African Court on Human and Peoples' Rights

The Matter of

Mulokozi Anatory

v.

United Republic of Tanzania

Application N°057/2016

Judgment of 5 September 2023

Declaration

1. Whereas I agree with the operative part of the judgment referred to above, specifically, Points V, VI and VII thereof, I decided to write this Declaration because I disagree completely on Point VIII of the operative part. In my opinion, the Court should have taken a position on an issue that deserves reflection, as it is of paramount importance.

2. Through this Declaration, I am only reiterating what I have stated in previous dissenting opinions concerning the same matter (see Judgment of 13/06/2023, Application Number 003/2019, and Judgment of 13/06/2023, Application Number 031/2016)

3. Indeed, it emerges from the aforementioned judgment, specifically, Point VIII of the operative part thereof, that the Court found that the Respondent State did not violate the Applicant's right to respect for dignity as guaranteed by Article 5 of the Charter, as regards the

guilty verdict, although in its Paragraph 73, , the Court, by an *obiter dictum*, clearly notes the global position regarding the death penalty and the Court's position on mandatory death penalty in previous judgments in which Tanzania is the Respondent State. Indeed, Tanzania restricts judges from exercising their margin of appreciation, according to which the mandatory death penalty constitutes a violation of the right to life as well as other rights enshrined in the Charter, specifically, Articles 1, 4 and 5 thereof and, therefore, should be expunged from the Penal Code of the Respondent State.

4. The rule that requires judges to rule only at the request of the parties and never to take up a matter *suo motu*, failing which they would be judging *ultra petita*, should not apply in cases where the Court has already established its position in its judgments and has set a precedent, including on the mandatory death penalty, for example and, by extension, the right to life.

5. In fact, Paragraph 1 of the judgment cited above indicates that the Applicant is currently on death row at the Butimba Central Prison awaiting enforcement of the death penalty by hanging handed down to him for murder.

6. The Applicant alleges a violation of his right to respect for dignity guaranteed by Article 5 of the Charter before the domestic courts, among other things.

7. It emerges from the Applicant's requests that he prays the Court to set aside his conviction (Paragraph 13 of the Judgment). The Court,

after assuming jurisdiction and declaring the Application admissible, dismissed all of the Applicant's allegations and requests as unfounded.

8. However, as mentioned in Paragraph 73 above, the Court deemed it fit to add an *orbiter dictum* to remind the Respondent State of the Court's position on the death penalty and its jurisprudence concerning the matter, according to which the mandatory death penalty constitutes a violation of the right to life as well as other rights enshrined in the Charter and should thus be expunged from the Penal Code of the Respondent State.

9. In my opinion, the said *orbiter dictum* does not in any way place any obligation on the Respondent State as regards enforcement of the death penalty, especially as the Applicant is on death row. This is because, what would matter to the Respondent State, and rightly so, is that the Court dismissed the Applicant's allegations, on which basis his conviction and sentence could be said to be just and founded.

10. In light of the foregoing, it is my opinion that the Court should have interpreted the Applicant's request for acquittal as a request for annulment of the mandatory death penalty, especially considering that the Applicant is self-represented before this Court, without any legal assistance. This is because, whether the requests concern the procedure that led to the conviction or the right to a fair trial, the purpose is the same; the requests relate to the death penalty pronounced against an applicant who is on death row, and therefore to the right to life.

11. If the Court, *suo motu*, raises a matter of public policy established in its jurisprudence, the said matter can be considered as an exception to the principle of *ultra petita* in the broad sense, that is, as relating not only to the request but also to the submissions in support thereof. It was therefore incumbent on the Court to raise, *suo motu*, the violation of a legal rule imposed by the Court itself on the Respondent State in its jurisprudence.

12. This rule is sufficiently important to be qualified as public policy insofar as it is in the public interest and not only in the interest of the Applicant directly concerned, and this, even beyond the submission of the latter before the Court in support of his application. This is because the issue no longer concerns the annulment of any sentence other than the death penalty but concerns the protection of the right to life.

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

Lady Justice Bensaoula Chafika

Done at Arusha, this Fifth Day of September in the Year Two Thousand and Twenty-Three, the French text being authoritative.