

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Judgments

Application No. 036/2016 - Ibrahim Yusuf Calist Bonge and Others

v.

United Republic of Tanzania

Application No. 029/2016 Kachukura Nshekanabo Kakobeka

v.

United Republic of Tanzania

4 December 2023

Declaration by Blaise Tchikaya, Judge

1. On 4 December 2023 in Algiers, the African Court delivered, among other decisions, two judgments against Tanzania. The first matter is *Ibrahim Yusuf Calist Bonge and Others*¹ and the second is *Kachukura Nshekanabo Kakobeka*². What these judgments have in common is that they uphold the death penalty, with hanging as method of execution.

2. This Declaration, which dissents from the majority position of the Court in the two afore-mentioned judgments, overabundantly underscores the status of international human rights law not only on the question of the death penalty, but also on the rejection of this same penalty as regards one of its known modes of execution, namely, hanging.

¹ The case, the outcome of which was dramatic, resulted from the robbery of a cash transfer van along Nyerere Street, Dar es Salaam on 16 December 2012. Ambushed by robbers, the vehicle in which were, in addition to the driver, an accountant and a police officer, was intercepted. The latter two were shot dead - see AfCHPR, *Judgment*, § 3 *et seq.*

² Mr. Kakobeka the Applicant is accused of having on 17 September 2007, “allegedly murdered two women, one by strangulation and one by inflicting wounds with a sharp object”, v. AfCHPR, *Judgment*, § 3.

3. Having penned various dissenting opinions on the issue of the death penalty, I state, once again, in the *Calist Bonge* and *Kakobeka* cases, my opposition to the death penalty.³ My first dissenting opinion, issued in 2019, reads as follows: “the mandatory death penalty is merely an avatar of the death penalty; it constitutes an arbitrary deprivation of life (...) It is not compatible with the requirements of international human rights law. The distinction between the two is decidedly inadequate”⁴. Essentially, the three Applicants challenged before this Court, *mutatis mutandis*, the violation of their rights in the proceedings before domestic courts, which culminated in the death penalty.

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4. The purpose of this Declaration is to denounce, first, the repugnancy and inhumanity of the death penalty and, second, the wait-and-see attitude of this Court. The Court’s attitude is wait-and-see to the extent that it denounces the irregularity of the mandatory death penalty imposed by the Respondent State, without calling into question the very principle of the death penalty. It would appear that since the *Rajabu et al.* case of 2019 to date, the Court has not taken the time to consider the legal regime that upholds the death penalty, in order to declare it, in its entirety and in all its forms, contrary to human rights
5. In the cases under consideration, the Court falls back on its 2022 position, particularly, that of three cases with identical decisions issued on 1 December 2022, namely, *Marthine Christian Msuguri*, *Igola Iguna* and *Ghati Mwita*⁵. In the said decisions, the Court, once again, only condemned the mandatory death penalty. This Court, which is a human rights court, should keep pace with the evolution of international law. As long as international justice focusses on building clarity into human rights, it will be useful to bear

³ Schabas (W.), *The abolition of the death penalty in International Law*, Grotius, Cambridge, 1993, 384 p.; *Communication Dexter Eddie Johnson v. Ghana*, 28 March 2014, p. 9 *et seq.*

⁴ Dissenting op. under ECHR, *Rajabu and others v. Tanzania*, 8 December 2019, § 9.

⁵ AfCHPR, *Marthine Christian Msuguri v. Tanzania; Igola Iguna v. Tanzania, Ghati Mwita v. Tanzania*, 1 December 2022

in mind that the right to life and its sanctity have no association with the death penalty.

6. It is therefore paradoxical that, by the *Calist Bonge and Others*, and the *Kakobeka* decisions, the Court stuck to the old legal regime by validating a variant of the death penalty. Indeed, capital punishment, particularly in States such as the Respondent State, leads to lengthy procedures, anguish and torment, which rob individuals of all humanity. This constitutes cruel treatment. It must be stated categorically that the death penalty is unacceptable, as the European Court of Human Rights (EHCR) has notably done.
7. On 12 May 2005, the Grand Chamber of the ECHR, in *Öcalan v Turkey*, declared that: “the capital punishment in peacetime ... is an unacceptable form of punishment that is no longer permissible under Article 2 of the European Convention. The Court concluded that “the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 of the European Convention”.
8. The Court’s decisions in the matters of *Bonge et al.* and *Kakobeka* are out of step with the current level of international law. The European system is unambiguous today. The latest Protocol prohibits the death penalty⁶. It reads: “No reservation may be made to the provisions of this Protocol under Article 57 of the Convention”. This Protocol emphasizes that “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.” It is further indicated that this constitutes a “final step towards abolishing the death penalty in all circumstances”.
9. It can be said that the two decisions rendered by this Court are inconsistent with international law. Firstly, international law denounces capital

