Judgments
Thomas Mgira v. Tanzania
Umalo Mussa v. Tanzania

(13 June 2023)
Partially Dissenting Opinion

from
Judge Blaise Tchikaya, Vice-President

Introduction

I. The two cases, Thomas Mgira and Umalo Mussa, "revive" the issue of the death penalty

A. The Thomas Mgira judgment

B. The matter of Umalo Mussa

II. The Umalo and Mgira decisions are clear violations of rights

A. The impact of the universal moratorium on the death penalty

B. An ultimately unfortunate dual international regime

Conclusion

Introduction

1. This opinion, like the previous one[1], concerns the death penalty. At the previous session, and in three cases on the same issue, the Court by majority decided to

[1] *Separate opinion under CAfDHP, Marthine Christian Msuguri v. Tanzania; Ghati Mwita v. Tanzania; Igola Iguna v. Tanzania, 1 December 2022*.

maintain its position expressed in the 2019 *Rajabu case*[2]. In the two decisions *Thomas Mgira v. Tanzania and Umalo Mussa v. Tanzania*[3], the Court reiterated the same approach and by and large for the same reasons.

2. Once again, while I regret to dissent, this opinion holds the view that the position of the Court, notwithstanding its majority character, is indeed out of touch. It should change.

3. This obsolescence relates to the decision and the reasoning in these judgments. The two cases in question depict this. There is an approach to be followed when proceedings concern an infringement of rights and there is another, when the individual is denied life and sentenced to death. This should impact on the merits as much as the judicial approach. The Court has started adopting a similar approach on the admissibility of applications challenging the mandatory death penalty. This voluntarism should be followed on the merits.

4. We note that "While listening to the majority position of my honourable colleagues, there is a question which must be asked: How can the Court maintain its jurisprudence in this way? The one beyond the evolution of the applicable international law. There would be two regimes: one in favour of the full protection of the right to life[4] and another which is less favourable[5]". In addition to expressing our dissent on the operative part of the *Umalo Mussa* and *Thomas Mgira* judgments and their reasoning, this opinion will further address the legal complexity of the current situation.

[2] AfCHPR, *Ali Rajabu and others v. Tanzania*, 8 December 2019: *The Rajabu case* concerns *Mr Ally Rajabu, Angaja Kazeni aka Oria, Geofrey Stanley aka Babu, Emmanuel Michael aka Atuu and Julius Petro*, Tanzanian nationals sentenced to death for murder. This mandatory sentence was the sentence upheld by the national judges.
[3] AfCHPR, *Umalo Mussa v Tanzania*, 17 March 2023 and *Thomas Mgira v Tanzania*, 22 March 2023.
[4] Breillat (D.), L'abolition mondiale de la peine de mort, Relating to the 2nd Optional Protocol on the International Covenant on Civil and Political Rights on the abolition of the death penalty, RSC, 1991, p. 261.
[5] The 2019 *Rajabu et al*. judgment; 2022 judgment from this perspective, reflects a limited reading of Article 4 of the Charter.

5. The *Thomas Mgira case* was a continuation of the docket from the last session. The facts of the matter date back to 2002. The Applicant was indicted for the murder of his neighbour, Masaga Ntobi, on the night of 1 October 2002.

6. Also before the Court was the matter of *Umalo Mussa*, the facts of which date back to 1995. The Applicant and two others, now deceased [6], had murdered a man and his wife. They were convicted by the High Court on 29 June 2005 on two counts of murder. Mr *Umalo Mussa* was also sentenced to death by hanging. He lodged an appeal at the Mwanza Court of Appeal, which on 21 May 2009 dismissed his appeal in its entirety. His application for review was still pending when he filed an application before this court on 8 June 2016.

7. These two matters, *Mgira* and *Mussa*, have in common the fact that they join the list of cases extending and reviving the death penalty (I.). They involve the irregularity of hanging. Two issues that have been the subject of a previous opinion, they are the subject of our disapproval here in a context where international law, supported by the United Nations, is resolutely against any death penalty (II).

