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

GOZBERT HENERICO

V

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 056/2016

JUDGMENT

10 JANUARY 2022

TABLE OF CONTENTS

The Court composed of: Blaise TCHIKAYA, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO - 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:

Gozbert HENERICO
Represented by:

Mr. Donald DEYA, Chief Executive Officer, Pan African Lawyers Union (PALU)

Versus

UNITED REPUBLIC OF TANZANIA
Represented by:

i. Mr Gabriel P. MALATA, Solicitor General, Office of the Solicitor General
ii. Ms Sarah MWAIPOPO, Director, Division of Constitutional Affairs and Human Rights, and Principal State Attorney, Attorney General's Chambers
iii. Ambassador Baraka LUVANDA, Director, Legal Unit, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation
iv. Ms Nkasori SARAKIKYA, Principal State Attorney, Attorney General's Chambers
v. Mr Mark MULWAMBO, Senior State Attorney, Attorney General's Chambers
vi. Mr Richard KILANGA, Senior State Attorney, Attorney General's Chambers

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

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

after deliberation,

renders the following Judgment:

I. THE PARTIES

1. Gozbert Henerico, is a national of Tanzania, who, at the time of filing the Application, was at Butimba Central Prison, Mwanza Region, awaiting the execution of the death sentence, following his conviction and sentence for the offence of murder. He alleges the violation of his rights to fair trial, life and dignity.

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 the Protocol on 10 February 2006. It further deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit.[2]

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that on 27 May 2008, at Nyakaka Buturage village within Bukoba District, Kagera Region, following the sale of land by the Applicant's brother, Respick Henerico, the Applicant who had been drinking heavily and was inebriated on drugs, stormed into the home of his relatives, who were also his neighbours. He injured three (3) of them with a panga (machete) by slashing them on the shoulders, head, neck and hands. During the attack, he also killed his nephew (late brother's son) who at the time was being carried by the grandmother on her back.

4. Following the attack, the surviving relatives raised the alarm compelling the Applicant to flee the crime scene to the home of the area chairman who was also his relative. The Applicant was apprehended and taken to the police station, while the injured were rushed to the hospital.

5. The Applicant was arrested on 27 May 2008 and subsequently charged with the offence of murder, under Criminal Case No. 7 of 2012 before the High Court of Tanzania at Bukoba. His arraignment was conducted on 21 May 2012, followed by the preliminary hearing on 5 June 2014 and the commencement of the trial on 16 February, 2015. Subsequently, the High Court convicted the Applicant and sentenced him to death, by its judgment of 22 April 2015.

6. The Applicant appealed his conviction and sentence by filing Criminal Appeal No. 114 of 2016 before the Court of Appeal of Tanzania sitting at Bukoba. On 26 February 2016, the Court of Appeal dismissed his appeal for lack of merit.

B. Alleged violations

7. The Applicant alleges the following:
    i. That the Respondent violated his right to a fair trial under Article 7 of the Charter:

(a) When it detained him for an unreasonably long period of time before trying him;
(b) When it failed to provide him with effective legal representation;
(c) When it failed to acknowledge that his trial was tainted by actual or perceived bias due to the assessors having cross-examined the Applicant; and
(d) When the Respondent State failed to provide him with adequate access to an interpreter.

ii. That the Respondent violated his right to life under Article 4 of the Charter by imposing a mandatory death penalty upon finding the Applicant guilty of murder:
(a) When it failed to take into account his specific circumstances;
(b) That the alleged offence fell outside the narrow category of the "most serious" offences to which the death penalty can be lawfully applied; and
(c) That the Respondent State imposed a death penalty despite failing to ensure that he received a fair trial.

iii. That the Respondent violated his right to dignity under Article 5 of the African Charter:
(a) By imposing a capital punishment on him as a mentally ill person; and
(b) By sentencing him to death by hanging, which is a cruel and inhuman way of administering the death sentence.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. This Application was filed on 15 September 2016 and served on the Respondent State on 15 November 2016.

9. On 18 November 2016, the Court issued an Order for provisional measures for the Respondent State to refrain from executing the death penalty imposed on the Applicant pending the determination of the Application.

10. On 6 February 2017, the Respondent State filed its Response to the Application and generally on reparations and this was served on the Applicant on 9 February 2017. The Applicant filed his Reply on 17 March 2017.

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

12. On 13 March 2018, this Court requested the Applicant to file the Report of the medical examination of his mental health status undertaken at Isanga Mental Institution, Dodoma, following the order of the High Court of 21 May 2012. On 4 June 2019, the Applicant informed the Court that he was unable to obtain a copy of the report requested by this Court.

13. On 24 April 2018, the Pan African Lawyers Union (PALU) sought leave from the Court to represent the Applicant and to amend the Application and file further evidence pursuant to Rule 50 of the Rules of Court.

14. On 2 May 2018, the Court re-opened pleadings and granted leave to the Applicant to amend the pleadings and file additional evidence.

15. On 4 June 2018, the Applicant filed the amended Application, including a medical evaluation report dated 29 May 2018, which had been commissioned by PALU, on his mental health status of the Applicant. This amended application and medical evaluation report on the Applicant's mental health status were served on the Respondent State on 14 June 2018.

16. The Applicant filed submissions on reparations on 3 December 2018, which were served on the Respondent on 6 December 2018.

17. The Respondent State did not file a Response to the Applicant's amended Application, including on the medical evaluation report on the mental health status of the Applicant commissioned by PALU, and on reparations.

18. On 17 September 2018, Cornell University, Law School, Human Rights Clinic wrote to the Court expressing its interest to represent the Applicant. The request

was communicated to PALU on 24 September 2018, and on 26 September 2018, it informed the Court that, it agreed to the collaboration.

19. On 4 October 2018, Cornell University, Law School, Human Rights Clinic wrote to the Court requesting its intervention with the Butimba Prison authorities to access the Applicant's prison file and health records, including the medical evaluation report on the mental health status of the Applicant which it deemed crucial in representing the Applicant. This medical evaluation report was pursuant to the order of 21 May 2012, by the High Court, made after the taking of the Applicant's plea, that the Applicant should undergo a medical evaluation on his mental health status at the time of commission of the offence.

20. On 28 January 2019, the Applicant filed additional documents in support of his submission on reparations and these were served on the Respondent State on 7 February 2019.

21. On 28 March 2019, the Applicant requested for a public hearing in the matter to provide him with an opportunity to present the "complex factual issues that would benefit from examination of expert witness testimony, concerning the Applicant's mental capacity". The request was notified to the Respondent State on 29 March 2019, for its observations but it did not file its Response.

22. On 3 June 2019, PALU forwarded to the Registry for its information, a letter PALU had addressed to the Attorney General requesting access to the Applicant's Medical Report on his mental health status which was ordered by the High Court, after the taking of the Applicant's plea on 21 May 2012. [3] PALU also informed the Registry that, the Attorney General did not respond to their letter.

[3] The letter was written by PALU addressed to the Attorney General dated 4 June 2019, indicating that the Applicant had spent time at Isanga Mental Institution in Dodoma, sometime between June 2012 and November 2013, prior to the commencement of the trial proceedings and requesting the Attorney General to authorise release of the Applicant's Medical records by the Butimba Prison authorities.

23. On 28 June, 2019, PALU forwarded to the Registry, for information, an email addressed to the Attorney General's Office reminding it to provide the medical report which PALU had earlier requested.

24. On 18 May 2020, the Court suspended the time limits for proceedings before the Court due to the Covid-19 situation effective from 1 May to 31 July 2020. It deliberated on the request by the Applicant to compel the authorities of Butimba Prison to provide the medical evaluation report on the mental health status of the Applicant, following the Order of the High Court. It also deliberated on the request for a public hearing, filed by the Applicant on 28 March 2019. The Court decided not to intervene or hold a public hearing.

25. On 5 October 2020, the Court communicated to the Parties, the resumption of computation of time limits for proceedings before the Court, which had taken effect from 1 August 2020.

26. Pleadings were again closed on 18 March 2021, by which time the Respondent State had still not filed a Response to the amended Application, including on the report commissioned by PALU on the medical evaluation of the Applicant's mental health status. By the same notice, the Parties were also informed about the decision of the Court not to have a public hearing.

IV. PRAYERS OF THE PARTIES

27. The Applicant prays the Court to find that:

i. That the Respondent has violated the Applicant's rights under Articles 4, 5, and 7 of the African Charter;
ii. That an Oral hearing be held in this matter, pursuant to Rules 27 and 71 of the Rules of the Court[4];
iii. That the Respondent take appropriate measures to remedy the violations of the Applicant's Rights under the African Charter;

[4] Applicant's Notice of Request for Oral hearing, *Application 056/2016 Gozbert Henerico v. United Republic of Tanzania*, dated 28 March 2019 Paragraph 4.

iv. That the Respondent set aside the death sentence imposed on the Applicant and remove him from the death row;
v. That the Respondent amend its Penal Code and related legislation concerning the death sentence to make it compliant with Article 4 of the African Charter;
vi. That the Respondent release the Applicant from prison; and
vii. That the Respondent pay reparations to the Applicant in such an amount as the Court deems fit.

28. The Respondent State prays the Court to find that:

i. The Court is not vested with the jurisdiction to adjudicate over the Application;
ii. The Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;
iii. The Application be declared inadmissible;
iv. That the Respondent has not violated Article 1 of the African Charter;
v. That the Respondent has not violated Articles 3(1) and (2) of the African Charter on the Applicants right to equality before the law and equal protection of the law;
vi. That the Respondent has not violated Article 5 of the African Charter on the Applicants right to dignity;
vii. That the Respondent has not violated Article 6 of the African Charter on the Applicants right to liberty and security of his person;
viii. That the Respondent has not violated Article 7(1) of the African Charter on the Applicants right to have his cause heard;
ix. That the Respondent has not violated Article 9(1) of the African Charter on the Applicants right to receive information;
x. That there are no errors in the judgment of the Court of Appeal which resulted into miscarriage of justice;
xi. That the Respondent proved its case beyond a reasonable doubt against the Applicant;
xii. That the evidence adduced against the Applicant was credible and reliable;
xiii. That the High Court and Court of Appeal complied with the laws in believing and acting on the evidence of the prosecution;
xiv. That the High Court and Court of Appeal properly evaluated the defence of the Applicant;
xv. That the Application be dismissed in its entirety for lack of merit; and
xvi. The Application be dismissed with costs.

V. JURISDICTION

29. Pursuant to Article 3 of the Protocol:

> 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 instruments ratified by the States concerned.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

30. The Court further observes 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"[5].

31. On the basis of the above-cited provisions, the Court must ascertain its jurisdiction and dispose of objections to its jurisdiction, if there are any.

A. Objections to material jurisdiction of the Court

32. The Respondent State raises an objection on the material jurisdiction of the Court based, first, on the ground that the Court lacks jurisdiction to reverse the decisions of its Court of Appeal and, secondly, that it is being called upon to sit as a court of first instance.

