

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL REVISION NO. 2 OF 2007

CHELA KILASA.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for the Revision of the Preliminary

Hearing proceedings conducted by the High

Court of Tanzania at Geita)

(Masanche, J.)

dated 4th June, 2004

in

High Court Sessions Case No. 145 of 2002

.....

RULING OF THE COURT

6th October, & 11th October, 2010

KIMARO, J.A.:

This application for revision, made under section 4(3) of the Appellate Jurisdiction Act, [CAP 141 R. E. 2002] is seeking for an order for revising the proceedings conducted in respect of the Preliminary Hearing,

to include a memorandum of matters not in dispute, because the trial court did not draw up one. The application is supported by an affidavit deposed by Mr. Jerome Muna, learned advocate.

At the hearing of the application he also appeared for the applicant and he adopted his affidavit. In the affidavit at paragraph 4 it is averred that in contravention of section 192(3) of the Criminal Procedure Act, [CAP 20 R.E. 2002] the learned judge who conducted the preliminary hearing omitted to draw a memorandum of matters not in dispute. In paragraph 4 the learned advocate says that the failure to draw a memorandum of matters not in dispute has occasioned a failure of justice to the applicant because it is recorded in the proceedings that several documents forming documentary evidence in proof of the case for the prosecution have been admitted in court as exhibits. These are the caution statement of the applicant –exh.P1, Caution statement of Hamisi Kalekwa-exh.P2, a sketch plan-exh.P3 and a post mortem report –exh. P4.

Citing sections 192(3) of CAP20, the learned advocate said the law imposes a mandatory obligation on the part of the court to comply with the said provision because the word used is “shall” implying that it was mandatory for the court to draw a memorandum of matters not disputed.

He said the applicant could only accept the documents as being correct after a memorandum of matters not in dispute was drawn up. He contended further that under section 192(4) of the same Act, a document admitted in evidence at the preliminary hearing stage is deemed to have been proved and an accused person may not at a later stage in the trial dispute its correctness. He prayed that the proceedings be quashed and a fresh preliminary hearing be conducted on compliance with the provisions of section 192.

The respondent Republic was represented by Mr.Seth Msemwa, learned State Attorney. He supported the application. He cited the case of **MT. 7479 Benjamin Holela Vs R** [1992] T.L.R 130 and requested the Court to order that a memorandum of matters not in dispute be drawn up because that was the omission which the trial court did.

The record of the preliminary hearing speaks by itself. It is true that the learned judge who conducted the preliminary hearing omitted to draw a memorandum of matters not disputed.

Section 192(3) of CAP 20 provides that:

“At the conclusion of a preliminary hearing

held under this section, **the court shall**
prepare a memorandum of the matters agreed
and the memorandum shall be read over and
explained to the accused in a language that he
understands, signed by the accused and his
advocate (if any) and by the public prosecutor,
and then filed.” (Ephasis added).

Both the learned advocate and the learned State Attorney submitted correctly that it is mandatory for the trial court conducting a preliminary hearing to draw up a memorandum of matters not disputed. The section is couched in mandatory terms. In the case of M.T. **Benjamin Holela** (supra), the trial court omitted to read out to the appellant the memorandum of matters not in dispute drawn up during the preliminary hearing. That piece of evidence partly formed the basis of the appellant's conviction. On appeal to the Court that evidence was challenged. The Court held that:

“Section 192(3) of the Criminal Procedure Act,

1985 imposes mandatory duty that the contents of the memorandum must be read and explained to the accused. Since the requirements under section 192(3) were not complied with, the provisions of section 193 (4) of the Criminal Procedure Act cannot apply;"

The learned advocate for the applicant asked the Court to quash the proceedings and order fresh preliminary hearing. In our considered opinion this is not necessary. An order for drawing up the memorandum of matters not in dispute will suffice to remedy the situation. What we emphasize is a strict compliance of the provisions of section 192 (1) and (2) that is to say the trial court has to draw the memorandum of matters not in dispute, explain the same to the applicant, and then require all parties to sign the same. The court record should also reflect compliance with the said provisions.

The application is allowed. The trial court is ordered to draw a memorandum of matters not in dispute from the proceedings that were conducted on 4th June 2004. It is ordered.


DATED at MWANZA this 7th 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.


W. P. Bampikya
SENIOR DEPUTY REGISTRAR