I. The Thomas Mgira and Umalo Mussa matters "revive" the death penalty

8. One of the first cases to be deliberated upon during this session, the *Thomas Mgira case* provides sufficient insight into the Court's approach to the issue of the death penalty.

A. The Thomas Mgira Judgment

9. As is often the case, a violation of his fair trial rights is challenged by Mr *Mgira* in the domestic proceedings leading to his death sentence. He claims that he was convicted on the basis of:

[6] Both of the Applicant's co-accused died before the proceedings began. The dates of death are not known.

"The most unreliable visual identification possible". This was allegedly derived from "the testimony of a single witness"[7].

It was obtained without the witness being sworn in and it was uncorroborated. In the end, he contends that this submission contains:

> "Several fundamental contradictions and inconsistencies which question the credibility of the witnesses".

10. The Applicant submits that the Respondent State's Court of Appeal deprived itself of the opportunity to correct its errors by failing to grant his request for an extension of time to review the decision of the Respondent State's Court[8].

11. For the purposes of this opinion, it is ultimately irrelevant what the domestic arguments for the decision are. The Court, in its role as an international jurisdiction, has always taken the view that it is not its task to rule on the evidence:

> "It is not for the Court to decide on the value of the evidence in order to review a conviction"[9].

12. In the *Thomas Mgira* case, although the death sentence was imposed, the operative part of the decision states that:

> *"*The Respondent State did not violate the Applicant's right to a fair trial protected by Article 7 of the Charter; (...) and that it did not violate the Applicant's right to equality before the law and equal protection of the law".

13. This approach may seem disappointing in the field of human rights. Everyone is entitled to regard his or her death sentence as unjust. Therefore, the Court should better clarify the exemption of a violation of law when there is a conviction

[7] ACHPR, *Thomas Mgira v. Tanzania*, 3 March 2023, § 6.
[8] *Idem.,* § 6.
[9] See in particular, AfCHPR, *Ivan v. Tanzania*, 28 March 2019, § 63. See also *Mohamed Abubakari v. Tanzania*, § 26 and 173. See also *Kijiji Isiaga v. Tanzania*, § 66; *Oscar Josiah v. Tanzania (Merits)*, § 52.

to a punishment that the law largely rejects. This may appear to the Applicant to be a contradiction[10].

B. The Umalo Mussa case

14. The *Umalo Mussa* case has identical elements. The Applicant objects to the violation of his right to be:

> "Heard, inasmuch as the High Court convicted him and the Court of Appeal upheld the said conviction against him on the basis of a self-incriminating statement"[11]. Moreover, in the Applicant's view, this was done under duress. The Applicant is said to have retracted his statement."

15. It behoves on national proceedings to assess the relevance and scope of the Applicant's arguments. This approach is also established with respect to national courts of the Respondent State. A principle which is clearly stated in *Majid Goa alias Vedastus v. Tanzania*, 26 September 2019:

> "With particular reference to the evidence on which the Applicant's conviction was based, the Court considers that it is not indeed for it to pronounce on its value in order to review that conviction. However, it considers that there is nothing to prevent it from examining that evidence as part of the case file submitted to it, in order to determine whether, in general, the manner in which the national court assessed it complied with the requirements of a fair trial within the meaning of Article 7 of the Charter", § 53.

16. The penal system of the Respondent State, pursuant to article 179 of the Criminal Code, applies the mandatory death penalty, as shown by previous case law on the issue[12]. The attachment of the said State is known. This is on the

[10] This may seem 'elliptical' as Sarah Cassella stigmatised in her article. See G. Le Floch (ed.), The contribution of the jurisprudence of the African Court on Human and People's Rights to International Public Law, Ed. Pédone, 2023, pp. 261 et seq.
[11] AfCHPR, *Umalo Mussa v. Tanzania*, § 6
[12] AfCHPR*, Amini Juma v. Tanzania*, Judgment of 30 September 2021, § 130; *Ally Rajabu and Others v. Tanzania*, 28 November 2019, § 109; *Ghati Mwita v. Tanzania*, 1 December 2022, § 75..

scale of African states that have not divorced from the penal traditions of the colonial era. It is known that it is when the State comes into being that the infliction of the death penalty acquires a legal basis and becomes organised. African states in fact inherited the same rational and political foundations of the 18th and 19th centuries in Europe[13].