33. The Respondent State contends in the first place that, the Court has no jurisdiction to assess the evidence adduced in the course of the Applicant's trial and appeal since the Applicant is requesting it to quash his conviction and sentence. The Respondent State argues that the Court has no jurisdiction to do so, since both the conviction and sentence were upheld by the Court of Appeal, which is the highest Court of the Respondent State. The mandate of the Court is to make declaratory orders and not reverse the decisions of the Court of

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

Appeal. It contends that for these reasons the Court lacks material jurisdiction to adjudicate over the matter and should dismiss the Application.

34. The Respondent State further submits that the Court is not a court of first instance to determine issues which were never considered by the domestic courts and are being raised by the Applicant for the first time before this Court. As such this Court, should find that it lacks jurisdiction to determine them. The issues allegedly raised for the first time are:

    i. Discrepancies between evidence adduced by PW1 and PW7
    ii. Violation of the Applicant's right to dignity
    iii. Violation of the Applicant's right to information
    iv. That the Applicant was not tried within a reasonable time.

35. The Applicant argues that the Court's material jurisdiction is established since the Respondent State is a party to the Charter, the Protocol and also deposited the Declaration under Article 34(6) of the Protocol.

36. He also contends that the subject matter of the Application involves alleged violations of the rights protected by the Charter, for which the Court has material jurisdiction and further cites the Courts jurisprudence in that regard.[6]

***

37. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[7]

[6] *Kijiji Isiaga v. United Republic of Tanzania,* ACtHPR, Application No. 032/2015, Judgment of 21 March 2018 (merits), § 35.
[7] See, for instance, *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18.

38. The Court recalls, its established jurisprudence, "that it is not an appellate body with respect to decisions of national courts"[8]. However "... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned.[9] In this regard, therefore it would not be sitting as an appellate court, if it were to examine the allegations by the Applicant. This claim is therefore dismissed.

39. The Court further notes that the alleged violations relating to the proceedings before the domestic courts are of rights provided for in the Charter, rights to life, to dignity, and to a fair trial.

40. The Court recalls that, in accordance with its established case-law on the application of Articles 3(1) and 7 of the Protocol, it is competent to examine relevant proceedings before domestic courts to determine whether they comply with the standards set out in the Charter or any other instrument ratified by the State concerned.[10] Consequently, the claim that the Court would be sitting as a court of first instance is, also dismissed**.**

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

B. Other aspects of jurisdiction

42. The Court notes that its personal, temporal and territorial jurisdiction are not contested by the Respondent State. Nonetheless, in line with Rule 49(1) of the

8 Ernest Francis Mtingwi v. Malawi (jurisdiction) § 14.
9 Kenedy Ivan v. United Republic of Tanzania, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations) § 26*; Armand Guehi v. United Republic of* Tanzania (merits and reparations) *(7 December 2018) 2 AfCLR 247 § 33; Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits*)* (23 March 2018) 2 AfCLR 287 § 35*.*
[10] *Ernest Francis Mtingwi v. Malawi* (jurisdiction) (15 March 2013)*,* 1 AfCLR 190 § 14.; *Kenedy Ivan v. United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations), § 26; *Armand Guehi v. Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

Rules[11], it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

43. In relation to its personal jurisdiction, the Court recalls as indicated in paragraph 2 of the judgment, that the Respondent State is a party to the Protocol and deposited the Declaration under Article 34(6) of the Protocol with the Chairperson of the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.

44. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020. [12] This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court holds that it has personal jurisdiction.

45. In respect of its temporal jurisdiction, the Court notes all the violations alleged by the Applicant are based on the judgments of the High Court and Court of Appeal rendered on 22 April 2015 and 26 February 2016, respectively, that is, after the Respondent State ratified the Charter and the Protocol, and deposited the Declaration. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[13] Consequently, the Court holds that it has temporal jurisdiction to examine this Application.

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

---

[11] Formerly Rule 39(1) of Rules of Court, 2 June 2010.
[12] *Andrew Ambrose Cheusi v. United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35- 39.
[13] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71- 77.

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

VI. ADMISSIBILITY

48. 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."

49. 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."[14]

50. 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 the following conditions:
>
> a. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> b. Comply with the Constitutive Act of the Union and the Charter;
> c. Not contain any disparaging or insulting language;
> d. Not based exclusively on news disseminated through the mass media;
> e. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f. Be filed 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;
> g. Not raise any matter or issues previously 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.

[14] Formerly Rule 40 Rules of Court, 2 June 2010.

A. Objection based on non-exhaustion of local remedies

51. The Respondent State has raised an objection to the admissibility of the Application based on the requirement of exhaustion of local remedies.

52. The Respondent State avers that the Applicant has not exhausted domestic remedies in respect of the new claims that he is raising before the Court. According to the Respondent State, "the said allegations have never been raised before the Courts in the United Republic of Tanzania, which is contrary to Rule 40(5) of the Rules of Court …"[15] The Respondent State cites the Court's and Commission's jurisprudence in support of its contention that since these claims are being raised before the Court for the first time, they are inadmissible.[16]

53. The Respondent State avers that the Applicant never raised the issue of the discrepancies between PW1 and PW7 and the alleged violation of the Applicant's right to dignity, as a ground for appeal before the Court of Appeal. In any case, the Applicant had the option to file a Constitutional Petition under the Basic Rights and Duties Enforcement Act, challenging the infringement of his rights during his trial in the High Court of Tanzania but the Applicant did not pursue this available remedy. As such the available remedies were never exhausted.

54. Additionally, if the Applicant believed that there were errors in the judgment of the Court of Appeal, he should have filed an application for review in the Court of Appeal under Rule 66(1) (a) of the Court of Appeal Rules, 2009, by virtue of which the Court of Appeal could review its judgment on the ground that the decision was based on a manifest error on the face of the record which resulted in a miscarriage of justice. The Respondent State argues that the Applicant did not pursue this available remedy.

---

[15] Rule 50(2)(e) of the Rules of Court, 25 September 2020.
[16] *Urban Mkandawire v Republic of Malawi,* ACtHPR, Application No. 003/2011, Judgment of 13 March 2011 (jurisdiction & admissibility), § 38.1-38.2; *Peter Joseph Chacha v. United Republic of Tanzania*, ACtHPR, Application No. 003/2012, Judgment of 28 March 2014 (jurisdiction & admissibility), § 142-145 and African Commission on Human and Peoples' Rights' decision *in Article 19 versus Eritrea*

55. The Respondent State concludes that these remedies are easily available and there was no hindrance or obstruction to the Applicant accessing and utilising them, therefore the Application should be declared inadmissible and duly dismissed.

*

56. The Applicant states that the Respondent' State's objections are "manifestly incorrect; they have been raised and rejected by this Court on previous occasions".

57. With regard to failure to file a Constitutional Petition, the Applicant states that the Court has held that an Applicant is only required to exhaust ordinary judicial remedies and that filing a constitutional petition, is an "extraordinary remedy which the Applicant was not required to exhaust prior to filing his application". The Applicant cites the Court's decision in *Kijiji Isiaga v. United Republic of Tanzania* in this regard.

58. The Applicant avers that similarly, with regard to filing an application for review of the judgment of the Court of Appeal, this is an extraordinary remedy in the Tanzanian judicial system, that the Applicant need not utilise before filing an application before this Court.

59. On the failure to raise the violation of the Applicant's right to dignity, in connection with the imposition of the death penalty despite the Applicant's mental illness and intellectual disability, and stipulating hanging as the means of execution, the Applicant avers that the Respondent State makes no suggestion that the Tanzanian Court of Appeal, has the power to substitute the death penalty for a lesser penalty, given that the death penalty is mandatory for murder cases in Tanzania. Thus, an application before the Court of Appeal seeking to declare the death sentence a violation of his right to dignity would have no real prospect of success. The Applicant cites the Commission's decision in *Jawara v. The Gambia* in this regard. The Applicant concludes by calling on the Court to find the Application admissible.

***

60. The Court observes that pursuant to Article 56(5) of the Charter, whose requirements are mirrored 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.[17]

61. 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 26 February 2016. In light of this, the Court, considers therefore, that the Respondent State had the opportunity to address the violations allegedly arising from the Applicant's trial and appeals. Furthermore, the Court has previously held that the constitutional petition and an application for review at the Court of Appeal within the Respondent State's judicial system are extraordinary remedies which applicants are not required to exhaust before filing their applications before this Court.[18]

62. Consequently, the Court holds that the Applicant has exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and **t**herefore, it dismisses the Respondent State's objection.

B. Other conditions of admissibility

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

64. 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.

---

[17] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94.
[18] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 477-478 §§ 63-65.

65. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is the promotion and protection of human and peoples' rights. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

66. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it compliant with the requirement of Rule 50(2)(c) of the Rules.

67. The Application is not based exclusively on news disseminated through mass media as it is based on court documents from the municipal courts of the Respondent State, thus it complies with Rule 50(2)(d) of the Rules.

68. The Court recalls that according to Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, there is no specific time frame within which the case must be brought before the Court. In this regard, this Court, in *Application No. 013/2011, Norbert Zongo and others v. Burkina Faso*, concluded that the "…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].

69. The Court notes that the Applicant filed his Application before this Court on 15 September 2016, after the Court of Appeal had dismissed his appeal on 26 February 2016, that is, 6 (six) months and 20 (twenty) days after the said dismissal. The question therefore, is whether the period between the exhaustion of local remedies and the referral to the Court constitutes a reasonable time within the meaning of Article 40(6) of the Rules [20]. The Court notes that in the

[19] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme v. Burkina Faso* (merits) (2014) 1 AfCLR 219,§ 92. See also *Thomas v. Tanzania (*merits), § 73.
[20] Rule 50(2)(e) of the Rules of Court of 25 September 2020.

instant case, the period of 6 (six) months and 20 (twenty) days is manifestly reasonable time.

70. The Court, therefore, finds that the Application was filed within a reasonable time in compliance with Rule 50(2)(f) of the Rules.

71. The Court observes 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.

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

VII. MERITS

73. The Applicant alleges that the Respondent State violated his rights to a fair trial, right to life and right to the respect of dignity.

A. Alleged violation of the right to a fair trial

74. The Applicant alleges that the proceedings leading to his conviction and sentencing for murder violated four (4) aspects of his right to a fair trial as follows:

i. The right to be tried within a reasonable time before arraignment at the High Court;
ii. The right to effective legal representation;
iii. The right to be tried by a competent court or tribunal; and
iv. The right to be provided with an interpreter.

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

75. The Applicant avers that he suffered an unreasonably long delay before he was convicted and sentenced, considering that the Respondent State detained him for approximately seven (7) years before commencing the trial. The Applicant states that the pre-trial period far exceeds periods that have been found to be "unreasonable" in cases decided by the Court such as *Alex Thomas v Tanzania*, and *Mariam Kouma and Ousmane Diabate v. Mali* and several other cases [21], more so since there were no factors that warranted such delay.

76. The Applicant avers that the case was not a complex one. It involved an allegation of murder, based on the evidence of eye witnesses and an examination of the murder weapon. No complex or advanced evidence was adduced such as DNA samples The Applicant contends that the Respondent State has not provided an explanation as to why he was arrested and detained on 27 May 2008 and his arraignment where he took the plea was held on "21 May 2012, followed by the preliminary hearing on 5 June 2015" and subsequently, the commencement of the trial on 16 February, 2015. The Applicant also states that he was "…arrested and taken before the Justice of the Peace in 2008 and was held approximately for seven years before being tried and convicted."

