

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 2019². 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 judgment³ 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 1989⁵.

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 of 1948. 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 May 2014, ¶9 and following.