17. While the African Court has shown the unjust nature of the death penalty, notably, the national procedure followed, it has always considered that this should be done on a case-by-case basis. It has limited itself to stating the irregularity of the mandatory death penalty. This has been a stigma since the *Rajabu case*[14].

18. The judge must have discretionary powers and decide on the sentence or punishment to be meted; the Court particularly stressed on this in its decisions. The Court considers that if the judge had discretion to sentence those convicted of murder, he or she would have the latitude to take into account all the factors of each case to apply the sentence proportionately.

19. The present cases are reminiscent of the Court's approach. It combines the circumstances of the case with the formal impossibility it finds of challenging the mandatory death penalty. This is clearly stated In *Umalo Mussa*:

> "The Court further notes that the Court referred to its jurisprudence, according to which the consideration of a confession, uncorroborated, is subject to strict conditions, namely that the statement was made voluntarily, that it is true and that there is no element of corroboration.[15] The Court applied these criteria to the facts of the case against the

[13]It should be recalled that the Code of Hammurabi (2285-2242 B.C.) included killing by fire, water.... *The books of Leviticus and Exodus* are full of reasons for death for murder, abduction for slavery, but also idolatry, sorcery, non-respect of ritual laws, adultery, incest, sadism, bestiality and prostitution.

[14] *v. Tchikaya dissenting opinion under Rajabu*, that "(...) It was therefore for the Court to place this infringement in its legal context: in addition to the right to life, the application of the death penalty was at issue. As in its recent *Eddie Johnson Dexter case*, the regime applicable to the mandatory death penalty was the anchor of the controversy between the Applicant and the Respondent State. This distinction in the death penalty is neither operational nor justified in its legal meaning. It is very relative"

[15] *Tuwamoi v. Uganda* [1967] EA 84 at 91: "The point of law is this: the court of record is entitled to convict an accused on the basis of a recanted confession if it is satisfied, after taking into account the material elements of the case, that nothing but the truth and nothing else emerges from the statement"

> Applicant and was satisfied that the Applicant was rightly convicted on the basis of his voluntary confession[16].
>
> "The Court considers that, with regard to the proceedings before the High Court and the Court of Appeal, the treatment by the domestic courts of the extrajudicial statement and the allegation of torture does not reveal any violation of the standards set out in the Charter"[17].

20. It should be noted that the Court found that:

> "The Respondent State has not violated any of the Applicant's rights as alleged"[18].

21. It goes without saying that the legal finding of the existence of the mandatory death penalty, which is clearly integral to the present case, remains without consequence. The Court does not dwell on it. The present dissent, as in the previous cases, is justified.

22. In the *Thomas Mgira* judgment of the same day, the Court made a significant change. It formulated an obiter dictum:

> "The Court, while not finding in the present case a violation of the Applicant's rights, wishes, however, to reiterate its finding in its earlier judgments[19] that the mandatory death penalty constitutes a violation of the right to life as well as of other rights enshrined in the Charter and should therefore be repealed from the Respondent State's Penal Code[20].

23. This last element marks a rather significant difference between the two judgments. The *obiter dictum* contained in *Thomas Mgira* shows that the Court

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[16] CAfDHP, *Umalo Mussa, op. cit.,* § 80.
[17] *Idem.,* § 82.
[18] CAfDHP, *Umalo Mussa, op. cit.,* § 104.
[19] *Ally Rajabu and Others v. Tanzania,* 28 November 2019), 3 §§ 104-114. See also, *Amini Juma v. Tanzania, CAfDHP*, Application No. 024/2016, Judgment of 30 September 2021, §§ 120-131 and *Gozbert Henerico v. Tanzania,* CAfDHP, Application No. 056/2016, Judgment of 10 January 2022, § 160.
[20] AfCHPR, *Thomas M'Gira, op. cit.,*

does not think of invalidating the mandatory death penalty in extenso, even though it would be justified in law to do so, since it constitutes a violation of the right to life as well as of other rights enshrined in the Charter, as mentioned here. All in all, we are back to the *Ally Rajabu*[21] decision in which the Court noted that:

> "The mandatory imposition of the death penalty as provided for in section 197 (...) does not allow the convicted person to present mitigating evidence (...) and therefore applies to all convicted persons, regardless of the circumstances in which the offence was committed. Secondly, the trial court has no choice but to impose the death penalty in all cases of murder. This court is thus deprived of the discretion inherent in any independent court which must be exercised in assessing both the facts and the application of the law, in particular how the principle of proportionality should be applied between the facts and the punishment..."[22].