77. The Applicant further avers that the delay was not attributed to him as he did not file multiple applications before the court or call any witnesses rather, during the appeal, the prosecution made only one application, to have the applicant medically examined to establish whether he was competent to stand trial. The Applicant contends that the delay itself is a weighty punishment on its own, warranting a more lenient sentence overall, not to mention the great anxiety it caused him regarding the uncertainty of his future. To underscore his argument, he cites the case of *Pratt and Morgan v. Jamaica*[22] and the Constitutional Petition

[21] ECtHR, *Smirnova v. Russia*, Application no. 9157/04, Judgment of 15 October 2019; *Guchino v. Portugal,* Application No. 8990/80, Judgment of 10 July 1984; *Faith Tas v. Turkey* (No.3), Application No. 4581/08, Judgment of 24 April 2018, HRC *Hendricks v. Guyana*, Communication 838/1998, UN Doc. A/58/40, Vol II at 113 (2002)
[22] Privy Council Appeal No.10 of 1993,3 *WLR* 995, 143 *NLJ* 1639 (Nov 2 1993).

of *Kigula and Others v. Attorney General* [23] and the Malawi High Court case of *Republic v Bisket Kumitumba*[24].

78. Finally on this issue the Applicant observes that the undue delay was particularly prejudicial to him, since the prosecution's evidence was based exclusively on the account of six (6) prosecution witnesses who were asked to recall and testify on matters that occurred seven (7) years prior. That the extended and unwarranted passage of time, cast doubt on the credibility of the witness testimonies. The Applicant requests the Court to find that the Respondent State's conduct not only amounts to a violation of the Applicant's right, but also undermines the credibility of the overall proceedings.

*

79. The Respondent State avers that Article 7 of the African Charter has not been violated as alleged by the Applicant and that the proceedings during the trial were fair and all requirements were met as envisaged under this provision.

80. The Respondent State submits that "on the issues of the length of the trial each case is required to be decided on its own merit. The time required to finalise a case depends on a number of factors such as number of judges and investigators, financial resources and the nature of a particular case". The Respondent State further argues that "this issue was never raised in the domestic courts and therefore, should not be determined for the first time in this Court".

***

81. The Court notes that Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or tribunal".

[23] Constitutional Appeal No.03 of 2006 (21 January 2009) of the Uganda Supreme Court
[24] Sentence Rehearsing Cause No. 59 of 2015 (unreported) at the Malawi High Court

82. The Court recalls, as it has held in its earlier judgments, various factors are considered in assessing whether justice was dispensed within a reasonable time within the meaning of Article 7(1)(d) of the Charter. These factors include the complexity of the matter, the behaviour of the parties, and that of the judicial authorities who bear a duty of due diligence in circumstances where severe penalties apply.[25]

83. The Court further notes that the timeframe that is being contested by the Applicant is the period he was detained after his arrest and before he was arraigned for trial at the High Court of Tanzania sitting in Bukoba. The record indicates that the Applicant was arrested on 27 May 2008, his police statement was recorded on 2 June 2008, following which he was then detained at Butimba Central Prison**.** The Court observes that the Applicant avers that he was taken before the Justice of the Peace in 2008, but does not specify the date when this happened.

84. The Court further, observes that the record shows that the Applicant first appeared before the High Court sitting at Bukoba on 21 May 2012, for the plea taking, followed by the preliminary hearing on 5 June 2014, and not 5 June 2015 as stated by the Applicant, and that the trial commenced on 16 February 2015. Nevertheless, the Court observes that this error by the Applicant on the date of the preliminary hearing does not have any effect on the timeframe under consideration, that is, the pre-trial period.

85. The Court notes that the pre-trial period ran from the time the Applicant was arrested on 27 May 2008, to the time the trial commenced on 16 February 2015, this being a period of six (6) years, eight (8) months and nineteen (19) days. The Court therefore has to determine whether this period before the hearing commenced can be considered as reasonable, taking into account the relevant factors.

---

[25] See *Armand Guehi v. Tanzania* (Merits and Reparations), §§122-124. See also *Alex Thomas v. Tanzania* (Merits), §104 *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania* (Merits) (2016) I AfCLR 507, § 155; and *Norbert Zongo and Others v. Burkina Faso* (Merits) (2014) I AfCLR 219, §§ 92-97, 152.

86. The Court has previously held in the matter of *Armand Guehi v. United Republic of Tanzania,* that where an Applicant is in custody, the Respondent State bears an obligation to ensure that the matter is handled with due diligence and expeditiously, more so where there are no impediments caused by the Applicant and the delay is not caused by complexities of the case.[26]

87. The Court finds that, in the instant case, since the Applicant was in custody, the Respondent State had an obligation to ensure that the proceedings against him were handled with due diligence and expeditiously.

88. The Court notes that the Respondent State provides generic reasons to justify the delay in the commencement of the trial. The Respondent State argues, that the "time required to finalise a case depends on a number of factors such as number of judges and investigators, financial resources and the nature of a particular case". The Court observes that the Respondent State has not elaborated on the specific factors that resulted in the Applicant's trial commencing six (6) years, eight (8) months and nineteen (19) days after his arrest.

89. The Court also notes that there is nothing on the record to show that the Applicant impeded the progress of the investigations before his arraignment at the High Court. Therefore, the length of the pre-trial period cannot be considered as reasonable.

90. Consequently, the Court finds that the Respondent state violated the Applicant's right to be tried within a reasonable time as provided for under Article 7(1)(d) of the Charter.

[26] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 247 § 124

ii. Alleged violation of the right to effective legal representation

91. The Applicant argues that the right to effective legal representation is an integral part of the right to a fair trial and due process rights provided for under Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR), which establishes the right "[t]o have adequate time and facilities for the preparation of his defence and to communicate with a counsel of his choosing" and Article 7 of the Charter. He cites a number of cases in support of his position.[27]

92. The Applicant alleges that he was not visited by a defence counsel prior to the commencement of his trial. He states that he was provided four (4) different lawyers, at each stage of the proceedings, that is, during the taking of his plea, during the preliminary hearing, during the trial and at the appeal stage. The Applicant states that all these lawyers had minimal or no contact with him, leading to an ineffective and inconsistent defence falling short of providing a "competent, capacitated and committed" defence. He alleges that all the lawyers failed to properly consult with him, took adverse and contradictory positions that were to his detriment and did not provide effective representation which is manifestly illustrated and "needs to be called out for correction".

93. The Applicant avers that the first lawyer, Mr. Katabalwa, made adverse statements during his plea hearing that compromised his defence. The Applicant avers that Mr Katabalwa stated that the Applicant "attacked and injured three people and one child died" and that in his "application for the medical examination" of the Applicant, he further stated that the Applicant "committed the offence". The Applicant avers that these statements made at the onset of the criminal proceedings were highly prejudicial and directly contradicted the Applicant's plea at the trial, that he did not kill the victim.

[27] Human Rights Committee: *Hendricks v Guyana*; *Brown v Jamaica*; *Aliboeva v Tajikistan*; *Said v Tajikistan*; *Aliev v Ukrain*; *LaVende v Trinidad and Tobago; Kelly v Jamaica; Reid v Jamaica;* ECtHR: *Ocalan v Turkey*; *Nechiporuk and Yonkalo v Ukaraine; Salduz v Turkey; Artico v Italy; Kamasinski v Austria; Sannino v Italy; Czekalla v Portugal; Falcao dos Santos v Portugal; and African Commission: Interights & Ditshwanelo v Republic of Botswana*

94. The Applicant states that, during the preliminary hearing, the second lawyer, Mr. Nathan, objected to the admission into evidence of the caution statement recorded by the police on 2 June 2008, on the basis that the Applicant was tortured prior to recording the statement. However, at the trial before the High Court, the third lawyer Mr. Erasto did not object to admission of the caution statement as evidence, as a result of which it was subsequently read out loud before the court by the prosecution witness and considered as admissible evidence by the trial Judge and assessors.

95. The Applicant adds that, the caution statement was later expunged from the record by the Court of Appeal, on the basis that it was recorded in violation of the law, but not before it had been considered as part of the prosecution's evidence that was presented to support his conviction. Further, that Mr. Erasto, his lawyer during the trial did not consult him before the trial at the High Court, where he was convicted and sentenced. The Applicant states that he only met with the lawyer one (1) hour before the trial begun. The Applicant considers that the lawyer did not get instructions from him or represent his interests during the trial, which denied him the right to a fair trial.

96. Furthermore, the Applicant alleges that, Mr Erasto, his lawyer during the trial at the High Court failed to call as witnesses any of the individuals in whose company he had been out drinking up to 8:00 pm on the day the alleged crime was committed. That this testimony could have cast doubt on the evidence of the prosecution witnesses, who claimed that the Applicant had visited the site of the attack twice previously on the day in question. That, even after ten (10) years, the Applicant still maintains that he was out with friends on the fateful day and recalls their identity. The Applicant avers that the trial lawyer committed very basic errors that a minimally competent defence counsel would not have made, and yet the onus was on the Respondent State to provide the Applicant with effective representation.

97. The Applicant claims that he had been out drinking out with friends for an extended period on the day of the incident and "was drunk on that day". The Applicant argues that intoxication is a potential defence for murder under the

Tanzanian law. However, the trial lawyer, Mr. Erasto failed to mention the Applicant's state of intoxication on the day of the incident or to plead intoxication as a defence in his closing submissions. This resulted in the defence of intoxication not being raised.

98. The Applicant states that, his lawyer during his appeal, Mr. Kabunga, did not consult with him when his caution statement was admitted as evidence. He further states that during his plea taking, his lawyer, Mr. Katabalwa, prayed the High Court to order that the Applicant undergo a medical examination to determine his mental health status at the time of committing the offence. The Applicant states that, the lawyer made the request because a medical examination ought to be undertaken before the commencement of the Applicant's trial and because the lawyer was of the view that there was a possibility that the Applicant was of unsound mind at the time of the commission of the offence since the Applicant "believed that what happened was as a result of witchcraft". Following the lawyer's request, the High Court ordered that the Applicant be detained for medical examination at Isanga Mental Institution, Dodoma and the medical report be submitted to it.

*

99. The Respondent State avers that the Applicant was charged with murder and provided with four (4) defence counsels throughout the proceedings, namely; Advocates S.L Katabalwa, Nathan Alex and Lameck Erasto in the High Court and Aaron Kabunga before the Court of Appeal. That the Applicant through his defence counsel was given an opportunity to cross examine the prosecution witnesses and to also testify in the Court to defend himself.

100. The Respondent State further avers that the trial at the High Court was conducted in the presence of three (3) court assessors to ensure equal protection of the law. Furthermore, that the Applicant was able to appeal to the highest court within the Respondent State's justice system. For these reasons, the Respondent State argues that the Applicant's allegations should be deemed baseless, unsubstantiated and should be dismissed for lack of merit.

101. The Respondent State avers that the Applicant was prosecuted for an act which constituted a legally punishable offence at the time he committed it and the sentence meted out to him is in compliance with the laws of the land.

