***Submission to the OHCHR in contribution to the yearly supplement to the Quinquennial Report of the Secretary General on the question of the death penalty in relation to safeguards for people with mental or intellectual disabilities***

**March 2022**

**ABOUT REPRIEVE**

Reprieve is a charitable organisation registered in the United Kingdom (No. 1114900) in special consultative status with the United Nations Economic and Social Council (ECOSOC) that provides free legal and investigative support to those who have been subjected to state-sponsored human rights abuses. The key beneficiaries of Reprieve’s work belong to some of the most vulnerable populations in the world, as it is in their case that human rights are most swiftly jettisoned and the rule of law is cast aside. In particular, we protect the rights of those facing the death penalty and deliver justice to victims of arbitrary detention, torture, and extrajudicial killing.

This submission is made in contribution to the yearly supplement to the Quinquennial Report of the Secretary General on the question of the death penalty. The submission provides an update on developments since 1 July 2020, focusing on the implementation of safeguards to protect the rights of those facing the death penalty, in particular persons with mental or intellectual disabilities, and the mental health impacts of the death penalty.

**EXECUTIVE SUMMARY**

* In April 2021, the Supreme Court of Malawi declared the death penalty to be unconstitutional and ordered resentencing. However, in August 2021, the Court reversed this decision and reinstated the death penalty, causing anguish and panic amongst those on death row.
* In Tanzania, the African Court has issued two further rulings against the mandatory death penalty, but neither decision has yet been implemented, leaving hundreds of people languishing on death row.
* In July 2021, the Kenya Supreme Court issued clarification and guidance on its 2017 *Muruatetu* decision abolishing the mandatory death penalty. The guidance restricted eligibility for resentencing, excluding thousands who were eligible before.

# **SUBMISSION**

## **Malawi**

*Updates*

1. Malawi has had a *de facto* moratorium on the death penalty since 1992. In 2007, the Supreme Court of Malawi overturned the mandatory death penalty, allowing resentencing in 169 cases and over 150 people were released from death row.[[1]](#footnote-0) In rare cases, Malawi has continued to sentence people to death for murder, recently in cases involving the killing of persons with albinism.[[2]](#footnote-1) These trials are fraught with fair trial violations, including allegations of confessions induced through torture.[[3]](#footnote-2) There are currently 25 people on death row in Malawi: 24 men and 1 woman.[[4]](#footnote-3)
2. In April 2021, the Supreme Court of Malawi in *Khoviwa v. Republic[[5]](#footnote-4)* declared the death penalty to be unconstitutional and contrary to the right to life under the Constitution of Malawi. The Court ordered the resentencing of all those sentenced to death.[[6]](#footnote-5) However, in August 2021, the Court, in a confusing breach of established procedure, reversed its decision, reinstating the death penalty.[[7]](#footnote-6)
3. Following this reversal, Parliament is urgently pursuing abolition of the death penalty. Parliamentarians have started the process to pass a bill to abolish the death penalty.
4. One provision of the original *Khoviwa* judgment was preserved, allowing an additional nine people sentenced to death access to resentencing hearings. Many of these men are elderly, the oldest being 72. All suffer from serious medical complaints, including HIV/AIDS, tuberculosis, frequent malaria and high blood pressure, compounded by decades spent in extremely poor prison conditions.[[8]](#footnote-7) Those on death row are affected by lack of food in prisons, which has reached crisis levels.[[9]](#footnote-8) Reprieve and partners are working to urgently proceed with the hearings, aiming for the nine men to be released.

*Mental health impacts of the death penalty*

1. In Malawi, a significant proportion of the 25 individuals on death row had a psycho-social disability at the time of the offence, including intellectual disabilities, severe depression and anxiety disorders, and psychosis.[[10]](#footnote-9) All of the 25 individuals have experienced mental health issues following arrest as a result of torture, trauma and inhumane prison conditions.[[11]](#footnote-10) There is no treatment for mental or intellectual disability in Malawi’s prisons.[[12]](#footnote-11)
2. In 2021, the mental health of all those on death row suffered a further blow when they learned about the reversal of the abolition of the death penalty. This caused considerable mental anguish and suffering. As one man, Stephen Ching’ombe stated, “when we learned about the reinstatement of our death sentences, I wished I could have hanged myself right then.”[[13]](#footnote-12) Another man, George Billiati, has been deeply affected by the reinstatement of the death penalty. Mr. Billiati was already experiencing severe anxiety and depression and, as an elderly person, accelerating physical health issues. The original judgment in *Khoviwa* gave Mr. Billiati his first cause for hope in decades. Learning about the reversal was devastating and pushed him further into hopelessness. Mr. Billiati said: “I felt so devastated. Please take the rope of death off us.”[[14]](#footnote-13)
3. Sophia Jere is the only woman currently on death row in Malawi. Ms. Jere was arrested in December 2015, convicted of murder in June 2019, and sentenced to death later that same year, despite her limited involvement in the offence.[[15]](#footnote-14) Ms Jere married very young and endured a physically and mentally abusive relationship. She has continued to suffer from health issues stemming from the abuse. Since working on her case, Reprieve has uncovered information relating to Ms. Jere’s mental health, including a possible intellectual disability. When she was first incarcerated, Ms. Jere did not grasp for many months that she was on death row.[[16]](#footnote-15) The fluctuations in her status resulting from the *Khoviwa* judgments have caused her significant distress.

