

**COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES  
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

**Declaration by Judge Blaise Tchikaya**

**in the**

**Matters of**

***Gerald Koroso Kalonge v. Tanzania* (Application No. 024/2018)**

***Kija Nestory Jinyamu v. Tanzania* (Application No. 015/2018)**

***Lameck Bazil v. Tanzania* (Application No. 027/2018)**

***Rashidi Romani Nyerere v Tanzania* (Application No. 023/2018)**

**(13 November 2024)**

1. Once again, at its 74<sup>th</sup> session, the African Court on Human and Peoples' Rights heard four cases relating to the death penalty and, again and again, arose the issue of the international regime that the Court applies to this criminal sanction. The majority of my honourable colleagues confirmed the Court's former conservative jurisprudence.<sup>1</sup>
2. I pen this Declaration having, regrettably, elected to disagree with the majority decision.<sup>2</sup>
3. The four Applicants claim that they were not afforded the enjoyment a fundamental right, namely, the right to a fair trial in domestic courts.<sup>3</sup> This was not taken into account. All four were sentenced to death for murder. *Kija Nestory Jinyamu* was incarcerated in Uyui Central Prison, awaiting

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<sup>1</sup> AfCHPR, *Ally Rajabu and Others v. Tanzania*, 28 November 2019.

<sup>2</sup> Although the Respondent State has not carried out the death penalty for some time now, it should be emphasised that this penalty, even if not carried out, only offers the condemned person an inhuman and dehumanising prospect, no matter how convinced they may be of their guilt.

<sup>3</sup> ACtHPR, *Kija Nestory Jinyamu*, 13 November 2024: As the Respondent State did not make any submissions, the Court rendered a decision on its own motion in line with its jurisprudence: *African Commission on Human and Peoples' Rights v. Libya*, 1 AfCLR *Libya*, 2016, 153, §§ 38 to 42; AfCHPR, *Fidèle Mulindahabi v. Rwanda*, Judgment, 26 June 2020, § 30; AfCHPR, *Yusuph Said v. Tanzania*, Judgment, 21 September 2021, § 17; AfCHPR, *Robert Richard v. Tanzania*, Judgment, 2 December 2021, §§ 17 to 18.

execution of the death sentence imposed on him. In the case of *Rashidi Romani Nyerere*, he was at Ruanda Central Prison awaiting execution of the death sentence.

4. The same Respondent State charged *Gerald Koroso Kalonge* with murder, on 30 June 2015.<sup>4</sup> *Lameck Bazil* was also sentenced to death, together with his father-in-law, Pancras Minago, for murder. They murdered Ms Magdalena Andrew, a person with albinism and neighbour of the Applicant's father-in-law. Both were subsequently arrested and charged.<sup>5</sup>
5. It is noteworthy that all four Applicants, *Lameck Bazil*<sup>6</sup>, *Kija Nestory*,<sup>7</sup> and *Gerald Koloso Kalonge*<sup>8</sup> and *Rashidi Romani Nyerere*<sup>9</sup>, were sentenced to death by hanging. It emerges from the record that, in addition to challenging the sentence of the death penalty, there was an issue on the use of hanging as a means of enforcing the sentence.
6. We raise, firstly, the recurring question of the death penalty (I.); and secondly, aspects relating to hanging, which the Court has already accepted as anachronistic and rejected. The rather paradoxical content of this last point will be highlighted. We therefore contend in this Declaration that this paradox, namely, the perplexing fact that the Court repudiates hanging while at the same time not rejecting the death penalty in all its aspects, should be brought to an end. In effect, we posit that one cannot reject hanging without a complete ban on the death penalty (II.).

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<sup>4</sup> It should be noted that the Applicant requested the Court to "order the Respondent State to release him and grant him compensation in so far as he was unlawfully sentenced to death by hanging", Judgment, § 12.

<sup>5</sup> The Applicant and his father-in-law were convicted of murder by the High Court of Tanzania on 27 October 2016. They were sentenced to death by hanging, Judgment, § 4.

<sup>6</sup> ACtHPR, *Lameck Bazil v. Tanzania*, 13 November 2024, § 4.