102. The Respondent State concludes its arguments by affirming that the Applicant was accorded his rights in compliance with the requirement of a fair trial and the allegations should be dismissed for lack of merit.

***

103. Article 7(1) (c) of the Charter provides that:

> 1. Every individual shall have the right to have his cause heard. This comprises:
> …
> (c) The right to defence, including the right to be defended by counsel of his choice.

104. The Court has held that Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, guarantees for any one charged with a serious criminal offence, the right to be automatically assigned a counsel free of charge, where he does not have the means to pay him, whenever the interests of justice so require.[28]

105. In the matter of *African Commission on Human and Peoples' Rights v. Libya*, the Court held that "every accused person has a right to be effectively defended by a lawyer, which is at the heart of the notion of a fair trial".[29]

106. The Court has previously considered the issue of effective representation in the matter of *Evodius Rutechura v. United Republic of Tanzania*[30] where it held that the right to free legal assistance, comprises of the right to be defended by counsel, however the right to be defended by counsel of one's choice is not

[28] *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR, 465 § 124
[29] African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153 § 95
[30] *Evodius Rutechura v United Republic of Tanzania*, ACtHPR, Application No. 004/2016, Judgment of 26 February 2021 (merits and reparations) §73

absolute when the counsel is provided through a free legal assistance scheme.[31] It further held that, the important consideration is whether the accused is given effective legal representation rather than whether he or she is allowed to be represented by a lawyer of their own choosing.[32] It is the duty of the Respondent State to provide adequate representation to an accused and intervene only when the representation is not adequate.[33]

107. The Court considers that, "effective assistance of counsel" comprises two aspects.[34] First, defence counsel should not be restricted in the exercise of representing his client. Second, even if there are no restrictions, counsel should not deprive a client of effective assistance by failing to provide competent representation that is adequate to ensure a fair trial or, more broadly, a just outcome.[35]

108. The Court deems that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. The quality of the defence provided is essentially a matter between the client and his representative and the State should intervene only where the lawyer's manifest failure to provide effective representation is brought to its attention.[36]

109. This Court notes that with regard to effective legal representation through a free legal assistance scheme it is not sufficient for a State to provide the counsel. States must also ensure that those who provide legal assistance under that scheme have enough time and facilities to prepare an adequate defence, and to provide robust representation at all stages of the legal process starting from the arrest of the individual for whom such representation is being provided.

---

[31] ECHR, *Croissant v. Germany* (1993) App No.13611/89 § 29, *Kamasinski v. Austria* (1989) App No. 9783/82, § 65.
[32] ECHR, *Lagerblom v. Sweden* (2003) App No 26891/95, §§ 54 - 56.
[33] ECHR, *Kamasinski v. Austria* (1989) App No. 9783/82, § 65.
[34] HRI/GEN/1/Rev.9 (Vol. I) page 256, paragraph 333-335
[35] ECHR, *Strickland v. Washington*, 466 U.S. 668, 686 (1984).336; *Lafler v. Cooper*, 566 U.S. ___, No. 10–209, slip op. (2012) (erroneous advice during plea bargaining).
[36] ECHR, *Vamvakas v. Greece (no. 2)*, *Application no. 2870/11* § 36; *Czekalla v. Portugal*, §§ 65 and 71; *Czekalla v. Portugal*, App. No. 38830/97, ECHR 2002-VIII)

110. In the instant case, the question that arises, is whether the Respondent State discharged its obligation of providing the Applicant with effective free legal assistance and ensured that Counsel had adequate time and facilities to enable the preparation of the Applicant's defence.

111. The Court notes that the Respondent State provided four different lawyers to represent the Applicant during his arraignment, at the preliminary hearing; at the trial before the High Court and at the appeal before the Court of Appeal. These were Advocates S.L Katabalwa, Nathan Alex and Lameck Erasto at the High Court and Aaron Kabunga at the Court of Appeal, respectively.

112. The Court notes that there is nothing on the record to demonstrate that the Respondent State impeded the four Counsel who it designated to represent the Applicant, to access him and consult him on the preparation of his defence. The Court further notes that, there is nothing on the record to show that the Respondent State denied the designated Counsel adequate time and facilities to enable the Applicant prepare his defence.

113. The Court observes that, rather, the allegations relate to the Counsel not raising or objecting to certain evidentiary issues in relation to his defence. These are matters between him and his counsel which should not, in these circumstances, be imputed on the Respondent State.

114. The Court also finds that there is nothing on the record to demonstrate that the Applicant informed the High Court and the Court of Appeal of the alleged shortcomings in the Counsel's conduct in relation to his defence. The Applicant was free to raise with the respective courts, his discontent about the manner in which he was represented. The Court further notes that, the Court of Appeal granted the request by his Counsel Advocate Aaron Kabunga to have the Applicant undergo a mental medical examination to determine whether he was fit to stand trial as this was omitted before the trial at the High Court commenced.

115. In view of the above, the Court holds that the Respondent State discharged its obligation to provide the Applicant with effective free legal assistance. The Court therefore, finds that the Respondent State has not violated Article 7 (1) (c) of the Charter.

iii. Alleged violation of the right to be tried by a competent court or tribunal

116. The Applicant states that "Section 3(3) of the Evidence Act [Cap1]" provides that a "court" includes all judges, magistrates and assessors and all persons, except arbitrators, legally authorised to take evidence. All trials involving murder, held before the High Court are to take place with the aid of assessors. The Applicant avers that in *Lucia Anthony v Republic*, the Court of Appeal found a breach of the right to fair trial where the assessors cross examined two prosecution witnesses and a defendant.

117. Furthermore, the Applicant avers that, during his trial, the assessors cross examined him and appeared to have given their judgment on the case immediately after the summing up by the Judge, indicating that they did not take time to consider the evidence adduced during the trial.

*

118. The Respondent State avers that the Applicant was tried by impartial and independent courts in accordance with the laws governing criminal trials. He was presumed innocent from the time he was arrested on 27 May 2008 until the prosecution proved its case beyond reasonable doubt and the High Court found him guilty of the offence of murder on 5 March 2015. The Respondent State argues that the Applicant was represented throughout his trials by counsel and he was given an opportunity, through his counsel, to cross examine the prosecution and to testify in court in his defence. The Respondent State further avers that the trial at the High Court was conducted in the presence of three (3) Assessors to ensure the principle of equality before the

law and protection before the law, that he was sentenced according to the law, and finally that the Applicant filed an appeal at the highest court in the land.

***

119. Article 7(1) of the Charter provides: “Every individual shall have the right to have his cause heard”.

120. The Court observes from the record of proceedings at the High Court, that the three (3) assessors simply sought clarifications from the Applicant. The Court nevertheless, observes that the Applicant has not demonstrated how this violated his right to be heard by a competent tribunal and consequently dismisses this allegation.

121. From the foregoing, the Court finds that the Respondent State has not violated Article 7(1) of the Charter with regard to the right to be tried by a competent court or tribunal.

iv. Alleged violation of the right to be provided with an interpreter

122. The Applicant cites Article 14(3)(f) of the ICCPR which provides for the free assistance of an interpreter, where an accused cannot speak or understand the language used during criminal proceedings. The Applicant cites several cases from the European Court[37] and the African Commission’s Principles and Guidelines to a Fair Trial and Legal Assistance in Africa, which set out this principle.

123. The Applicant avers that at the very minimum, he was entitled to be provided an interpreter from the early investigative stage of the proceedings since he

[37] *Human Rights Committee- Bozbey v Turkmenistan*, Communication No. 1530/2006. (2011) 18 IHRR 414 ; *Sobhraj v Nepal* Communication No. 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010) ECHR, *Diallo v Sweden*, Judgement of 5 January 2010 Application No. 13205/07
Luedicke, Belkacem and Koç v Germany, ECHR, Judgment of 28 November 1978, Application No. 13205/07; *Kamasinki v Australia*, ECHR, Judgment of 19 December 1989; *Hermi v Italy*, ECHR, Judgment of 18 October 2007, Application No. 18114/02

speaks only Kihaya and is illiterate. The Applicant states that the Court records do not indicate whether an interpreter was made available either at the arraignment when the Applicant took the plea or the preliminary hearing. The Applicant further avers, that the failure of the Respondent State to provide an interpreter was fundamentally prejudicial since his Counsel made some arguments that contradicted his own statement namely, the matter on whether the Applicant had carried out the attack and whether he had motivation for the attack because of the belief that PW 1 was a witch. The Applicant states that, had an interpreter been provided, he would have objected to, and requested that the Counsel's statements which were deviating from his position be disregarded.

124. The Applicant further states that, at the trial, the interpreter was only present for the purposes of interpreting his testimony and that of PW 1 for the Court's benefit. The Applicant argues that no interpreter appears to have been made available to enable him to understand what was said by the other witnesses, counsel, the judge or the assessors. He concludes by stating that he was not afforded the resources needed to enable him to effectively understand pre-trial proceedings, defend himself during the trial, and have his cause heard. This allegedly resulted in the violation of his right to fair trial and caused significant repercussions on the outcome of the trial.

*

125. On its part, the Respondent State did not specifically address this issue but rather, observed that the Applicant was defended by four advocates from commencement of his trial to the appeal stage and that he was accorded all the guarantees in compliance with the requirements of the right to fair trial.

***

126. The Court has previously considered the issue of provision of interpretation and observed that "even though Article 7(1)(c) of the Charter referred to earlier does not expressly provide for the right to be assisted by an interpreter, it may

be interpreted in the light of Article 14(3)(a) of the ICCPR, which provides that ... everyone shall be entitled to ... (a) be promptly informed and in detail in a language which he understands of the nature and cause of the charge against him; and (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court". [38]

127. It is evident from a joint reading of the two provisions that every accused person has the right to an interpreter if they are unable to understand the language in which the proceedings are being conducted.

128. The Court has held in the Matter of *Yahaya Zumo Makame v. United Republic of Tanzania*[39] "that an accused person is entitled to an interpreter if he or she cannot understand or speak the language that is being used in court. It is practically necessary that where an accused person is represented by Counsel that the need for interpretation is communicated to the Court". Furthermore, it held in the Matter of *Armand Guehi v. United Republic of Tanzania*[40] that if an Applicant does not object to the continuance of proceedings in a language other than his own, he will be deemed to understand the processes and to have agreed to the manner in which they were being conducted.

129. The record before this Court demonstrates that when the prosecution was presenting its case during the trial, it was established that, PW1 was not conversant in Kiswahili and only spoke Kihaya, as a result of which the court requested an interpreter to be sworn in to interpret from Kiswahili to Kihaya and vice versa.

130. On the other hand, the Court notes that at the Applicant's arraignment, when taking his plea, the information was read over and explained to him in Kiswahili, to which he pleaded *"Siyo kweli"* in Kiswahili, meaning, not true and thereafter a plea of not guilty was entered. Furthermore, that the Applicant never voiced his concerns about not being able to understand the proceedings because of

[38] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 477 § 73
[39] ACtHPR, Application No. 023/2016, Judgment of 25June 2021 (merits and reparations), § 93
[40] *Ibid* § 77

a language barrier or at any point objected to the proceedings. The Court notes that the Applicant did not point to any part of the proceedings where he expressly objected and demanded the presence of an interpreter[41].

