged violations. [50] In the present case, the Court observes that the Applicants fail to prove that they earned the sums they indicated. They also fail to demonstrate the connection between the violations

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

established and the loss. No proof of the claimed monthly earnings was lodged with the Court to support their assertions.

128. The Court, therefore, dismisses the Applicants' claims for reparations for material prejudice.

ii. Moral prejudice

129. In respect of moral prejudice, the Applicants claim that they suffered "harm, pain and suffering, including mental anguish, humiliation and sense of injustice", for which they seek compensation. Specifically, they point out that they have suffered eighteen (18) years imprisonment as well as complete disruption of their lives due to their incarceration. The Applicants also claim the sum of Thirty Thousand United States Dollars (US$30 000) for themselves and Eight Thousand Unites States Dollars (US$8 000) for each indirect victim as reparations for the moral prejudice suffered.

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130. Without specifically addressing the Applicants' claims for reparations for moral prejudice, the Respondent State prayed the Court to dismiss the Applicants' claim.

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131. The Court recalls its case-law where it has held that moral prejudice is presumed in cases of human rights violations and the quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.[51] One option that the Court has utilised in this connection has been to grant a lump sum.[52]

[51] *Zongo and Others v. Burkina Faso* (reparations), *supra*, § 55; *Umuhoza v. Rwanda* (reparations), *supra*, § 59; *Jonas v. Tanzania, supra*, § 23.
[52] *Rashidi v. Tanzania* (merits and reparations), *supra*, § 119; *Evarist v. Tanzania* (merits), *supra*, § § 84-85; G*uehi v. Tanzania* (merits and reparations), *supra*, § 177.

132. The Court notes that it has earlier found that the Respondent State violated the Applicants' right to life and right to dignity on account of which they suffered moral prejudice. Accordingly, the Applicants are entitled to reparations for the moral prejudice suffered.

133. The Court also notes that the disruption of Applicants' life plan is related to their incarceration. However, since the Court has not found the Applicant's conviction to be unlawful, it cannot award any reparations for harm suffered as a result of the incarceration per se.

134. Equally, the Court notes that the Applicants do not prove their relationship to the alleged indirect victims. In the circumstances, the Court dismisses the claim for reparations for moral prejudice suffered by alleged indirect victims.

135. In view of all of the above, and taking into account other similar cases involving the Respondent State, the Court awards each of the Applicants the sum of Three Hundred Thousand Shillings (TZS 300,000) as moral damages.

B. Non pecuniary reparations

136. The Applicants pray the Court to set "aside the death sentence imposed on the Applicants and [to order] their removal from death row". They also pray the Court to restore their liberty and to order the Respondent State to amend its law to ensure the respect for the right to life.

i. Amendment of laws

137. The Applicants pray that the Respondent State be ordered to amend its laws to ensure respect for the right to life under Article 4 of the Charter by repealing the mandatory death sentence for the offence of murder.

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138. The Respondent State did not file any submissions on this point.

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139. The Court recalls that, where appropriate, it has ordered State Parties to amend their legislation in order to bring it in conformity with the Charter. For example, the Court has previously ordered the Respondent State "to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken."[53] In another case, the Court ordered Burkina Faso to "amend its legislation on defamation in order to make it compliant with Article 9 of the Charter, Article 19 of the Covenant and Article 66(2) of the Revised ECOWAS Treaty."[54] A similar approach was adopted by the Court in *Association pour la Protection des Droits des Femmes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali*[55] as well as in *Jebra Kambole v. United Republic of Tanzania*.[56]

140. In the present case, the Court, having found that the provisions for the mandatory death penalty, and execution by hanging, contravene the Charter, orders the Respondent State, within Six (6) months from the date of notification of this Judgment, to take all necessary constitutional and legislative measures to amend the provisions of its Penal Code and ensure that they are aligned with the provisions of the Charter so as to eliminate the violations identified herein.

ii. Restitution

141. The Applicants submit that "[they] cannot be returned to the state they were before their incarceration but, as a starting point, their liberty can be restored

[53] *Tanganyika Law Society and Others v. Tanzania* (merits), *supra*, § 126.
[54] *Konate v. Burkina Faso* (merits), *supra*, § 176.
[55] *APDF and IHRDA v. Republic of Mali* (merits and reparations) (11 May 2018) 2 AfCLR 380, § 130.
[56] *Kambole v. Tanzania*, *supra*, § 118.

as the second best measure taking into account passage of time since the alleged offence was committed."

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142. The Respondent State did not file any submissions on this point.

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143. Regarding the Applicants' prayer to be set free, the Court recalls that it can only make such order in compelling circumstances. In the present Application, the Court notes that its findings only pertain to the sentencing and do not, therefore, affect the conviction of the Applicants. The prayer for release is therefore not warranted. Accordingly,the Court dismisses the Applicants' prayer to be released from prison.