## **Tanzania**

*Country updates*

1. In November 2019, the African Court on Human and Peoples’ Rights held in *Rajabu and others v United Republic of Tanzania[[17]](#footnote-16)* that the mandatory death penalty was contrary to the African Charter's provisions on fairness[[18]](#footnote-17), due process[[19]](#footnote-18), right to life[[20]](#footnote-19), and inhuman and degrading treatment/torture.[[21]](#footnote-20) The Court ordered Tanzania to revise the Penal Code to remove the mandatory death penalty within one year. To date, the decision has not been implemented.
2. Since 2019, the African Court has issued two further rulings against the mandatory death penalty. In September 2021, in *Amini Juma v United Republic of Tanzania*,[[22]](#footnote-21) the Court found violations of the rights to life[[23]](#footnote-22) in respect of the mandatory death penalty[[24]](#footnote-23); to dignity[[25]](#footnote-24) in respect of death penalty by hanging[[26]](#footnote-25); and to be tried within a reasonable time.[[27]](#footnote-26) The Court ordered Tanzania to remove the mandatory death penalty within one year of the judgment, which it has not done.[[28]](#footnote-27)
3. In January 2022, in *Gozbert* *Henrico v United Republic of Tanzania*,[[29]](#footnote-28) the Court found that the mandatory death penalty gives the judge no discretion in sentencing, contrary to Article 4 of the Charter.[[30]](#footnote-29) Further, the failure of the Tanzanian High Court to consider a medical report on Mr. Henrico’s mental health status constituted a violation of the right to a fair trial.[[31]](#footnote-30) The Court ordered removal of the mandatory death penalty and re-opening of Mr. Henrico’s case within one year. No action has been taken to date.[[32]](#footnote-31)
4. Tanzania’s failure to implement the unequivocal rulings of the African Court impacts hundreds of people on death row.[[33]](#footnote-32) The exact figure is unconfirmed as Tanzanian authorities do not publish information on the prison population.[[34]](#footnote-33)

*Mental health impacts of the death penalty*

1. Courts in Tanzania routinely hand down death sentences in trials that fail to uphold safeguards for mental illness.
2. Ghati Mwita is a 62-year-old woman sentenced to the mandatory death penalty. As a survivor of gender-based violence, Ms. Mwita has committed her life to service. She returned to Tanzania in 2008 to start a charity for victims of female genital mutilation, but, following an accidental death in her home, she was arrested and sentenced to death in an unfair trial.[[35]](#footnote-34) She has spent 13 years in prison, including 10 years on death row. Although Ms. Mwita’s death sentence was commuted to life imprisonment in 2020, her physical and mental health have been permanently compromised due to prison conditions and underlying health issues. Prison conditions in Tanzania are harsh and life threatening. Ms. Mwita is elderly and is living with HIV without regular access to medication. In prison, Ms. Mwita was diagnosed with Persistent Depressive Disorder and her mental health has declined significantly following her arrest; she is paranoid and occasionally suicidal.[[36]](#footnote-35)
3. If Tanzania were to implement the African Court’s judgment, everyone who has been sentenced under the mandatory death penalty would be eligible for resentencing. Therefore, Ms. Mwita, despite commutation of her death sentence to life, would be eligible for a resentencing hearing in which mitigating factors would be considered in her new sentence. Moreover, judges would be able to use their discretion in future death eligible cases.