131. In view of the foregoing, the Court finds that the Respondent State did not violate Article 7(1)(c) of the Charter as read together with Article 14(3)(a) of the ICCPR as regards the alleged failure to provide the Applicant with interpretation during his trial.

B. Alleged violation of the right to life

132. The Applicant avers that the Respondent State violated his right to life namely by:

i. Imposing the mandatory death penalty without considering the circumstances of the offender and the offence;
ii. Imposing the death penalty outside the category of cases to which it can be lawfully applied; and
iii. Imposing the death penalty without a fair trial.

133. On the first ground, the Applicant argues that the High Court relied solely on the mandatory sentence for murder as provided under Tanzanian Law, yet, Article 4 of the Charter and Article 6 of the ICCPR provide for the right to life and create a presumption in favour of life, therefore, the death penalty should be imposed only in the most exceptional circumstances. The Applicant argues further that, the mandatory imposition of the death penalty negates the discretionary power of the judicial officer to consider the circumstances of the offender and the offence, and to determine whether the offence is one of the worst of its kind, warranting imposition of the death sentence.

134. In relation to his mental health status, the Applicant avers that the High Court should have considered this as a mitigating factor, similar to what is done in other national jurisdictions.[42] He submits that, after this Application was filed

[41] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 77
[42] *Mitcham v DDP*(Supra), Eastern Caribbean Court;

before this Court, PALU commissioned Mr Isaac Lema[43], a clinical psychologist, to undertake a medical examination of his mental health status at the time the alleged murder was committed. In a report dated 29 May 2018[44], Mr. Lema confirmed that at the time of his arrest, the Applicant suffered from severe learning difficulties, foetal alcohol syndrome and psychosis.

135. The Applicant argued that these conditions would have a profound effect on his behaviour, in particular, limiting his ability to control his impulses, understand social codes of conduct, and respond appropriately to stressful situations.

136. Citing a number of cases from various jurisdictions, [45] the Applicant argues that if the judicial officers of the Respondent State had the liberty to consider the above-mentioned conditions, during the proceedings against him, they would not have concluded that sentencing the Applicant to death was the appropriate punishment. The Applicant surmises that in all cases concerning the possible application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence including its specific aggravating or extenuating elements must be considered by the sentencing court.

137. On the second ground, the Applicant submits that, for a death sentence to be permissible, it is necessary that the offence must be of the most serious

Republic v. Margret Nadzi Makolija. Criminal Appeal No. 396 of 2008, Malawi High Court;
Republic v James Galeta (Sentencing rehearing Cause No. 47 of 2015), Malawi High Court;
Republic v Dan Saidi Zonke (Sentencing rehearing Cause No. 7 of 2016), Malawi High Court;
R v Reyes (2003) 2LRC 688, Supreme Court of Belize.

[43] A Clinical Psychologist at Muhimbili University of Health and Allied Sciences (MUHAS) working under the Department of Psychiatry and Mental Health for both MUHAS and Muhimbili National Hospital in Dar-es Salaam. Experienced in diagnosis and treatment of a variety of mental illnesses and forms of intellectual disability. Mr Lema has particular experience in assessing and treating individuals who suffer from addiction and addiction related illnesses.

[44] This Report is annexed to the additional evidence filed by the Applicant to support the amended Application. The Report is dated 29 May 2018.

[45] *Moise v the Queen* (unreported)- Eastern Caribbean Court of Appeal; *Pipersburgh v R- Privy Counci*l; *Mitcham & Ors v DPP*- Eastern Caribbean Court of Appeal; *S v Makwanyane*- South African Constitutional Court; *Trimmingham v The* Queen *Mulla; & Another v State of UP*

nature.[46] He submits that the burden of proving that his case before the domestic courts met this threshold rested with the Respondent State, which failed to do so. The Applicant further submits that, the Respondent State violated his right to life by sentencing him to death, without considering his mental and sobriety status at the time of the commission of the offence and the lack of intent to kill.

138. On the third ground, the Applicant avers that the African Commission has emphasised that "if, for any reason, the criminal justice system of a state does not, at the time of trial or conviction, meet the criteria for Article 7 of the African Charter or if the particular proceedings in which the penalty is imposed have not stringently met the highest standards of fairness, then the subsequent Application of the death penalty will be considered a violation of the right to life". The Applicant submits that there have been several breaches of his right to a fair trial, which in turn have resulted in the imposition of the death sentence on the Applicant, consequently violating his right to life.

*

139. The Respondent State, responded cumulatively on the three grounds raised by the Applicant.[47]

140. The Respondent State avers that the "Court of Appeal did not breach Article 13(6)(d) and 14 of its Constitution, because the Court of Appeal is the final authority in dispensing justice in Tanzania as per Article 107A (1) of the Constitution". It further argues that, the punishment for the offence of murder is provided by statute, under Section 197 of the Penal Code [Cap16, Revised Edition, 2002] and that the Court of Appeal [48], has upheld the constitutionality of the death penalty as provided under its Constitution.

[46] *Brown v Jamaica*, HRC; *Chisanga v Zambia*; *Republic v Jamuson White*, High Court of Malawi; *Kindler v Canada*, Communication No. 470/1991; *Trimmingham v The Queen*; and *Luboto v Zambia*
[47] Respondents' Response to the Application filed on 6 February 2017, in response to the original Application before Applicant was represented by PALU.
[48] *Mbushuu Alias Dominic Mnyaroje and Another v. Republic* **[**1995**]** TLR.

141. The Respondent State submits that Article 6 of the ICCPR does not prohibit the imposition of the death penalty, which is a lawful penalty. It only requires States which have not abolished the death penalty, to impose it only for the most serious crimes in accordance with the laws, pursuant to a final judgment rendered by a competent court.

142. The Respondent State further argues that the Applicant has never raised before domestic courts, the allegation that the death penalty is in violation of the Constitution of the United Republic of Tanzania. The Respondent State avers that it is being made aware of this claim for the first time, before this Court, since the Applicant never utilised the remedies available within the municipal courts, of filing a constitutional petition or raising the matter as a ground of appeal before the Court of Appeal. The Respondent State argues that, this allegation is an afterthought and should be dismissed for lack of merit.

***

143. 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".

144. The Court considers that, although the Applicant has raised three separate grounds relating to the alleged violation of the right to life and the mandatory imposition of the death penalty, that is, the circumstances of the offender, the lawfulness of the sentence and compliance with guarantees of due process during the trial, the only issue for it to determine is whether the mandatory imposition of the death penalty constitutes an arbitrary deprivation of the right to life.

145. The Court recalls the well-established international human rights case-law on the criteria to apply in assessing arbitrariness of a death sentence [49], that is,

[49] 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 (2OOO) 293 (ACHPR 2OO0), § 20.*;* See Article 6(2), ICCPR;

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.

146. In relation to the first criteria, the Court notes that the death sentence is provided for in Section 197 of the Penal Code of the United Republic of Tanzania.

147. Regarding the second criteria, the Court observes that the Applicant's 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 him. The Court further notes that, the Applicant contends 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, thus denying the judicial officer the discretion to impose any other sentence.

148. In relation to the third criteria, the Court recalls that in the Matter of *Ally Rajabu and Others v Tanzania*, it has decided that the death penalty can only be imposed in accordance with the norms and standards required by a fair trial.[50] 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.[51]" The Court finds that, by taking away the discretionary power of a judicial officer to impose a sentence on the basis of proportionality and individual circumstances of a convicted person, the mandatory death sentence does not comply with the requirements of due process in criminal proceedings.[52]

---

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*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations), § 104.

[50] *Ally Rajabu and Others v. Tanzania* (merits and reparations), § 98.

[51] *Ibidem, §107.*

[52] *Ibidem*, 110.

149. 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 Applicant does not uphold fairness and due process.

150. From the foregoing, the Court holds that the mandatory nature of the imposition of the death penalty constitutes an arbitrary deprivation of the right to life.

151. The Court, therefore, finds that the Respondent State has violated Article 4 of the Charter.

C. Alleged violation of the Applicant's right to the respect of dignity

152. The Applicant cites Article 5 of the Charter and avers that the Respondent State has violated his right to the respect of dignity through (i) the imposition of the death penalty in circumstances where a person suffers from mental illness and intellectual disability and (ii) the imposition of the death penalty by hanging.

i. Imposition of the death penalty on persons who suffer from mental illness and intellectual disability

153. The Applicant avers that executing persons who suffer from severe mental illness or intellectual disability violates the right to dignity and constitutes cruel, inhuman or degrading punishment. The Applicant further submits that in its General Comment No. 2, the African Commission, has recognised the need to prohibit the execution of persons with psycho- social and intellectual disabilities and the same holds true for courts around the world.[53]

[53] *Francis v Jamaica* (Communication No. 606/1994, Judgment of 3 August 1995); *Sahandath v Trinidad and Tobago*; (Communication No. 606/1994, Judgment of 3 August 1995; *Ford v. Wainwright*, 477 US. 399, 409-10, 417; *Panetti v Quaterman*,551 U.S 930, 979-80-(2007) at 958-59; *Atkins v Virginia*, 536, us. 304 (2002); *Piper's burg v The Queen; Moise v The Queen.*

154. The Applicant avers that he suffers from severe mental illness and intellectual disability, and on this basis alone the death penalty ought not to have been meted out to him because, doing so, violates his right to dignity. The Applicant also states that the Respondent State failed to carry out a mental health evaluation on him, before his trial, and thus did not take into account his mental health condition in determining whether the death sentence was justified. The Applicant argues that he was taken to a mental institution in Dodoma, solely for the purpose of assessing whether he was insane or competent to stand trial. Furthermore, that he was unable to access the medical report of the evaluation of his mental health status which was undertaken while he was at the Isanga Mental Institution in Dodoma.

*

155. The Respondent State did not respond on this issue.

***

156. The Court notes that, although it is alleged that the imposition of the death penalty on a mentally ill person violates the person's right to dignity, the issue for determination is rather, whether the imposition of the said penalty was done following proceedings conducted in accordance with the guarantees of the right to a fair trial. The Court notes in this regard, the pertinence of Article 7(1) of the Charter which provides that: "Every individual shall have the right to have his cause heard."

157. The Court notes from the record of proceedings that, On 21 May 2012, during the taking of his plea before the High Court, Mr. Katabalwa, the Applicant's lawyer, observed that his client may not have been of sound mind and prayed the court to order that the Applicant should undergo a medical examination to determine his state of mind at the time he committed the offence. The prosecution did not object to this request. On the same date the High Court ordered that the Applicant undergo a medical examination on his mental health status at Isanga Mental Institution, in Dodoma, and that the medical report be

presented to it. The record before this Court indicates that the Applicant was institutionalised at the said mental health facility from June 2012 to November 2013.

158. The Court notes that there is nothing from the record to indicate that the medical evaluation report of the mental health status of the Applicant ordered by the High Court, was transmitted to it for consideration before it delivered its judgment on 22 April 2015. If this were the case, the report would have been referred to by the High Court in the course of the trial proceedings and in its judgment.

