AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS **COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES**		

THE MATTER OF

GOZBERT HENRICO

V

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 056/2016

JOINT DECLARATION OF JUDGE BEN KIOKO AND JUDGE TUJILANE CHIZUMILA

1. In the instant case, the twin main issues at hand were, firstly, the mandatory imposition of the death penalty in a manner that takes away the discretion of the judicial officer and, secondly, the method of carrying out the death penalty, namely, by hanging. The relevant provisions in the Respondent State's Penal code, were challenged as constituting cruel, inhuman and degrading treatment.

2. While we agree in substance with the majority decision on these two issues, there is one particular point, relating to the clarity and preciseness of one of the paragraphs in the operative part of the Judgment, on which we join issue with the majority.

3. It was our view, which we still hold now, that the operative part of a Court decision ought to be couched in such a manner that the reader, whether a litigant, or a scholar, or a student of law, or a member of the public will easily understand the context and import of the orders issued by the Court.

Furthermore, we believe that the overriding principles in drafting a judgment are "clarity, coherence and conciseness"[1] and of course, fidelity to the law and facts; all other considerations in our view are secondary. This is important because experience has shown, as Lord Burrows has also stressed, that "there are few people who read every word of a judgment". Indeed, Lord Burrows even goes further to exclude academics from among the few persons who would read every word of a judgment, asserting that the focus will be on the section on the law[2].

4. We agree with the reasoning behind the paragraph in question as articulated in the body of the final judgement. However, we hold the view that there was a serious flaw in the process, as well as an omission in one of the operative paragraphs of the judgment that is the subject of this Declaration. We believe that in this instance, the Court adopted a process that gave primacy and undue consideration to form rather than substance.

The Process

5. The judgement was scheduled for delivery on 2 December 2021. However, on the date of delivery it was taken out following insistence that there was a fatal error in the operative part of the judgment. For this reason, delivery of the judgment was deferred to allow further deliberations. The alleged fatal error was the reference to a previous decision of the Court, as indicated hereunder, preference being for the paragraph to stop immediately after "imposing sentences":

> *Orders the Respondent State to immediately, take all necessary steps, to remove the mandatory imposition of the death penalty from its Penal Code as it impinges the discretion of the judicial officers in imposing sentences,* ***and, also to comply with the Court's decision in the matter of Ally Rajabu v. United Republic of Tanzania[3], which was to the same effect.***

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[1] See Lord Burrows, Justice of the Supreme Court of the United Kingdom 20 May 2021, on "Judgment-Writing: A Personal Perspective" at the Annual Conference of Judges of the Superior Courts in Ireland, page 2 in which he stresses the three Cs.

[2] Ibid Page 5. Lord Burrows asserts "There are few people who read every word of a judgment. …. So, for example, an academic, unlike the parties, is rarely interested in the ins and outs of the facts and will often rely on a headnote for the facts, if there is one. What the academics are interested in is the law. It makes no difference to an academic if the judgment has 300 paras on the facts or 30 paras on the facts. All that fact-finding will be skipped or quickly flicked through in any event although he or she may have to dip into it further at some stage".

[3] Ally Rajabu and Others v Tanzania v United Republic of Tanzania, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations) § 107. In its judgment, *the Court had ordered the Respondent State to take all necessary measures, within one (1) year from the notification of this judgment to remove the mandatory imposition of the death penalty from its Penal Code and for the rehearing of the case on the sentencing of the*

6. It should be underlined that indeed the last part of the paragraph in question did not correctly express what had been agreed earlier by the Court. It ought to have instead stipulated, **"and in line with the Court's decision in the matter of *Ally Rajabu v. United Republic of Tanzania,* which was to the same effect**'. The Court had also agreed that there would no need for a footnote in the operative part since a full citation was already provided for in the body of the judgment. We see no conceivable reason, even with this alleged error, why delivery of the judgment was deferred.

7. We hold the view that while references to other decisions in the operative part is not elegant, its inclusion cannot constitute a fatal error by any stretch of the imagination. Postponing delivery of the judgment for this reason alone was in our view unjustified.

Subsequent formulation and Practice of the Court

8. Subsequently, the Court decided that the paragraph should simply read as follows: "***Orders* the Respondent State to immediately, take all necessary steps, to remove the mandatory imposition of the death penalty from its Penal Code as it impinges the discretion of the judicial officers in imposing sentences**". We did not share this view.

9. While we agreed with the logic of requiring immediate implementation of the decision, since the Respondent State had failed to implement previous decisions of the Court to the same effect, we think this context ought to have been included in the operative part. This is in consonance with the practice of the Court[4]. Indeed, in all judgments where the Court has found violation of a right provided for in the Charter, for example the right to free legal assistance, it states so in the operative part. The Court does not simply state that it found a violation of Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, but adds- "for failure to provide the Applicant with free legal assistance".[5]

Applicants through a procedure that does not allow the mandatory imposition of the death sentence and upholds the full discretion of the judicial officer.

[4] For example, in **Anudo Ochieng Anudo v Tanzania, Application no. 012/2015,** delivered on 2 December 2021 (reparations) **the Court** *ordered* the Respondent State to take all the necessary steps to restore the Applicant's rights, by allowing him to return to the national territory, ensuring his protection and submitting a report to the Court within forty-five (45) days of notification of this Judgment*".*

[5] See Hamis Shaban alias Amis Ustadh v.Tanzania, Application no. 026/2015, delivered on 2 December 2021 (merits and reparations) , in which the Court found that **"***the Respondent State is in violation of Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, for failure to provide the Applicant with free legal assistance"*. The Court granted pecuniary reparations and ordered *"the Respondent State to pay the amount indicated under sub-paragraph (vii) above free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid".*

10. Additionally, we could not identify any previous decision of the Court where it required immediate implementation of its decision. Indeed, all decisions of the Court requiring a change in the law normally carry a time frame of one year or two years. The only reason for stipulating immediate implementation of this judgment was because, the Respondent State had been given one (1) year in in Ally Rajab[6], and in subsequent decisions, to change its law, which it had failed to do.

11. We believe that, if it is accepted that majority of readers do not read the full judgments of the Court, what is the logic for leaving it out an important aspect of the reasoning of the Court? If virtually all decisions of the Court carry a time frame beyond the date of its issue, how is one to understand the reasoning of the Court without going through the entire judgment? What prejudice could possibly accrue from being clear, coherent and precise?

12. For our part, we would have joined the consensus with a formulation that generally made reference to previous decisions of the Court, for example, “in line with previous decisions of the Court” or “in line with previous decisions of the Court that remain unimplemented”. By leaving out this important aspect of the reasoning of the Court, we believe the majority have followed a perilous path that is new and inconsistent and without any good reason for doing so.

Signed: **Signed**

Ben KIOKO, Judge Tujilane Rose Chizumila, Judge

Done at Arusha, this Tenth Day of January in the year Two Thousand and Twenty two, in English and French, the English text being authoritative.

[6] Ibid.