24. On various occasions, the opportunity has been given to recall, among other violations, the double jeopardy entailed by this mandatory death penalty. It is a sentence that is internationally irregular and deprives the judge of the power to decide[23].

II. The Umalo and Mgira decisions clearly violate the rights of the accused

25. The *Umalo and Mgira* decisions are, whatever one may say, a renewal of rights abuses because of the capital punishment they entail. These decisions do not reflect the violations that the death penalty entails. And the African Charter, it must be recalled, is not the only instrument against capital punishment. Without mentioning the abolition of the death penalty, it proclaims the right to life as something to be protected[24].

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[21] AfCHPR, Ally Rajabu and Others v. Tanzania, op. cit.
[22] *Idem.,* §§ 109 et s.
[23] This punishment is reminiscent of the executions without trial under the Moorish kings of Granada that the historical painting by Henry Regnault in 1870 gives cause to deplore (Musée d'Orsay, Paris).
[24] v. *Opinion* of Judge Tchikaya in *Ally Rajabu and Others v. Tanzania*, § 22.

26. It is necessary at this point to recall the applicable law. Article 3 of the *Universal Declaration of Human Rights* clearly protects life:

> "Everyone has the right to life, liberty and security of person"

27. This is confirmed by Article 6 of the Second Covenant on Civil and Political Rights:

> "The right to life is inherent in the human person. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

28. Its Second Optional Protocol aims at the abolition of this death penalty, it reads:

> "No one within the jurisdiction of a State Party to the present Protocol shall be executed. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction. (Article 1) and:
>
> "No reservations to the present Protocol shall be permitted, except reservations made upon ratification or accession providing for the application of the death penalty in time of war in respect of a conviction for an extremely serious military crime committed in time of war" (Article 2).

29. The Thirteenth Additional Protocol to the European Convention on Human Rights in its Article 1 concludes that:

> "The death penalty is abolished. No one shall be condemned to such a penalty or executed".

30. Before Protocol No. 13 abolished the death penalty in all circumstances.

31. There is no need to revisit the international regime's disapproval of the mandatory death penalty[25]. This rejection is unanimous. It is a clear violation of the rights of individuals. One can therefore think that the two decisions, Umalo and Mgira, under debate, do not escape this analysis. In both cases, there was reason to go further. In the debate on the right of the State to take life and on the responsibility that society has towards those it condemns, these cases give rise to a debate[26].

32. It does not seem self-evident that:

> "The Respondent State has not violated the Applicants' right to equality before the law and their right to equal protection of the law, protected by Article 3 of the Charter", as the Court suggests in this *Mgira* case."

33. Nor does it seem self-evident that there has been no violation of the Applicant's right:

> "To have his case heard; by having delayed in ruling on the application for review of the judgment of the Court; by not having been given the benefit of his right to a defence...".

34. Two arguments to buttress the reasoning can be provided: firstly, in terms of human rights, the rights in question are not autonomous, they are linked. The ineffectiveness of one weakens the others and makes them uncertain. They are neither juxtaposed nor superimposed, nor are they hierarchical. The second argument concerns the real meaning of the death penalty. It can be summed up