159. The Court further notes that the record indicates that the Applicant and his legal representatives tried to obtain from Isanga Mental Institution and from the Attorney General's Office, the report of the medical evaluation on the Applicant's mental health status ordered by the High Court**.**

160. The Court therefore finds that, by the High Court not considering the medical evaluation report of the Applicant's mental health status, this constitutes a grave procedural irregularity that resulted in a violation of the Applicant's right to a fair trial**,** as guaranteed under Article 7(1) of the Charter.

ii. Execution of the death penalty by hanging is a cruel, inhuman and degrading treatment

161. The Applicant submits that in Tanzania, the death penalty is administered by hanging, and the High Court directed that hanging be used to execute his sentence. The Applicant also avers that "hanging causes excessive suffering and is strictly not necessary, therefore, it constitutes a violation of Article 5 of the African Charter".

162. The Applicant contends that the African Commission has previously observed[54] that "the current position of international human rights law and the

[54] *Interights & Ditshwanelo v. Republic of Botswana.*

execution of the death penalty is that where a death sentence has been imposed it must be carried out in such a way as to cause least possible physical and mental suffering".

*

163. The Respondent State contends that throughout the trial, it recognised and respected the dignity of the Applicant, who was treated in accordance with the law during his trials in the High Court and before the Court of Appeal.

164. The Respondent State argues that the death penalty is provided for under Section 197 of its Penal Code as a punishment for murder. It avers further that, the sentence for the offence of murder has been deemed constitutional by the highest court in the land, the Court of Appeal, and that in any case, the Applicant is raising this alleged violation for the first time before this Court and if he was aggrieved, he should have raised the matter before the domestic courts. The Respondent State therefore concludes that this allegation is vague, frivolous and should be dismissed for lack of merit.

165. The Respondent State further avers that the ICCPR recognises the death penalty for serious offences as long as it is applied in accordance with the laws of the country at the time, and is carried out pursuant to a final judgment rendered by a competent court.

166. The Respondent State cites Article 27 of the Charter and contends that by killing the deceased, the Applicant instead neglected his duty to respect the right to life and dignity of the deceased. According to the Respondent State, the Applicant brutally terminated the life of the deceased who was an innocent child, therefore it is he who failed to recognise the rights and duties enshrined in the Charter. Finally, the Respondent State argues that, in any case, the Applicant has not demonstrated how his right to be treated with respect and dignity was violated.

***

167. Article 5 of the Charter provides as follows:

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

168. The Court notes that the Applicant alleges the violation of his right to life through the mandatory imposition of the death penalty and method of execution of the death penalty by hanging, which arises from his sentence. The issue of the imposition of the mandatory death penalty has already been dealt with, therefore, the issue for determination here is whether the method of execution of the death penalty, that is, by hanging, constitutes cruel, inhuman and degrading treatment.

169. The Court recalls that it has previously held in the Matter of *Ally Rajabu and Others v Tanzania* that, the implementation of the death penalty by hanging, where such a penalty is permitted, is "inherently degrading" and "encroaches upon dignity in respect of the prohibition of … cruel, inhuman and degrading treatment".[55] The Court therefore found that, this constitutes a violation of the right to dignity under Article 5 of the Charter. The Applicant in the instant case faces the same penalty.

170. The Court therefore finds that the Respondent State has violated Article 5 of the Charter.

VIII. REPARATIONS

171. The Court notes that Article 27(1) of the Protocol stipulates that "[If] the Court finds that there has been violation of a human or peoples' right, it shall make

[55] *Ally Rajabu v. Tanzania*, (merits and reparations), § 119 -120.

appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

172. As it has consistently held, the Court considers that, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered. Finally, the Applicant bears the onus to justify the claims made.[56]

173. The Court also restates that measures that a State could take to remedy a violation of human rights can include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.[57]

174. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers.[58] With regard to moral damages, the Court has held that the requirement of proof is not strict [59] since it is presumed that there is prejudice caused when violations are established.[60]

175. The Court has found that the Respondent State violated the Applicant's right to be heard within a reasonable time as provided under Article 7(1)(d) of the Charter due to the delay in commencing his trial. The Court has also found that

---

[56] *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20 to 31; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, §§ 52 to 59; and *Reverend Christopher* R. *Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§. 27 to 29.

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

[58] *Kennedy Gihana and Others v. Republic of Rwanda*, ACtHPR, Application No. 017/2015, Judgment of 28 November 2019, § 139; See also *Reverend Christopher R. Mtikila v. Tanzania* (reparations), § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations), § 15(d); and *Kalebi Elisamehe v. Tanzania* (merits and reparations), § 97.

[59] *Norbert Zongo and Others v. Burkina Faso* (reparations), § 55. See also *Kalebi Elisamehe v. Tanzania*, § 97.

[60] *Ally Rajabu and Others v. United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v. Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v. United Republic of Tanzania*, ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and reparations), § 119; *Norbert Zongo and Others v. Burkina Faso* (reparations), § 55; and *Kalebi Elisamehe v. Tanzania* (merits and reparations), § 97.

with the imposition of the mandatory death penalty on the Applicant, the Respondent State has violated the Applicant's right to a fair trial as provided under Article 7(1) of the Charter, the right to life as provided under Article 4 of the Charter and the right to dignity, as provided for under Article 5 of the Charter. Lastly, the Court has also found that the conclusion of the Applicant's trial without consideration of the medical evaluation report of the Applicant's mental health status during the commission of the offence is a violation of Article 7(1) of the Charter.

176. The Court notes that some of the Applicant's claims for reparation are made in United States Dollars. In its earlier decisions, the Court has held that, as a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.[61] In the present case, the Court will apply this standard and monetary reparations, if any, will be assessed in Tanzanian Shillings.

177. It is against these findings that the Court will consider the Applicant's prayers for reparation.

A. Pecuniary reparations

i. Material prejudice

178. The Applicant prays the Court to grant his brother Respick Henerico, reparations in the amount of United States Dollars Two Thousand and Ninety Seven (USD 2,097 or Tanzanian Shillings (TZS) 3,428,000), for material loss suffered. That the expenses are broken down for the past two years as follows: amounts: (i) provision of food amounting to TZS 80,000 per month and TZS 1,920,000 in total (ii) provision of shelter amounting to TZS 20,000 per month and TZS 480,000 in total: and (iii) provision of other basic necessities (such as clothing and other incidental expenses) amounting to TZS 22,000 per month

[61] See *Lucien Ikili Rashidi v. Tanzania* (Merits and Reparations); and Application No. 003/2014. Judgment of 0711212018 (Reparations), *Ingabire Victoire Umuhoza v. Republic of Rwanda,* § 45.

and TZS 528,000 in total. The Applicant also claims that, Respick Henerico has also suffered financial loss due to the Applicant's incarceration by incurring transport costs of TZS 200,000 per month from visiting the Applicant at Butimba prison, providing pocket money to the Applicant in the amount of TZS 70, 000 and expenses amounting to TZS 30,000 for the purchase of necessities for the trip. The Applicant also states that Respick Henerico incurred expenses of TZS 200,000 for transportation to visit the Applicant in hospital.

*

179. The Respondent State did not respond regarding this claim.

***

180. The Court recalls that in order for a claim for material prejudice to be granted, an applicant must show a causal link between the established violation and the loss suffered, and further prove the loss suffered. [62] In the instant case, the Court notes that the Applicant has not established the link between the violations established and the material losses claimed. The Court observes that the Applicant has provided an affidavit explaining that Respick Henerico is his alleged brother, but has not provided other acceptable evidence to prove the relationship or specific proof of the expenses allegedly incurred, such as receipts for the payments.[63].

181. The Court, therefore, dismisses the Applicant's prayers for damages for the material prejudice suffered as a result of his incarceration.

[62] See *Armand Guehi v. Tanzania* (merits and reparations), § 181; *Norbert Zongo and Others v. Burkina Faso* (reparations), § 62.
[63] *Christopher Jonas v. United Republic of Tanzania,* Application No. 011/2015. Judgment of 25 September 2020 (reparations), § 20, *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 18

ii. Moral prejudice suffered by the Applicant

182. The Applicant requests that this Court awards him reparations for moral prejudice on the basis of equity as exercised by this Court in previous cases, while considering the unique circumstances the Applicant endured. The Applicant argues that, being held for seven (7) years without trial deprived him of the proximity of his family and isolated them from him. Additionally, he was never able to plan for his future and has never met his sole surviving son who was born soon after his arrest.

183. The Applicant prays the Court to grant him the amount of United States Dollars thirty thousand (USD 30,000) for the moral prejudice suffered.

*

184. The Respondent State did not respond to this claim.

***

185. The Court recalls its jurisprudence in the matter of *Armand Guehi v. United Republic of Tanzania*, where, due to a delay in the commencement of the Applicant's trial for murder it held that "in the circumstances of this case where the Applicant was accused of murder and faced the death sentence, such delay is also likely to have caused anguish. The prejudice that ensued warrants compensation, which the Court has discretion to evaluate based on equity".

186. The Court also recalls its jurisprudence in the matter of *Ally Rajabu and Others v. United Republic of Tanzania*[64]*,* in which it observed that:

> [t]he prolonged period of detention awaiting execution causes the sentenced persons to suffer: ... severe mental anxiety in addition to other circumstances, including, …: the way in which the sentence was imposed, lack of consideration

[64] *Ally Rajabu and Others v Tanzania v United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations) §§ 149-150

> of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; ... the fact that the judge does not take into consideration the age or mental state of the condemned person; as well as continuous anticipation about what practices their execution may entail[65].

187. In the instant case, the Court notes that the lengthy pre-trial period of six (6) years, eight (8) months and nineteen (19) days in and of itself caused the Applicant prejudice and the uncertainty associated with waiting for the commencement of the trial, resulted in anxiety, distress and psychological tension to the Applicant.

188. The Court further observes that in the instant case, while the death sentence is yet to be carried out, the Applicant has inevitably suffered prejudice from the established violation caused by the very imposition of the sentence, as it was mandatory in nature. The Court is cognisant of the fact that being sentenced to death is one of the most severe punishments with the gravest psychological consequences.

189. In view of the above, the Court decides to grant damages in the sum of Tanzanian Shillings Five Million (TZS 5,000,000) as fair compensation for the moral prejudice the Applicant suffered.

iii. Moral prejudice suffered by indirect victims

190. The Applicant prays the Court to grant United States Dollars five thousand (USD 5000) to his brother Respick Henerico and five thousand (USD 5000) to Godfrey Henerico his son as indirect victims on account of moral prejudice suffered.

*

[65] *Amin Juma v United Republic of Tanzania*, ACtHPR, Application No. 024/2016, Judgment of 30 September 2021 (merits and reparation), §15

191. The Respondent State did not respond specifically to this allegation.

***

192. The Court notes that with regard to indirect victims, as a general rule, moral prejudice is presumed with respect to parents, children and reparation is granted only when there is evidence of spousal relations, or filiation with an applicant. For other categories of indirect victims, proof of moral prejudice suffered is required.[66]

193. In the instant case, the Applicant prays the Court to grant United States Dollars five thousand (USD 5000) to his brother, Respick Henerico and United States Dollars five thousand (USD 5000) to Godfrey Henerico, his son as indirect victims for moral prejudice they allegedly suffered.