<sup>7</sup> On 21 September 2007, the High Court found Kija Nestory guilty of triple murder and sentenced him to death by hanging. see ACtHPR, *Kija Nestory*, 13 November 2024, § 3.

<sup>8</sup> On 30 June 2015, the High Court of Tanzania found the Applicant and three of his co-accused guilty of the murder and sentenced them to death by hanging, ACtHPR, *Gerald Koroso Kalonge v. Tanzania*, 13 November 2024, § 3.

<sup>9</sup> On 1 October 2013, the High Court of Tanzania found the Applicant guilty of murder and sentenced him to death by hanging ACtHPR, *Rashidi Romani Nyerere v. Tanzania*, 13 November 2024, § 4.

## ***I. The death penalty should be declared null and void in all four cases***

7. What we seek to do in this section is to share with all those liable to capital punishment the evolutions and developments of the current abolitionist regime.<sup>10</sup> That the death penalty is obsolete should be a universal principle, as it is in international human rights law.<sup>11</sup>

8. We know that the practice of beheading people for their crimes is a step backwards in civilisation. As Susan Kigula says: <sup>12</sup>

“The use of the death penalty by states is a sign of weakness and inability to manage crime and the problems of society. States must find solutions to crime”.<sup>13</sup>

9. It has been said that customary law and international conventions repudiate the death penalty as a criminal sanction. However, in line with its jurisprudence, the Court considered that *Mr Kija Nestory Jinyamu* was sentenced by the national judge in disregard of a fundamental right, namely the freedom that a judge must have. It follows that failure to uphold the freedom of a judge constitutes a major violation of the rights of individuals.

10. In *Gerald Koroso Kalonge*, the Court clearly relied on recognised principles to criticise the fact of a judge being deprived of his discretion to impose a sentence:

“(…) The Court observes ... that, the mandatory imposition of the death penalty as provided for in Section 197 of the Penal Code

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<sup>10</sup> ACHPR (African Commission on Human and Peoples' Rights), *Study on the issue of the death penalty in Africa*, 10 April 2012, p. 54.

<sup>11</sup> Arlettaz (J.) et Bonnet (J.) (sous la direction), *L'objectivation du contentieux des droits et libertés fondamentaux - Du juge des droits au juge du droit*, Actes du colloque du 12 décembre 2014, Pédone, 2015, 202 p.

<sup>12</sup> Susan Kigula was sentenced to death by hanging in Uganda for a murder in 2002. She had consistently maintained her innocence. The death penalty was automatically imposed for crime in her country. Now a human rights activist, she challenged the constitutionality of the mandatory death penalty before the Supreme Court and won her case. The mandatory death penalty was thus abolished in Uganda. Ms Kigula was released in 2016.

<sup>13</sup> See Kigula (S.), in, *Handbook of Playdog Advocacy for the Abolition of the Death Penalty in Africa*, 2019, Amnesty International Ltd Peter Benenson House, 2019, p. 17.

of Tanzania does not permit a convicted person to present mitigating evidence and therefore applies to all convicts without regard to the circumstances in which the offence was committed. Secondly, in all cases of murder, the trial court is left with no other option but to impose the death sentence. The court is thus deprived of the discretion, which must inhere in every independent tribunal to consider both the facts and the applicability of the law, especially how proportionality should apply between the facts and the penalty to be imposed. In the same vein, the trial court lacks discretion to take into account specific and crucial circumstances such as the participation of each individual offender in the crime".<sup>14</sup>

11. However, it fails to carry the argument to its logical conclusion by disapproving of the right of the Respondent State to take the lives of those in its care.
12. The Court's position is as ambivalent as ever with regard to the preservation of life, which is undermined by the death penalty. It confirms this in the *Lameck Bazil* case, observing that:

"the applicant was sentenced to the mandatory death penalty under a law which set aside the judge's discretion. In such circumstances, the Court reiterates, in accordance with its settled case-law, that the application of the mandatory death penalty constitutes a violation of the right to life protected by Article 4 of the Charter".<sup>15</sup>

13. I have previously declared my rejection of the death penalty:

"The Court, while asking Tanzania to review its legislation on a category of death penalty - the mandatory death penalty - is

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<sup>14</sup>AfCHPR, *Ally Rajabu and Others v. Tanzania*, 28 November 2019 § 109; of the same Court, *Amini Juma v. Tanzania*, 30 September 2021, § 120 to 131.

