

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: KIMARO, J.A., LUANDA, J.A., And MANDIA, J.A.:)**

**CRIMINAL APPEAL NO. 198 OF 2006**

**MARWA S/O JOEL@ GESABO..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

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

**(Mchome, J.)**

**dated the 12<sup>th</sup> day of May, 2006  
in  
Criminal Session No. 13 of 2002**

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**RULING OF THE COURT**

**4<sup>th</sup> October & 8<sup>th</sup> October, 2010**

**LUANDA, J.A.:**

The above named appellant was charged in the High Court of Tanzania at Musoma with Murder c/s 196 of the Penal Code. He was found guilty as charged and "sentenced" to suffer death by hanging. Aggrieved by the finding of the High Court he has come to this Court on appeal.

When the appeal was called on for hearing, the Court **suo motu** raised a point of law whether section 293(2) of Criminal Procedure Act, Cap. 20 was complied with. We posed that question because it appears the trial High Court did not inform the appellant his rights as provided for under the aforestated section after the close of the prosecution case. The section reads:-

*293(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 sections 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,*

*and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer, and thereafter the Court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights.*

Mr. Stephen Makwega learned Senior State Attorney concurred with the Court's observation. He informed the Court that the proceedings of the High Court in particular pages 9 to 10 shows very clearly that the appellant was not afforded that opportunity. He cited **Melkizedeki Mkuta VR Criminal Appeal no 17 of 2006** (CAT). He accordingly prayed that the Court nullifies the proceedings that followed the closure of the prosecution case and order the High Court to reconstitute itself and proceed from there till judgment.

Mr. Wilbard Butambala learned counsel for the appellant supported the Court's observation and the suggestion made by Mr. Makwega.

Pages 9 to 10 of the proceedings are clear that after the close of the prosecution case, the appellant was not informed of his rights as they are provided for under S. 293(2) of the Criminal Procedure Act, Cap. 20 (henceforth the Act).

In **Melkizedeki case** cited supra, the facts are almost similar to the present case. After reproducing S.293(2) of the Act, the Court observed thus, we quote:-

*"As submitted by both learned counsel, the above sub-section is couched in mandatory terms. That is by virtue of the use of the word "shall" in the sub-section. This means that it was mandatory to perform the function stated in sub-section. In this spirit section 53(2) of the Interpretation of Laws Act, (Cap.1 RE.2002) is relevant. Sub-section(2) thereto reads:-*

*(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be perform."*

After making the above observation, the Court in exercising its revisional powers, vacated the proceedings which followed the closure of the prosecution case and directed the High Court to resit and proceed from where it ended to judgment.

Since section 293(2) of the Act was not complied with, exercising revisional powers of this Court as they are provided for under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 as amended, we hereby quash and set aside the proceedings which followed the closure of the prosecution case on 4/5/2005. We direct the High Court to resit and proceed from there till judgment.

Order accordingly.

DATED at MWANZA this 5<sup>th</sup> day of October, 2010.

**N. P. KIMARO**  
**JUSTICE OF APPEAL**

**B. M. LUANDA**  
**JUSTICE OF APPEAL**

**W. S. MANDIA**  
**JUSTICE OF APPEAL**

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

A handwritten signature in black ink, appearing to read 'W. P. Bampikya', with a large, stylized flourish extending to the right.

W. P. Bampikya  
**SENIOR DEPUTY REGISTRAR**