194. The Court observes that the Applicant has filed a notarised Affidavit deposed by Respick Henerico, stating that he is the Applicant's younger brother, as well as certified copies of baptism certificates for Respikius Mwijage citing Henericko Paulo as the father and Gozbert Heneriko as the father of Godfrey Rweyemamu. The Court notes that, in his pleadings, the Applicant cited his son as Godfrey Henerico and not as Respikius Mwijage or Godfrey Rweyemamu as indicated in the copies of birth certificate he provided. The Applicant has also not provided an explanation for the difference between his son's name as listed in his pleadings and that indicated on the baptism certificates.

195. Under the circumstances, the Court is of the view that the documentary evidence provided in form of the affidavit and the copies of the baptism certificate, is not enough to prove the alleged indirect victims' filiation to the Applicant and the moral prejudice they allegedly suffered.[67]

[66] *Zongo and others v. Burkina Faso* (reparations), § 54; and *Lucien Ikili Rashidi v. Tanzania* (merits and reparations), § 135; *Léon Mugesera v. Rwanda* (merits and reparations), § 148.
[67] *Lucien Ikili Rashidi v. Tanzania* (merits and reparations), §§ 135-136

196. In view of the foregoing, the Court dismisses the Applicant's prayer for reparations for moral prejudice to the alleged indirect victims.

B. Non-pecuniary reparations

i. Release

197. The Applicant prays the Court to set aside the death sentence imposed on him and order his release from prison. He also states, that, the violation of his right to be tried within a reasonable period ought to result in his release.

198. The Applicant avers that there are several compelling reasons for the Court to order his release. He submits that re-opening the defence case or holding a retrial would "result in prejudice and occasion a miscarriage of justice", given the following circumstances (i) the passage of time since the alleged offence, (ii) the unfairness of the Applicant remaining in custody after ten (10) years in prison, (iii) the risk that a retrial may result in an unlawful mandatory death sentence, (iv) the existence of tainted evidence that is not capable of correction in fresh proceedings and (v) the Applicant's rehabilitation.

*

199. The Respondent State did not respond on this claim.

***

200. The Court considers, with respect to these prayers, that while it does not assume appellate jurisdiction over domestic courts and cannot set aside sentences handed down by those courts,[68] it has the power to make any order on reparations as appropriate, where it finds that national proceedings were not conducted in line with international standards.

[68] See *Armand Guehi v. Tanzania* (Merits and Reparations), § 33; Application No. 027/2015. Judgment of 21/09/18, *Minani Evarist v. United Republic of Tanzania* (Merits), § 81; *Mohamed Abubakari v. Tanzania* (Merits), op. *cit.*, §. 28.

201. Regarding the order to set aside the Applicant's sentence, the Court notes that it has not determined whether the conviction and sentence of the Applicant was warranted or not, as this is a matter to be left to the national courts. The Court is rather concerned with whether the procedures in the national courts comply with the provisions of human rights instruments ratified by the Respondent State.[69]

202. The Court recalls that it has established that it can only order a release:

> "[I]f an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice."[70]

203. In the instant case, the Court recalls that it has found that the Respondent State violated the Applicant's rights to a fair trial by High Court concluding his trial without considering the medical evaluation report of the Applicant's mental health status at the time of the commission of the offence which the High Court itself ordered for, as required by its own laws. The Court finds that the logical remedy is for the Respondent State to re-open proceedings and to conclude them within 1 (one) year from the date of notification of this judgment, and it so orders.

[69] *Ladislaus Onesmo v United Republic of Tanzania*, ACtHPR, Application No. 047/2016, Judgment of 30 September 2021 (merits and reparation) § 56; *Minani Evarist v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402, § 54. See also *Ernest Francis Mtingwi v. Tanzania* (jurisdiction), § 14; *Alex Thomas v. Tanzania* (merits), § 130; *Mohamed Abubakari v. Tanzania* (merits), §§ 25 and 26; *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65.
[70] *Minani Evarist v. Tanzania* (merits and reparations), § 82; See also *Jibu Amir alias Mussa and Saidi Ally alias Mangaya v. United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits and reparations), § 96; and *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 84; and *Kalebi Elisamehe v. Tanzania* (merits and reparations), § 111; Application No. 047/2016, *Ladislaus Onesmo v United Republic of Tanzania* (merits and reparations) § 93

ii. Guarantee of non-repetition

204. The Applicant prays the Court to order the Respondent State to amend its laws to ensure respect of the right to life under Article 4 of the African Charter by removing the mandatory death sentence for the offence of murder.

205. The Applicant further avers that the right to life can only be resolved by an order to revoke the death sentence imposed and accordingly, to remove the Applicant from death row. The Applicant affirms that the only way to ensure compliance with Article 4 of the African Charter is to order the Respondent to amend its laws to remove the mandatory death sentence for the offence of murder.

*

206. The Respondent State did not respond specifically to this allegation.

***

207. The Court has previously dealt with this matter and ordered the Respondent State to undertake all necessary measures to remove from its Penal Code the provision for the mandatory imposition of the death sentence[71]. The Court therefore reiterates this order in the instant case.

iii. Publication of the judgment

208. Though the Applicant did not seek orders for publication of this judgment, pursuant to Article 27 of the Protocol and the inherent powers of the Court, the Court will consider this measure.

[71] *Ally Rajabu and Others v. United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v. Tanzania* (merits and reparations), § 171 (xv - xvi)

209. The Court recalls its position that "a judgment, *per se,* can constitute a sufficient form of reparation for moral damages"[72]. Nevertheless, in its previous judgments, the Court has *suo motu* ordered the publication of its judgments where the circumstances so require.[73]

210. 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 Applicant and is systemic in nature. The Court further notes that its finding in this Judgment bears on a supreme right in the Charter, that is, the right to life.

211. In view of the above, the Court orders the publication of this Judgment.

IX. COSTS

212. The Applicant prays for payment of United States Dollars two thousand, four hundred and forty dollars (USD 2, 440) on account of legal and related costs. The Applicant also prays for payment of United States Dollars four thousand, four hundred (USD 4, 400) for legal fees and expenses incurred by the Applicant's counsel for transport expenses and the time spent on the case by the legal counsel, that is, United States Dollars four thousand four thousand (USD 4,000) for approximately twenty (20) hours at United States Dollars two hundred (USD 200) per hour and approximately United States Dollars Four Hundred and Forty (USD 440) for travel and other expenses incurred.

*

213. The Respondent State prays the Court to order Applicant to bear the costs of this Application.

***

[72] *See Reverend Christopher Mtikila v. Tanzania* (Reparations), § 45.
[73] See *Armand Guehi v. Tanzania*, op. cit., § 194; *Reverend Christopher R. Mtikila v. Tanzania* (Reparations), § 45 and 46(5); and *Norbert Zongo and Others v. Burkina Faso* (Reparations), § 98.

214. Pursuant to Rule 32(2) of the Rules "unless otherwise decided by the Court, each party shall bear its own costs, if any".[74]

215. The Court notes that the Applicant was represented by PALU 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 that were incurred by PALU in representing the Applicant therefore his claim in this regard is unjustified and is therefore dismissed.

216. In light of the foregoing, the Court rules that each Party shall bear its own costs.

X. OPERATIVE PART

217. 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* that the Application is admissible.

On merits

v. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial, protected under Article 7(1) (c) of the Charter as read together

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

with Article 14 (3) (d) of the ICCPR with regard to the provision of effective free legal assistance;

vi. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial, protected under Article 7(1)(c) of the Charter with regard to the provision of an interpreter;

vii. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial, protected under Article 7(1) (c) of the Charter with regard to the right to have his cause heard by a competent court or tribunal;

viii. *Finds* that the Respondent State has violated the Applicant's right to fair trial, protected under Article 7(1)(d) of the Charter with regard to the right to be tried within a reasonable time;

ix. *Finds* that the Respondent State has violated the Applicant's right to a fair trial under Article 7(1) of the Charter, with regard to the non-consideration by the High Court, of the medical evaluation report regarding the Applicant's mental health status at the time of commission of the offence;

x. *Finds* that the Respondent State has violated the right to life under Article 4 of the Charter in relation to the mandatory imposition of the death penalty;

xi. Finds that the Respondent State has violated the right to the respect of dignity under Article 5 of the Charter in relation to the method of execution of the death penalty, that is, by hanging.

Unanimously,

On reparations

Pecuniary reparations

xii. *Dismisses* the Applicant's prayer for material damages;

xiii. Dismisses the Applicant's prayer for damages for moral prejudice suffered by alleged indirect victims*;*

xiv. *Grants* the Applicant's prayer for damages for the moral prejudice he suffered and awards him the sum of Tanzanian Shillings Five Million (TZS 5,000,000);

xv. Orders the Respondent State to pay the sum awarded under (xiv) above, free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

Non-pecuniary reparations

xvi. *Orders* the Respondent State to take all necessary measures, through its internal processes and within one (1) year of the notification of this Judgment, to re-open and finalise the criminal proceedings relating to the Applicant through a procedure that does not allow the mandatory imposition of the death sentence and upholds the full discretion of the judicial officer;

xvii. *Orders* the Respondent State to immediately, take all necessary steps, to remove the mandatory imposition of the death penalty from its Penal Code as it impinges on the discretion of the judicial officers in imposing sentences.

xviii. Orders the Respondent State to publish this Judgment, upon notification thereof, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and to ensure that the Judgment remains accessible for at least one (1) year after the date of such publication.

Implementation and reporting

xix. *Orders* the Respondent state to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation 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

xx. Orders that each Party shall bear its own costs.

Signed:

Blaise TCHIKAYA, Vice-President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Modibo SACKO, Judge;

and Robert ENO, Registrar.

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

In accordance with Article 28(7) of the Protocol and Rule 70 of the Rules, the Declaration of Justice Blaise TCHIKAYA and the Joint Declaration of Justices Ben KIOKO and Tujilane R. CHIZUMILA are appended to this Judgment.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Judgment

Gozbert Henrico

v.

United Republic of Tanzania

(10 janvier 2022)

Application No. 056/2016

Declaration

of the Vice-President of the Court,

Judge Blaise Tchikaya

1. I voted in favour of the operative part of the judgment because, like my honourable fellow judges, I believe that in the instant case, the Tanzanian State violated a human right, namely the right of the Applicant, *Gozbert Henrico*[1], to a fair trial.

2. As an opponent of the death penalty by principle and conviction, this Declaration is an expression of my profound disagreement with the essence and the various forms of the death penalty, particularly the mandatory death penalty. We have already had the occasion to make observations on this matter, specifically in the

[1] ACtHPR, *Gozbert Henrico v. Tanzania*, 2 December 2021: The facts took place on 27 May 2008 in the Kagera region of Tanzania. Following the sale of a piece of land by his brother, the Applicant, drunk and under the influence of drugs, broke into the house of his relatives. Using a machete, he injured three of them in the shoulder, head, neck and hands. In the course of the attack, he also killed the son of his deceased brother carried on the back by his grandmother.