[25] The Court recalls that "the arbitrariness of the mandatory imposition of the death penalty and the violation of the right to a fair trial is confirmed by the jurisprudence of international courts (...) national courts in some African countries have adopted this same interpretation, finding the mandatory imposition of the death penalty to be arbitrary and in violation of due process; see Francis Karioko Muruatetu and another v. the Republic [2017] eKLR; Mutiso v. Republic, Criminal Appeal No. 17 of 2008, paras 8, 24, 35, 30 July 2010. *Francis Karioko Muruatetu and another v. the Republic* [2017] eKLR; *Mutiso v. Republic*, Criminal Appeal No. 17 of 2008, paras 8, 24, 35, 30 July 2010, Court of Appeal of Kenya; *Kafantayeni v. Attorney General*, 2007, MWHC 1, High Court of Malawi; and *Attorney General v. Kigula* (SC), [2009] UGSC 6, paras 37-45 Supreme Court of Uganda; see *Ally Rajabu v. Tanzania*, supra, § 110,

[26] These debates began for other continents as early as the end of the 18th century. *Cahin caha*, Africa joined the debate at the end of the colonial regime.

in one question: what would be the value of recognising rights when death is presumed[27] ? the suppression of life marks the end of all existence.

35. The international context in which the Umalo and Mgira decisions were rendered is entirely inappropriate for such decisions. The global context is indeed evolving, and a dual regime is emerging to which responses should be made. Furthermore, the universal moratorium on the death penalty adopted by the international community must be considered.

A. The impact of the universal moratorium on the death penalty

36. First, it has been said that international law outlaws the death penalty and rejects it in all its forms. Secondly, the international community, already in favour of abolition, adopted at the same time, in December 2022, resolution A/RES/77/222 for a universal moratorium on the use of the death penalty.

37. This adoption of 15 December 2022 by the UN General Assembly [28] did not have the desired impact on these two decisions[29]. The 2022 Resolution does state that it calls upon:

> "All states which are still practicing the death penalty (…) to progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed... To establish a moratorium on executions with a view to abolishing the death penalty...."

38. The moratorium aims at the abolition of the death penalty. For international law, the death penalty involves cruel, inhuman and degrading treatment, i.e., a violation of international law. It is accompanied by cruelty in the form of bringing

[27] Arguments inspired by Beccaria's work formed the basis of Prince Peter Leopold's reform of the penal code of the Grand Duchy of Tuscany, which became the first state to completely abolish the death penalty and torture.
[28] The vote was 125 in favour (2 more than in 2020), 37 against, 22 abstentions and 9 absent.
[29] 3 countries that had abstained in previous votes voted in favour of the resolution: Ghana, Liberia, Uganda. Among the 32 countries that abstained was the respondent state in the case.

those condemned to execution on death row, often for many years.[30] It will allow retentionist countries to take a step towards abolition, and help abolitionists to spare the lives of millions. History has shown that after one, two or three years of a moratorium it is difficult for the state to resume executions. The moratorium often paves the way for full abolition.

39. This approach could have allowed the Respondent State, like many others, to gradually begin abolishing the death penalty. As the Secretary General noted:

> "In Equatorial Guinea, a revision of the penal code abolishing the death penalty was approved by the Senate (...) it was awaiting final approval by the President. In its communication, Morocco indicated that a new draft penal code would reduce the number of articles providing for the death penalty (from 31 to 11) and that the draft revision of the Code of Criminal Procedure would limit the scope of application of the death penalty by requiring that such a sentence be pronounced by a unanimous vote of the judges. Uganda has removed the mandatory imposition of the death penalty from several criminal laws"[31].

40. On the universality of the abolition of the death penalty, it should be recalled, as has already been said, that in its *North Sea Continental Shelf judgment*, the International Court of Justice indicated that there is a relationship between conventional and customary norms. It considered that international conventions could produce applicable customary accessions[32].

[30] The conditions of detention of death row inmates can amount to torture or cruel, inhuman or degrading treatment. Prisoners on death row often seek to be executed as soon as possible in order to escape the abominable conditions of detention.
[31] United Nations, *Report of the Secretary-General on a moratorium on the use of the death penalty*, A/77/2 74, 2022.
[32] Court of Justice, *North Sea Continental Shelf Case*, Denmark and the Netherlands v. FRG, 20 February 1969.

B. A dual international regime, ultimately unfortunate

41. This is the issue with which we concluded in the *Msuguri and others cases* (2022)[33]. A dual regime has already been established, with the retention of the death penalty having to disappear for the sake of consistency and the meaning of human rights.