144. However, the Court considers that, while the Applicants' prayer for release is not warranted, they were sentenced to death under a regime which did not accord the domestic courts discretion on the sentence. Given that the Court has found the mandatory sentencing regime to be inconsistent with the Charter, it is necessary for it to make an order dealing with this sentencing regime.

145. Consequently, the Court orders the Respondent State to take all necessary measures for the rehearing of the case on the sentencing of the Applicants through a process that does not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.

iii. Publication

146. None of the parties made any submissions in respect of the publication of this judgment.

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147. The Court considers, however, 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. The Court notes that it 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.

iv. Implementation and reporting

148. Both Parties, apart from making a generic prayer that the Court should grant other reliefs as it deems fit, did not make specific prayers in respect of implementation and reporting.

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149. The justification provided earlier in respect of the Court's decision to order publication of the judgment, notwithstanding the absence of express prayers by the Parties, is equally applicable in respect of implementation and reporting. Specifically in relation to implementation, the Court notes that in its previous judgments directing the repeal of the provision on the mandatory death penalty, the Respondent State was directed to implement the decisions within one (1) year of issuance of the same.[57]

150. The Court observes that, in the present case, the violation of the right to life by the provision on the mandatory imposition of the death penalty goes beyond the individual case of the Applicants and is systemic in nature. The same applies to the violation in respect of execution by hanging. The Court further notes that its finding in this Judgment bears on a supreme right in the Charter, that is, the right to life.

[57] *Rajabu v. Tanzania* (merits), *supra*, § 171 and *Henerico v. Tanzania* (merits), *supra*, § 203.

151. In view of this, therefore, the Court deems it necessary to order the Respondent State to periodically report on the implementation of this judgment in accordance with Article 30 of the Protocol. The report should detail the steps taken by the Respondent State to remove the impugned provision from its Penal Code.

152. The Court notes that the Respondent State has not provided any information on the implementation of its judgments in any of the earlier cases where it was ordered to repeal the mandatory death penalty and the deadlines that the Court set have since lapsed. In view of this fact, the Court still considers that the orders are warranted both as an individual protective measure, and as a general restatement of the obligation and urgency behoving on the Respondent State to scrap the mandatory death penalty and provide alternatives thereto. The Court holds, therefore, that the Respondent State is under an obligation to report on the steps taken to implement this judgment within six (6) months from the date of notification of this judgment.

IX. COSTS

153. In their submissions, both Parties prayed the Court to order that the other Party pays the costs. The Applicants, additionally, requested the Court to reimburse them the sum of Five Hundred United States Dollars (US$500) to cover expenses related to transport and stationery costs.

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

155. In relation to the Applicants’ claim, the Court notes that they were represented by the East Africa Law Society (“EALS”) on a *pro bono* basis under the Court’s legal aid scheme. The Court notes that its legal aid

scheme covers the costs and expenses incurred by EALS in representing the Applicants.

156. Resultantly, the Court does not find any reason for departing from its established practice and thus orders that each Party will bear its own costs.

X. OPERATIVE PART

157. For these reasons:

THE COURT

Unanimously:

On jurisdiction

i. *Dismisses* the objection to its material 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 Applicants' right to non-discrimination under Article 2 of the Charter;
vi. *Holds* that the Respondent State did not violate the Applicants' right to equality and equal protection of the law under Article 3 of the Charter;
vii. *Holds* that the Respondent State did not violate the Applicants' right to fair trial under Article 7(1) of the Charter;

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

viii. *Holds* that the Respondent State violated the Applicants' right to lilfe protected under Article 4 of the Charter by reason of imposition of the mandatory death penalty;

ix. *Holds* that the Respondent State violated the Applicants' right to dignity protected under Article 5 of the Charter by prescribing hanging as a method for implementing the death penalty.

Unanimously,

On reparations

Pecuniary reparations

x. *Dismisses* the Applicants' prayer for reparations for material prejudice;

xi. *Dismisses* the prayer for reparations on behalf of indirect victims;

xii. *Orders* the Respondent State to pay each of the Applicants the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as damages for the moral prejudice suffered;

xiii. *Orders* the Respondent State to pay the amount indicated under subparagraph (ix) 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

xiv. *Dismisses* the Applicants' prayer for release from prison;

xv. O*rders* the Respondent State to take all necessary constitutional and legislative measures, within six (6) months of notification of this

Judgment, to ensure that the provisions of its Penal Code are amended and aligned with the provisions of the Charter so as to eliminate the violations identified herein;

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 Applicants through a procedure that does not allow the mandatory imposition of the death sentence and upholds the discretion of the judicial officer;

xvii. *Orders* the Respondent State, within a period of six (6) 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.

On implementation and reporting

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

On costs

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

Signed:

Modibo SACKO, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 70(3) of the Rules, the Declarations of Justice Blaise TCHIKAYA and Justice 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 version being authoritative.