<sup>15</sup> ACtHPR, *Lameck Bazil v. Tanzania*, 13 November 2024, § 55; See also ACtHPR, *Gozbert Henerico v. Tanzania*, judgment of 10 January 2022, § 160; of the same Court, *Romward William v. Tanzania*, 13 February 2024, § 59 to 65.

refusing to direct its decision to condemn the death penalty. It allows islands of tolerance to persist”.<sup>16</sup>

14. Therein lies the difficulty of the jurisprudence handed down by the Court on the question of the death penalty, which the four cases under discussion illustrate in the same manner. Indeed, it appears that since the 2019 case of *Rajabu et al*, the majority of the Court has not reconsidered its position. It is regrettable that it does not declare the death penalty, in its entirety and in all its forms, as contrary to human rights.
15. It is paradoxical that as recently as 13 November 2024,<sup>17</sup> the Court rendered these four decisions, *Gerald K. Kalonge, Kija N. Jinyamu, Lameck Bazil and Rashidi Romani Nyerere*, that left intact the old legal regime of the death penalty, thereby ultimately validating it.<sup>18</sup> This is because the old regime only repudiates the mandatory nature of the death penalty and not the death penalty *per se*.
16. Moreover, the death penalty undoubtedly entails lengthy procedures, anguish and torment that rob individuals of all humanity. This constitutes cruel treatment. The unfortunate defendants, *Gerald K. Kalonge, Kija N. Jinyamu, Lameck Bazil and Rashidi Romani Nyerere*, are still suffering this iniquitous punishment. The Respondent State has opted to put on hold, or perhaps never to enforcement the sentence. In application of the law, it must be declared that this death penalty is unacceptable and should be banned from legal systems. Human rights courts, such as this Court, should work towards this goal. Thus, the death penalty should have been declared obsolete in all four cases. The Court could have promoted other sanctions that are just as effective.

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<sup>16</sup> See Dissenting Opinion, *Rajabu and Others v. Tanzania*, 2019 § 28.

<sup>17</sup> See Statement by Judge Tchikaya (B.) in the *Romward William v. Tanzania; Deogratius Nicholas Jeshi v. Tanzania; Crosperry Gabriel and Ernest Mutakyawa v. Tanzania* judgments of 13 February 2024.

<sup>18</sup> It was written in 2019 that: “the mandatory death penalty is only an embodiment of the initial death penalty; it constitutes an arbitrary deprivation of life and 2) It is not compatible with the requirements of international human right law”, see Dissenting Opinion under AfCHPR, *Rajabu et al...* 8 December 2019, § 9.

17. The complete abolition of the death penalty should repudiate imposition of both mandatory death penalty and the death penalty imposed by the judge in the free exercise of his functions. In § 153 of the *Kalonge* judgment, the Court states:

“In the present judgment the Court has again established that the mandatory imposition of the death penalty violates the right to life guaranteed under Article 4 of the Charter. It, therefore, holds that the said sentence ought to be removed from the statutes of the Respondent State (...).”<sup>19</sup>

18. While this may come across as a rejection of the death penalty, it is in fact only a partial rejection. The death penalty in its non-mandatory form is still valid in principle.
19. If the Court finds hanging degrading and disapproves of it as a means of carrying out the death penalty, it should ban the death penalty in its entirety in the first place. There is a paradox here that calls for some elaboration.

***II. Putting an end to a paradox: the rejection of hanging cannot be dissociated from the total ban on the death penalty***

20. If hanging is contrary to current law, then there are consequences to be drawn. The Court cannot cling to its 2019 position, as conveyed in the majority position.<sup>20</sup> There will be a kind of paradox in the sense that the denunciation of hanging, or even of torture, cannot be meaningful without a complete ban on the death penalty.
21. All four cases involved hanging as a method of punishment. It has been said that all methods of execution of the death penalty, without exception, are cruel: the bullet in the head, stoning, the electric chair, lethal injection,

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<sup>19</sup> *Idem*, § 151.