**Kenya**

*Country updates*

1. In December 2017, the Kenyan Supreme Court declared in the landmark case of in *Francis Karioko Muruatetu v. Republic*[[37]](#footnote-36) that the country’s mandatory death sentence was unconstitutional.
2. Implementation of the *Muruatetu* judgement has been hampered by a lack of dissemination of the judgement and guidance on implementation. As a result, courts in Kenya have not approached resentencing consistently, leading to arbitrary, unfair judgements. In July 2021, in light of these challenges, the Supreme Court clarified the 2017 decision and issued guidance for resentencing. Unfortunately, the Court also decided to limit eligibility for resentencing, ruling that *Muruatetu* would only be applicable to sentences for murder.[[38]](#footnote-37) This significantly cut the number of people eligible, as most people sentenced to death have been convicted of robbery with violence – a non-lethal offence.

*Mental health impacts of the death penalty*

1. In Kenya, there are over five thousand people serving mandatory death sentences.[[39]](#footnote-38) The arbitrary application of resentencing across the country has significantly exacerbated feelings of hopelessness and despair among inmates.[[40]](#footnote-39)
2. Christine M is an elderly woman of 65 in prison in western Kenya.[[41]](#footnote-40) She and her two daughters-in-law were arrested for the death of a relative.[[42]](#footnote-41) Despite complete lack of evidence, they were sentenced to death.[[43]](#footnote-42) The unfair outcome sank Christine into a deep depression.[[44]](#footnote-43) She feels hopeless for herself and for her daughters in law.[[45]](#footnote-44) She said, “I wish I could trade myself for them. My life is over, I will die in prison, but I want them to be free as they deserve to be.”[[46]](#footnote-45) Christine’s hopelessness has been exacerbated by the arbitrary application of resentencing.[[47]](#footnote-46) None of her fellow inmates’ resentencing applications have been successful.[[48]](#footnote-47)
3. Christine’s case is characteristic of cases observed across the country. Unfair trials, with little or no access to counsel, followed by years in prison have worn away at the mental health of even those who were not vulnerable prior to arrest. Resentencing, applied uniformly across the country, would offer hope for many who have lost it. Moreover, resentencing conducted according to best practice would allow for presentation of evidence of current mental health status as mitigation.
1. *Francis Kafantayeni & Others v Attorney General* Constitutional Case No 12 of 2005 (2007) MWHC 1. [↑](#footnote-ref-0)
2. Malawi Court Uses Death Sentence to Help Stop Attacks on Albinos, 15 August 2019. <https://www.voanews.com/a/africa_malawi-court-uses-death-sentence-help-stop-attacks-albinos/6173912.html> [↑](#footnote-ref-1)
3. Malawi Human Rights Commission, A REPORT OF AN INVESTIGATION INTO THE DEATH OF MR. BULEYA LULE IN POLICE CUSTODY, HRC/05/03/234, May 2019. <https://malawilii.org/system/files/MHRC%20Buleya%20Report.pdf> [↑](#footnote-ref-2)
4. Information on file with Reprieve. [↑](#footnote-ref-3)
5. *Charles Khoviwa v The Republic* MSCA Miscellaneous Criminal Appeal No12 of 2017 (2021) MWSC 3. [↑](#footnote-ref-4)
6. *Charles Khoviwa v The Republic* MSCA Miscellaneous Criminal Appeal No12 of 2017 (2021) MWSC 3. <https://malawilii.org/mw/judgment/supreme-court-appeal/2021/3>; Malawi Constitution Art. 16 (Right to Life). [↑](#footnote-ref-5)
7. Malawi Supreme Court Retreats from Opinion that Declared Death Penalty Unconstitutional, 24 August 2021. <https://deathpenaltyinfo.org/news/malawi-supreme-court-retreats-from-opinion-that-declared-the-death-penalty-unconstitutional> [↑](#footnote-ref-6)
8. Information on file with Reprieve. [↑](#footnote-ref-7)
9. Prisoners Run Out of Food, Essentials, The Nation, 06 March 2022. <https://www.mwnation.com/prisoners-run-out-of-food-essentials/> [↑](#footnote-ref-8)
10. Information on file with Reprieve. [↑](#footnote-ref-9)
11. Information on file with Reprieve. [↑](#footnote-ref-10)
12. Information on file with Reprieve. [↑](#footnote-ref-11)
13. Information on file with Reprieve. [↑](#footnote-ref-12)
14. Information on file with Reprieve. [↑](#footnote-ref-13)
15. Information on file with Reprieve. [↑](#footnote-ref-14)
16. Information on file with Reprieve. [↑](#footnote-ref-15)
17. *Ally Rajabu and others v United Republic of Tanzania*, ACHPR no. 007/2015, 29 November 2019. <https://africanlii.org/afu/judgment/african-court/2019/7> [↑](#footnote-ref-16)