42. This dual regime is unfortunate. It hinders the evolution of individual rights. States that retain the death penalty have emphasised their sovereignty. They say they respect the decisions of other countries that have abolished it. By parallelism, they say they want to be respected in their legislation.[34] These countries claim to have strong democracies, judicial systems and guaranteed criminal procedures that support the death penalty. They also say that the death penalty is not prohibited by international law. This position is conflated with the fact that States have the sovereign right to decide whether or not to retain it for the most serious crimes as long as it is not applied summarily or arbitrarily.

43. Some States behave as if the issue is strictly a matter of domestic jurisdiction. This is not so established:

- Human rights cannot be a reserved domain of States, especially when those States themselves have internationally instituted such rights.

- When a clear trend emerges, as in the case of the abolition of the death penalty, the exception that could be made by those States that do not adhere to the trend becomes unacceptable, even in the name of sovereignty. The *affectio juris* implied by the existence of a rule in international law can be

[33] "If the Court fails to join the advances of international law, it is bound to be "caught by the patrol" of international law. Human rights doctrine and jurisprudence will note this. While listening to the majority position of my honourable colleagues, a question deserves to be asked: How can we understand that the Court maintains its jurisprudence in this way? The one below the evolution of the applicable international law. There would be two regimes: one favourable to the full protection of the right to life34 and the other less favourable35. Harmonisation is needed", Separate Opinion in AfCHPR, *Marthine Christian Msuguri v. Tanzania*; *Ghati Mwita v. Tanzania*; *Igola Iguna v. Tanzania*, 1 December 2022.

[34] For Libya in particular, as expressed at the United Nations, the decision of any State to retain the death penalty is a manifestation of the right to liberty. For Morocco, which is reflecting on the death penalty, the exchange of views and positions on the death penalty is a healthy phenomenon. v. United Nations, Report of the Secretary-General on a moratorium on the use of the death penalty, supra.

established on the basis of a practice that has become general[35]. This is the powerful movement of which the Secretary-General of the United Nations speaks about.[36] This will be its source.[37] The abolition of the death penalty has a solid legal basis in international law which this Court should uphold.

44. During this period, the United Nations has adopted, and many States have ratified, a large number of human rights instruments, thereby accepting the obligation to ensure that a range of domestic criminal justice practices such as the death penalty are consistent with international human rights standards.

Conclusion

45. A social system is judged by the exercise of its repressive power, by the way it views and treats its deviants and convicts. The reduction of death sentences remains a change in morals that could be considered an objective. Beyond the cases of *Umalo, Mgira and others*, a reflection must be conducted on how to collectively achieve the integral protection of life, as already formulated in international human rights law.

46. All democracies have stopped executing their death row inmates[38]. This historical fact is to be credited to the evolution of international human rights law. It explains the socio-political symbolism of capital punishment and its real raison d'être. Capital punishment could be summarised as an act decided by the judiciary on behalf of the state. Thus, there is a clear violation - at its core - of

[35] In its resolution 75/183 of 15 December 2022, the UN General Assembly noted a strong movement towards the abolition of the death penalty worldwide and the increasing number of accessions to and ratifications of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, and called upon States that had not yet done so to consider acceding to or ratifying the Protocol.
[36] *Idem.,* note 28.
[37] As Alain Pellet puts it, "the source is the sign of the 'legal success' of the rule". v. The General Course: International Law between Sovereignty and the International Community - The Formation of International Law", *Anuário Brasileiro de Direito Internacional*, vol. II, 2007, pp. 12-74.
[38] With the surprising exception of the United States and Japan, as noted by Dumas (A.) and Taube (M), *E. Universalis*. See also Schabas (W. A.), *The Abolition of the Death Penalty in International Law*, Grotius Publications, Cambridge (G.B.), 1993, 384 p.; *Death Penalty: After Abolition*, Council of Europe Publishing, Strasbourg, 2004.

the right to individual life and the fundamental rights attached thereto. These include the right to equality of all before the law, the right to a defence and the right to exercise these rights at all. All these rights are extinguished by capital punishment.

Judge Blaise Tchikaya,

Vice-President of the Court