

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

**(RAMADHANI, C. J.; MUNUO, J. A.; RUTAKANGWA, J. A.; KIMARO,
J. A.; And BWANA, J. A.)**

CRIMINAL APPEAL NO. 118 OF 2006

BAHATI MAKEJA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania at
Bukoba,)**

(Luanda, J.)

dated the 9th day of March, 2006

in

Criminal Sessions Case No. 5 of 1999

JUDGMENT OF THE COURT

.....

7th December, 2010 & 30th December, 2010

RAMADHANI, C. J.:

Before a Full Court in Mwanza the learned advocate for the appellant, Mr. Wilbard K. Butambala, argued that the learned trial judge did not comply with s. 293(2) of the Criminal Procedure Act, Cap 20 [RE 2002] which says:

“(2) When the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, **the court**, if it considers that there is evidence that the accused person committed the offence or any other offence of which, under the provisions of section 300 to 309 he is liable to be convicted, **shall inform the accused person of his right—**

- (a) to give evidence on his own behalf; and
- (b) to call witnesses in his defence,”

(Emphasis is ours.)

The learned advocate pointed out that the learned trial judge did not address the accused person as prescribed above but that the accused person’s learned advocate made the choice on behalf of his client thus:

“Mr. Kabunga: My Lord, we have one witness the accused. The accused will give evidence on oath.”

Mr. Butambala referred us to **Melkizedeki Mkuta v. R.** Criminal Appeal No. 164 of 2005 (CAT - Mwanza Registry) (unreported) where it was held that the word “shall”, which is used in s. 293(2), is defined by s. 53(2) of the Interpretation of Laws Act [Cap 1 RE 2002] (hereinafter referred to simply as Cap 1) to mean mandatory where a function has been imposed by law. The learned advocate asked us to follow that decision, to quash all

the proceedings after the finding of a case to answer, to return the case to the High Court for the accused person to be addressed as per s. 293(2) so as to proceed accordingly. The learned State Attorney, Mr. Zakaria Kakwaya, for the respondent/Republic, agreed with that submission.

The Court, however, produced two of its judgments decided in Mbeya: **Herman Henjewe v. R.** Criminal Appeal No. 164 of 2005 and **Goodluck Kyando v. R.** Criminal Appeal No. 118 of 2003, where a similar omission was done and the Court considered the word "shall" of s. 293(2) of the CPA and the provisions of s. 53(2) of Cap. 1. The Court held that as injustice was not occasioned then the omission was curable under s. 388 of the CPA and the appeals proceeded to be determined on merits.

Both Mr. Butambala and Mr. Kakwaya agreed that there was a need to convene a Full Bench to resolve the matter and hence this Full Bench at which Mr. Butambala appeared again for the appellant and repeated the submissions he had made in Mwanza which we have reiterated above.

For the respondent/Republic a team of Attorneys led by Mr. Stanislaus Boniface, learned Principal State Attorney, argued that there is no conflict between **Mkuta**, on the one hand, and **Henjewe** and **Kyando**, on the

other hand. He pointed out that the two Mbeya decisions were given before Cap 1 was in force and the word "shall" was not given the mandatory meaning but in **Mkuta** Cap 1 was already in force and "shall" was taken to be obligatory.

Another State Attorney, Mr. Jackson Bulashi, admitted that s. 293(2) of the CPA has been violated but asked the Court to do what it did in **Israel Misezero @ Minani v. R.** Criminal Appeal No. 117 OF 2006, where it invoked the doctrine of prospective annulment, that is, the enforcement of the provisions of a section as to the future and not to disturb what has already been decided before the judgment was given.

The Full Bench called Mr. Mutalemwa, learned counsel, to be amicus curiae. He had produced in another similar appeal in Mwanza a catalogue of seven judgments of this Court on the word "shall". He, however, agreed with Mr. Boniface on the two epochs of this Court's decisions.

We agree with Mr. Boniface on the two epochs. Cap 1 came into force on 1st September, 2004, (GN No. 312 of 3/9/2004) and, so, decisions before that date took "shall" to be discretionary whereas after that date "shall" became imperative.

Mr. Boniface agreed that s. 53(2) of Cap 1 is in conflict with s. 388 of the CPA. Whereas the former makes the violation of s. 293(2) of the CPA fatal the latter saves that omission provided that no failure of justice has been occasioned. Section 388 of the CPA provides as follows:

- (1) "Subject to the provisions of section 387, no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable".

It is our considered opinion that s. 388 is absolutely essential for the administration of justice under the CPA. There are a number of innocuous omissions in trials so if the word "shall" is every time taken to be imperative then many proceedings and decisions will be nullified and reversed. We have no flicker of doubt in our minds that the criminal law system would be utterly crippled without the protective provision of s. 388.

We are, therefore, of the well decided view that the interpretation of the word "shall" given in s. 53(2) of Cap 1 must be subjected to the protective provisions of s. 388 of the CPA.

And that is what the Legislature has done as expressed in s. 2(2)(a) and (b) of Cap 1 in the following terms:

"(2) The provisions of this Act shall apply to, and in relation to, every written law, and every public document whether the law or public document was enacted, passed, made or issued before or after the commencement of this Act, unless in relation to a particular written law or document—

- (a) express provision to the contrary is made in an Act;
- (b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application; or
- (c) ... "

It is clear to us that under either of the two paragraphs the definition of the word "shall" to be imperative where a function is imposed does not apply to the Criminal Procedure Act in view of s. 388 which subjects all mandatory provisions in that Act to the test of whether or not injustice has been occasioned.

It is our decided opinion that where an accused person is represented by an advocate then if a judge overlooks to address him/her in accordance with s. 293 of the CPA the paramount factor is whether or not injustice has been occasioned.

In the current matter there was no injustice occasioned in any way at all. It is palpably clear to us that the learned Judge must have addressed the accused person in terms of s. 293 of the CPA and that is why the learned advocate stood up and said that the accused person is going to defend himself on oath. But even if the learned judge had omitted to do so, the accused person had an advocate who is presumed to know the rights of an accused person and that he advised the accused person accordingly and hence his reply.

It is our considered view that the word "shall" in the CPA is not imperative as provided by s. 53(2) of Cap 1 but is relative and is subjected to s. 388 of the CPA. Having come to that determination it is not necessary to consider the submissions of Mr. Bulashi.

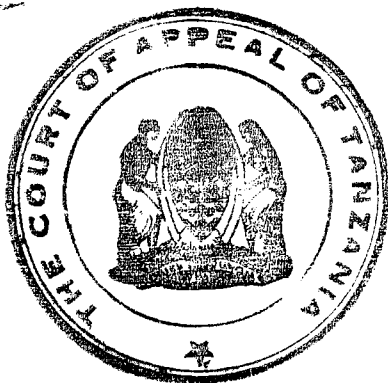
So, this appeal should go back to a Full Court to be heard and determined on merits. It is so ordered.

DATED at DAR ES SALAAM this 22nd day of December, 2010.

A. S. L. RAMADHANI
CHIEF JUSTICE

E. N. MUNUO
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL



N. P. KIMARO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


J. S. MGETTA
DEPUTY REGISTRAR