<sup>20</sup> AfCHPR, *Amini Juma v. Tanzania*, 30 September 2021, §§ 120 to 131; *Gozbert Henerico v. United Republic of Tanzania*, 10 January 2022 § 160; *Romward William v. Tanzania*, 13 February 2024 §§ 59 to 65.

asphyxiation, and so is hanging. All these methods of execution border on torture, which is already banned in modern legal civilisations.

22. However, the Court seems to have come to this conclusion, which it enunciates in the operative part of the four judgments, in particular in the *Kalonge* judgment, as follows:

“Orders the Respondent State to take all necessary measures, within six months of notification of this judgment, to remove “hanging” from its laws as a method of execution of the death penalty”.<sup>21</sup>

23. The Court condemns the methods used to carry out the death penalty. It equates them to torture. It holds them to be cruel, inhuman and degrading treatment, given the intense suffering inherent in them. The Court underscores that:

“execution by hanging is inherently degrading”<sup>22</sup>

24. In *Amini Juma v. Tanzania*,<sup>23</sup> the Court highlights one of the key points of international human rights law on the rejection of hanging:

“Furthermore, having found that the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature, this Court finds the method of implementation of that sentence, that is, hanging, inevitably encroaches upon the dignity of a person in respect of the prohibition of torture, cruel, inhuman and degrading treatment”.<sup>24</sup>

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<sup>21</sup> ACtHPR, Judgment *Gerald Koroso Kalonge v. Tanzania*, operative paragraph xviii; see 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; and ACtHPR, *Deogratius Nicholas Jeshi v. Tanzania*, 13 February 2024, operative paragraph viii.

<sup>22</sup> AfCHPR, *Rajabu and others v. Tanzania*, *supra*, §§ 118 and 119.

<sup>23</sup> AfCHPR, *Amini Juma v. Tanzania*, 30 September 2021, § 120.

<sup>24</sup> *op. cit.*, § 136

25. It has to be said again that the majority position hardly lends itself to understanding. It is not defensible as long as it leaves the death penalty in place. Hanging is only possible through the death penalty. The majority position of the Court has chosen a very questionable approach: by rejecting only the mandatory nature of the death penalty, it preserves the right to life without rejecting the death penalty in principle.
26. These four judgments show that, in order to clarify its jurisprudence, the Court should draw a rigorous consequence from its rejection of hanging; it should ban the death penalty in its entirety. These judgments once again open a door to outlawing the death penalty.
27. It is worth bearing in mind that the German playwright Bertolt Brecht, fighting against the new forms of barbarism, said these famous words:

“The people have been vindicated, but we mustn't sing victory, it's still too early: the womb is still fertile, from which the foul beast has sprung”.<sup>25</sup>

28. This profound rejection expressed by the playwright testifies to the horror that accompanies the abuse of human beings, while also demonstrating the need to safeguard the sanctity of humanism. Lethal injection, decapitation, electrocution, gassing or hanging of human offenders or criminals<sup>26</sup> does not remove the feeling of an excessive approach to the treatment of offences, even when pronounced by a judicial decision. This undoubtedly explains why some countries, as in this case, have legislation that authorises this punishment but refrains from carrying it out.
29. We felt compelled, against the grain of the majority opinion, to issue this Declaration on the judgments in *Gerald Koroso Kalonge v. Tanzania* (Application No. 024/2018); *Kija Nestory Jinyamu v. Tanzania* (Application

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<sup>25</sup> Brecht (B.), *The Resistible Rise of Arturo Ui*, 1941.

<sup>26</sup> Monestier (M.), *Peines de mort: Histoires et techniques des exécutions capitales des origines à nos jours* (Goeau-Brissonnière J.-Yves, Pref.), Ed. Cherche-Midi, 1994, 301 p.



No. 015/2018), *Lameck Bazil v. Tanzania* (Application No. 027/2018) and *Rashidi Romani Nyerere v Tanzania* (Application No. 023/2018) handed down on 13 November 2024. This is to express once again our constant disapproval of the failure to reject the death penalty completely.

Blaise Tchikaya, *Judge* 

Done at Arusha, this Thirteenth Day of November Two Thousand and Twenty-four, the French version being authoritative.

