

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

(CORAM: MSOFFE, J.A., MBAROUK, J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 67 OF 2006

JAMES BUGINGO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Mchome, J.)

dated the 5th day of December, 2005

in

Criminal Sessions Case No. 84 of 2002

JUDGMENT OF THE COURT

14 & 14 May, 2010

MBAROUK, J.A.:

The appellant, James Bugingo and two others were charged with the offence of murder contrary to Section 196 of the Penal Code in Criminal Sessions Case No. 80 of 2002 in the High Court of Tanzania (Mchome, J.) at Musoma. The 2nd accused was reported dead at the early stage of the trial whereas the 3rd accused was acquitted. The appellant was the only one found guilty, hence

convicted and sentenced to suffer death by hanging. Aggrieved, the appellant has come to this Court.

In this appeal, the appellant is represented by Mr. Salum Amani Magongo, whereas the respondent Republic had the services of Mr. Edwin Kakolaki, learned Senior State Attorney assisted by Mr. Mkemwa, learned State Attorney.

When the appeal was called on for hearing the Court *suo motu* raised a point on whether **Section 293 (2)** of the **Criminal Procedure Act** (Cap 20 R.E. 2002), hereinafter the **Act**, had been complied with.

Without any hesitation, Mr. Magongo conceded that **Section 293** of the **Act** has not been complied with. Hence he urged the Court to nullify the proceedings subsequent to where the prosecution closed its case on 8-11-2005.

On his part Mr. Kakolaki concurred that **Section 293 (2)** of the **Act** was not complied with and urged that the proceedings after the prosecution closed its case could be nullified. He went further

by urging this Court to invoke **Section 4 (2)** of the **Appellate Jurisdiction Act, 1979** as amended by **Act No. 17 of 1993**, to exercise its revisional jurisdiction and nullify those proceedings and direct the High Court to re-constitute itself and to proceed with the proceedings of the case after 8-11-2005.

In the instant case, it is crystal clear that the record of the proceedings of the trial court shows that the High Court failed to comply with the mandatory requirements found in **Section 293 (2)** of the **Act**. Both Mr. Magongo and Mr. Kakolaki conceded to that effect. Section 293 (2) reads as follows:-

*"(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,
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.”*
(Emphasis supplied.)

Looking at the proceeding of the case on 8-11-2005, the trial
High Court Judge noted as follows:-

Mr. Kiria: *I close the case for the prosecution
now.*

*SGD: L. B. MCHOME
JUDGE
8-11-2005*

ORDER: *Hearing 9-11-2005. Accused in
remand custody.*

*SGD: L. B. MCHOME
JUDGE
8-11-2005*

Thereafter, on 9-11-2005 the defence case began and the trial Judge failed to inform the accused person of his right under **Section 293 (2)** of the **Act**. According to the recent decisions of this Court in the case of **Melkizedeki Mkuta v Republic**, Criminal Appeal No. 17 of 2006 and **Maria Paskali v Republic**, Criminal Appeal No. 18 of 2006 (both unreported) such non-compliance of the mandatory requirement in **Section 293 (2)** makes the proceedings of the case a nullity. As the trial Judge in the instant case failed to comply with such mandatory requirements of **Section 293 (2)**, we are constrained to declare that the proceedings after the prosecution closed its case on 8-11-2005 are a nullity.

Having declared that proceedings after 8-11-2005 are a nullity, we now exercise our revisional jurisdiction under **Section 4 (2)** of the **Appellate Jurisdiction Act, 1979** as amended by **Act No. 17 of 1993**. For that reason, we quash and set aside the proceedings after the prosecution closed its case on 8-11-2005. Furthermore, the High Court is directed to re-constitute itself and proceed with the case after the prosecution closed its case on 8-11-2005.

DATED at MWANZA this 14th day of May, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

M. S. MBAROUK
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