18. African Charter, Article 7(1); *Ally Rajabu and others v United Republic of Tanzania* at paragraph 111. [↑](#footnote-ref-17)
19. African Charter, Article 7(1); *Ally Rajabu and others v United Republic of Tanzania* at paragraph 111. [↑](#footnote-ref-18)
20. African Charter, Article 4; *Ally Rajabu and others v United Republic of Tanzania* at paragraph 114. [↑](#footnote-ref-19)
21. African Charter, Article 5; *Ally Rajabu and others v United Republic of Tanzania* at paragraph 119*.* [↑](#footnote-ref-20)
22. *Amini Juma v United Republic of Tanzania*, ACHPR no. 024/2016, 30 September 2021. <https://www.african-court.org/cpmt/storage/app/uploads/public/615/bf4/f09/615bf4f09e55a745995400.pdf> [↑](#footnote-ref-21)
23. African Charter, Article 4; *Amini Juma v United Republic of Tanzania* at paragraph 120. [↑](#footnote-ref-22)
24. African Charter, Article 4; *Amini Juma v United Republic of Tanzania* at paragraph 120. [↑](#footnote-ref-23)
25. African Charter, Article 5; *Amini Juma v United Republic of Tanzania* at paragraph 136. [↑](#footnote-ref-24)
26. African Charter, Article 5; *Amini Juma v United Republic of Tanzania* at paragraph 136. [↑](#footnote-ref-25)
27. African Charter, Article 7(1)(d); *Amini Juma v United Republic of Tanzania* at paragraph 157. [↑](#footnote-ref-26)
28. Information on file with Reprieve. [↑](#footnote-ref-27)
29. *Gozbert Henrico v United Republic of Tanzania*, ACHPR no. 056/2016, 10 January 2022. <https://www.african-court.org/cpmt/storage/app/uploads/public/61e/163/77e/61e16377e31f0332569496.pdf> [↑](#footnote-ref-28)
30. *Gozbert Henrico v United Republic of Tanzania* at paragraph 148. [↑](#footnote-ref-29)
31. African Charter, Article 7(1); *Gozbert Henrico v United Republic of Tanzania* at paragraph 160. [↑](#footnote-ref-30)
32. Information on file with Reprieve. [↑](#footnote-ref-31)
33. ‘The available figures on prisoners on death row in Tanzania suggest a number currently in the hundreds. In December 2020, then President Magufuli commuted the death sentences of 256 individuals to life sentences’: see The Advocates for Human Rights et al., *United Republic of Tanzania’s Compliance with International Covenant on Civil and Political Rights* at paragraphs 4 and 22. <https://www.theadvocatesforhumanrights.org/uploads/tanzania_death_penalty_loipr_human_rights_committee_final.pdf> [↑](#footnote-ref-32)
34. This is contrary to the UN General Assembly’s repeated calls for States to publish “relevant information, disaggregated by sex, age, nationality and race, as applicable, and other applicable criteria, with regard to their use of the death penalty, inter alia, the number of persons sentenced to death, the number of persons on death row and the number of executions carried out, the number of death sentences reversed or commuted on appeal or in which amnesty or pardon has been granted, as well as information on any scheduled execution, which can contribute to possible informed and transparent national and international debates, including on the obligations of States pertaining to the use of the death penalty”: see UNGA Res 73/175, 73rd Sess, UN Doc A/RES/73/175 (17 December 2018), para 7(c). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/449/69/PDF/N1844969.pdf?OpenElement> [↑](#footnote-ref-33)
35. Information on file with Reprieve. [↑](#footnote-ref-34)
36. Information on file with Reprieve. [↑](#footnote-ref-35)
37. *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR. [↑](#footnote-ref-36)
38. Death Penalty Case Re-Visited By Kenya Supreme Court, 09 July 2021. <https://africanlii.org/article/20210709/death-penalty-case-re-visited-kenya-supreme-court> [↑](#footnote-ref-37)
39. Information on file with Reprieve. [↑](#footnote-ref-38)
40. Information on file with Reprieve. Reprieve has conducted interviews with people serving mandatory death sentences at 28 prisons around the country. Christine’s story is representative of stories heard from inmates at each institution visited. [↑](#footnote-ref-39)
41. Information on file with Reprieve. [↑](#footnote-ref-40)
42. Information on file with Reprieve. [↑](#footnote-ref-41)
43. Information on file with Reprieve. [↑](#footnote-ref-42)
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46. Information on file with Reprieve. [↑](#footnote-ref-45)
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48. Information on file with Reprieve. [↑](#footnote-ref-47)