Rajabu Case of 2019[2]. Indeed, in that Opinion, we held that " while asking Tanzania to review its legislation on a category of death penalty - the mandatory death penalty - is refusing to direct its decision to condemn the death penalty". The *Gozbert Henrico* decision falls along the same lines. This approach is partial. A simple conviction of death penalty should be recommended.

3. The same is true when the Court holds in paragraph 168 of this judgment [3] that "whatever the method of execution, the death penalty constitutes, in any event, cruel, inhuman and degrading punishment and notes that world practice is tending more and more towards its abolition as a sanction". And, "the application of the death penalty by hanging constitutes a violation of the right to dignity under the article of the Charter". This conviction is partial. The Court could have taken this reasoning to its logical conclusion by purely and simply banishing this punishment in all its forms from the African legal order.

4. In some ways, the *Gozbert Henrico* decision echoes the limitations of the 2019 *Rajabu et al.* decision, particularly with regard to the mandatory death penalty regime. Whether mandatory or not, these punishments, whose human and sociological effects are the same, should be subject to the same legal regime in terms of dismissal. Ultimately, it should be an abolitionist regime, without for that matter precluding the selective application of the mandatory death penalty for certain crimes.

The "two" death sentences have similar effects

5. We will not belabour the well-known harmful and devastating effects of the death penalty. Our opinion in Rajabu emphasized that "... what is condemned in the death penalty is found *mutatis mutandis* in the mandatory death penalty. The latter

[2] ACtHPR, Ally Rajabu and others, 28 November 2019: An application was submitted to the Arusha Court on 26 March 2015 by the Applicants who are Tanzanian nationals sentenced to death for murder, including Mr. Ally Rajabu. On the merits of the case, the Court had yet to take a clear position on the issue of the mandatory sentence which was the sentence upheld by domestic judges.

[3] ACtHPR, *Gozbert Henrico v. Tanzania*, § 168.

is of no significant contribution to the distinction that should be made with regard to the initial death sentence"[4]. The position of the Court is at odds with the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty of 1989[5].

6. Simply put, the mandatory death penalty combines most of the disadvantages of the death penalty. It violates fundamental human rights, as set out in the Universal Declaration of Human Rights of1948. It is also irrevocable. It is also considered to be no more dissuasive than life imprisonment. Moreover, it is used to execute suspects summarily, without any trial. The "two" death sentences are similar.

7. While there is no intention here to shift the debate to other kinds of death sentences, the fact remains that the issue of the death penalty always pits abolitionists against non-abolitionists. In this regard, it must be emphasized that there is no evidence that the death penalty is a deterrent. On the contrary, it has been shown that incidents of the most serious crimes have either decreased or stabilized in countries that have abolished the death penalty. Certainly, it is the essence of punishment - not its severity - that deters would-be criminals.

A unique dismissal regime

8. The law, as applied in the *Gozbert* case may still raise questions. The Court " orders the Respondent State to take all necessary measures, through its internal processes and within one (1) year (...) to implement the Court's decision in Ally Rajabu v. Tanzania the mandatory imposition of the death sentence and upholds the full discretion of the judicial officer". This operative part of the Judgment provides a basis for validating the death penalty, given that it challenges the mandatory death penalty only.

[4] *Rajabu* Opinion, § 10.

[5] The Second Optional Protocol to the International Covenant on Civil and Political Rights, for the abolition of the death penalty was adopted and proclaimed by the General Assembly in its Resolution 44/128 of 15 December 1989.

9. The *Dexter* decision rightly pointed out that "In this context, it recalls its jurisprudence and reiterates that the automatic and mandatory imposition of the death sentence, constitutes an arbitrary deprivation of life, incompatible with article 6(1) of the covenant, provided that the death sentence is passed without the personal circumstances of the accused or the particular circumstances of the crime being taken into consideration"[6].

10. The above-mentioned opinion recalls the Committee's conclusion that "The existence of a de facto moratorium on executions is not sufficient to make the mandatory death penalty compatible with the covenant". It is therefore clear that the two are twin penalties subject to the same dismissal regime under international law.

11. The history of abolition should do the rest. Two-thirds of the world's countries have either abolished the death penalty completely or no longer enforce it. In Europe, many countries have abolished the death penalty. The European Union requires its members to abolish the death penalty. This is a very important requirement for membership of the Council of Europe. In sub-Saharan Africa, 22 states have already abolished the death penalty. Every year, the situation evolves towards the end of the death penalty. The latest countries to abolish the death penalty are Chad and Sierra Leone.

Blaise Tchikaya

Judge,

Vice-President of the Court

[6] *Communication Dexter Eddie Johnson v. Ghana*, 28 March 2014, §9 and following.

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

GOZBERT HENRICO

V

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 056/2016

JOINT DECLARATION OF JUDGE BEN KIOKO AND JUDGE TUJILANE CHIZUMILA

1. In the instant case, the twin main issues at hand were, firstly, the mandatory imposition of the death penalty in a manner that takes away the discretion of the judicial officer and, secondly, the method of carrying out the death penalty, namely, by hanging. The relevant provisions in the Respondent State's Penal code, were challenged as constituting cruel, inhuman and degrading treatment.

2. While we agree in substance with the majority decision on these two issues, there is one particular point, relating to the clarity and preciseness of one of the paragraphs in the operative part of the Judgment, on which we join issue with the majority.

3. It was our view, which we still hold now, that the operative part of a Court decision ought to be couched in such a manner that the reader, whether a litigant, or a scholar, or a student of law, or a member of the public will easily understand the context and import of the orders issued by the Court.

Furthermore, we believe that the overriding principles in drafting a judgment are "clarity, coherence and conciseness"[1] and of course, fidelity to the law and facts; all other considerations in our view are secondary. This is important because experience has shown, as Lord Burrows has also stressed, that "there are few people who read every word of a judgment". Indeed, Lord Burrows even goes further to exclude academics from among the few persons who would read every word of a judgment, asserting that the focus will be on the section on the law[2].

4. We agree with the reasoning behind the paragraph in question as articulated in the body of the final judgement. However, we hold the view that there was a serious flaw in the process, as well as an omission in one of the operative paragraphs of the judgment that is the subject of this Declaration. We believe that in this instance, the Court adopted a process that gave primacy and undue consideration to form rather than substance.

The Process

5. The judgement was scheduled for delivery on 2 December 2021. However, on the date of delivery it was taken out following insistence that there was a fatal error in the operative part of the judgment. For this reason, delivery of the judgment was deferred to allow further deliberations. The alleged fatal error was the reference to a previous decision of the Court, as indicated hereunder, preference being for the paragraph to stop immediately after "imposing sentences":

> *Orders the Respondent State to immediately, take all necessary steps, to remove the mandatory imposition of the death penalty from its Penal Code as it impinges the discretion of the judicial officers in imposing sentences,* ***and, also to comply with the Court's decision in the matter of Ally Rajabu v. United Republic of Tanzania[3], which was to the same effect.***

---

[1] See Lord Burrows, Justice of the Supreme Court of the United Kingdom 20 May 2021, on "Judgment-Writing: A Personal Perspective" at the Annual Conference of Judges of the Superior Courts in Ireland, page 2 in which he stresses the three Cs.

[2] Ibid Page 5. Lord Burrows asserts "There are few people who read every word of a judgment. …. So, for example, an academic, unlike the parties, is rarely interested in the ins and outs of the facts and will often rely on a headnote for th facts, if there is one. What the academics are interested in is the law. It makes no difference to an academic if the judg has 300 paras on the facts or 30 paras on the facts. All that fact-finding will be skipped or quickly flicked through in any event although he or she may have to dip into it further at some stage"

[3] Ally Rajabu and Others v Tanzania v United Republic of Tanzania ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations) § 107. In its judgment, *the Court had ordered the Respondent State to take all necessary measures, within one (1) year from the notification of this judgment to remove the mandatory imposition of the death penalty from its Penal Code and for the rehearing of the case on the sentencing of the*

6. It should be underlined that indeed the last part of the paragraph in question did not correctly express what had been agreed earlier by the Court. It ought to have instead stipulated, **"and in line with the Court's decision in the matter of *Ally Rajabu v. United Republic of Tanzania,* which was to the same effect**'. The Court had also agreed that there would no need for a footnote in the operative part since a full citation was already provided for in the body of the judgment. We see no conceivable reason, even with this alleged error, why delivery of the judgment was deferred.

7. We hold the view that while references to other decisions in the operative part is not elegant, its inclusion cannot constitute a fatal error by any stretch of the imagination. Postponing delivery of the judgment for this reason alone was in our view unjustified.

Subsequent formulation and Practice of the Court

8. Subsequently, the Court decided that the paragraph should simply read as follows: "***Orders* the Respondent State to immediately, take all necessary steps, to remove the mandatory imposition of the death penalty from its Penal Code as it impinges the discretion of the judicial officers in imposing sentences**". We did not share this view.

9. While we agreed with the logic of requiring immediate implementation of the decision, since the Respondent State had failed to implement previous decisions of the Court to the same effect, we think this context ought to have been included in the operative part. This is in consonance with the practice of the Court[4]. Indeed, in all judgments where the Court has found violation of a right provided for in the Charter, for example the right to free legal assistance, it states so in the operative part. The Court does not simply state that it found a violation of Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, but adds- "for failure to provide the Applicant with free legal assistance".[5]

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

[4] For example, in **Anudo Ochieng Anudo v Tanzania, Application no. 012/2015,** delivered on 2 December 2021 (reparations) **the Court** *ordered* the Respondent State to take all the necessary steps to restore the Applicant's rights, by allowing him to return to the national territory, ensuring his protection and submitting a report to the Court within forty-five (45) days of notification of this Judgment*".*

[5] See Hamis Shaban alias Amis Ustadh v.Tanzania, Application no. 026/2015, delivered on 2 December 2021 (merits and reparations) , in which the Court found that **"***the Respondent State is in violation of Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, for failure to provide the Applicant with free legal assistance"*. The Court granted pecuniary reparations and ordered *"the Respondent State to pay the amount indicated under sub-paragraph (vii) above free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid".*

10. Additionally, we could not identify any previous decision of the Court where it required immediate implementation of its decision. Indeed, all decisions of the Court requiring a change in the law normally carry a time frame of one year or two years. The only reason for stipulating immediate implementation of this judgment was because, the Respondent State had been given one (1) year in in Ally Rajab [6], and in subsequent decisions, to change its law, which it had failed to do.

11. We believe that, if it is accepted that majority of readers do not read the full judgments of the Court, what is the logic for leaving it out an important aspect of the reasoning of the Court? If virtually all decisions of the Court carry a time frame beyond the date of its issue, how is one to understand the reasoning of the Court without going through the entire judgment? What prejudice could possibly accrue from being clear, coherent and precise?

12. For our part, we would have joined the consensus with a formulation that generally made reference to previous decisions of the Court, for example, “in line with previous decisions of the Court” or “in line with previous decisions of the Court that remain unimplemented”. By leaving out this important aspect of the reasoning of the Court, we believe the majority have followed a perilous path that is new and inconsistent and without any good reason for doing so.

Signed: **Signed**

Ben KIOKO, Judge Tujilane Rose Chizumila, Judge

Done at Arusha, this Tenth Day of January in the year Two Thousand and Twenty two, in English and French, the English text being authoritative.

[6] Ibid.