African Court on Human and Peoples' Rights

The Matter of Thomas Mgira v. United Republic of Tanzania

Application No. 003/2019

Dissenting Opinion

1. I decided to write this opinion because I disagree completely with the operative part of the judgment cited above, where the Court, in my opinion, should have taken a position on an issue that deserves reflection because it is of paramount importance.

2. Indeed, it emerges from paragraph 84 of the above-mentioned judgment that the Court clearly notes that having held in the instant matter that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its previous judgments that the mandatory death penalty is a violation of the right to life among other rights enshrined in the Charter and should thus be expunged from the laws of the Respondent State.

3. It emerges indeed from certain precedent-setting judgments of the Court (referred to in footnote 20 to paragraph 84 of the above judgment) in which the Respondent State is Tanzania, that in relation to the mandatory death penalty, the Court expressly pointed out that the mandatory death penalty imposed by the Respondent State, and which deprives the judge of a margin of appreciation as to whether or not to impose the death penalty, is contrary to Articles 1, 4 and 5 of the Charter. Accordingly, it ordered the Respondent State to take the necessary measures to expunge from its Penal Code the provision relating to the imposition of the mandatory death penalty.

4. The rule which requires judges to judge only on the request of the parties and never to take up a matter *suo motu*, failing which it would be judging *ultra petita*, should be subject to exceptions when it comes to issues on which the Court has already taken a position in its rulings and has set a precedent, including the mandatory death penalty for example and, by extension, the right to life!

5. It emerges from the above-mentioned Application that the Applicant is on death row in Butimba Central Prison awaiting execution of the death sentence handed down to him for murder. He alleges a violation of his fair trial rights in the domestic proceedings.

6. It emerges from the Application that the Applicant requests the Court to order appropriate measures to remedy the violation, including an order for his acquittal and release.

7. The Court, after assuming jurisdiction and declaring the application admissible, dismissed all of the Applicant's allegations and requests for reparation as unfounded. However, as mentioned in paragraph 84 above, the Court deemed it fit to add an *obiter dictum* reminding the Respondent State of its position on the death penalty and its jurisprudence on the matter, which establishes that the mandatory death penalty constitutes a violation of the right to life and other rights enshrined in the Charter, and should therefore be expunged from the Respondent State's penal code.

8. In my opinion, this *obiter dictum* does not in any way place an obligation on the Respondent State in relation to enforcement of the sentence, especially as the Applicant is on death row! What would matter to the Respondent State, and rightly so, is that the Court dismissed the Applicant's allegations and, therefore, that his conviction and sentence were just and justified.

9. For this reason, I am of the view that the Court should have interpreted the Applicant's requests seeking vacation of his conviction and sentence as a request for the vacation of the mandatory death penalty imposed, especially since the Applicant was not represented before the Court. In the end, whether the requests relate to the procedure that led to the conviction or to the right to a fair process, the purpose is the same, since it concerns the death penalty imposed on an Applicant who is on death row, and therefore the right to life!

10. The *ex officio* statement of a publicly-available plea, because it has been established by the court, can be considered an exception to the principle of *ultra petita* in the broad sense, i.e., as referring not only to the claim but also to the arguments advanced in support of it. It was therefore incumbent on the Court to raise, *suo motu*, the violation of a legal rule imposed by itself in its jurisprudence on the Respondent State.

11. This rule is sufficiently important to be qualified as a public policy insofar as it is in the interest of the community in general and not only in the interest of the Applicant, who is directly concerned, even beyond the pleas of the latter in support of his Application before the Court. The issue is no longer about fair trial but about the death penalty and therefore the right to life!

12. The *ultra petita* rule does not prevent the Court from giving a different legal interpretation to the facts of the matter, as it derives from the principle of the freedom of disposition of the parties and is also intended to ensure the efficiency of justice.

Judge Bensaoula Chafika