⁶ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, 1 July 2003

punishment as unlawful and rejects it wholly and entirely. Secondly, abolitionist as it is, the international community in December 2022, adopted resolution A/RES/77/222 for a universal moratorium on the application of the death penalty. Adopted by the UN General Assembly on 15 December 2022, this resolution did not have the desired impact at the domestic level.

10. The 2022 resolution clearly calls on all States still practising the death penalty “(...) To progressively restrict the use of the death penalty and to reduce the number of offences for which the death penalty may be imposed (...) To establish a moratorium on executions with a view to abolishing the death penalty...”.

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11. Like most of its previous decisions on the death penalty, the decisions in the *Bonge and others* and *Kakobeka* cases involved hanging. This point, as the Honourable Judge Dumisa Ntsebeza points out, constitutes in itself an open attack on human rights.
12. All methods of enforcing the death penalty, without exception, are cruel; a bullet in the head, stoning, electric chair, lethal injection, asphyxiation and hanging, all are cruel. Hanging is rejected not only for religious reasons. Hanging offends human faith, which indeed considers it as the “evil death”. It “*is frightening because it poses a threat to the body in terms of not rising again on the day of the Last Judgment, even though the confession of those condemned to death was authorized as far back as 1397*”.⁷
13. Execution by hanging is clearly considered contrary to human rights⁸. The ECHR condemned the United Kingdom when, on 31 December 2008, the country ignored a request from the ECHR not to hand over to the Iraqi

⁷ CriminoCorpus, *Crimes and Justices in the Middle Ages – Crimes and Punishments*, published – 2003, point 4.

⁸ In December 2008, the ECHR found that two defendants ran “a real risk of being subjected to an unfair trial followed by execution by hanging. They ruled that the two plaintiffs were thus subjected to inhuman and degrading treatment. Delivering to the Iraqi authorities two Iraqis accused of the murder of British soldiers, and who risked hanging, constitutes inhuman treatment. See ECHR, *Al-Saadoon and Mufdhi v. United Kingdom*, 2 March 2010.

authorities *Faisal Hussain Al-Saadoon* and *Khalef Hussain Mufdhi*, former Sunni dignitaries of the Baath Party. Arrested by the British in Iraq, the two individuals, who were accused of taking part in the murder of two British soldiers shortly after the invasion of Iraq in 2003⁹, were held in an Iraqi prison near Baghdad.

14. The Special Rapporteur on torture considered that (...) the execution of five men in Papua New Guinea in 2011 “inevitably led to cruel, inhuman or degrading treatment, or even torture”. In August 2022, the Committee Against Torture noted that hanging as a method of execution in Botswana, exacerbates the cruelty of the situation and was inhumane¹⁰.

15. I can therefore declare, as in my previous opinions, and in opposition to the stance taken by the majority of my distinguished honourable fellow judges, that the two decisions in *Calist Bonge and Others* and *Kachukura Nshekanabo*, deserved operative parts that are more consistent with international human rights law. We may not think about it, but as the sage French writer Victor Hugo told the Constituent Assembly, “think about it, what is the death penalty? The death penalty is the special and eternal sign of barbarism” (Speech before the Constituent Assembly, 15 September 1848).

Judge Blaise TCHIKAYA

Done at Algiers, on the Fourth Day of December in the Year Two Thousand and Twenty-Three, the French version being authoritative.



⁹ *Revue générale du droit*, 2010, p.17342

¹⁰ United Nations Committee Against Torture, Concluding Observations, Botswana, CAT/C/BWA/CO/1, para. 23 and 24; 23 August 2022. Vide also United Nations General Assembly, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/279, para. 40, 9 August 2012.