

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

**MISC.CR.APPLICATION NO. 49 OF 2004**

**TATU ABDALLA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**RWEYEMAMU J.**

This is an application brought by counsel for accused, seeking a direction by this court that "matters which were agreed admitted and undisputed" during the Preliminary Hearing be proved during trial. It is in a way, in my opinion a novel application.

The grounds adduced in court were basically those contained in the applicant's chamber application and elaborated on in the applicant's affidavit.

Counsel for the Republic objected to the application, basically saying that the court which conducted the PH and counsel for the applicant (even if it was a dock brief), should have

ensured that the applicant understood the nature of matters admitted or should swear an oath to that effect. Admittedly, I found this later argument strange – as I am not familiar with the procedure suggested.

Be that as it may, it seems to me the decision hinges on one key question namely, can facts already admitted thus deemed “duly proved” during PH, be required to be proved again?, The answer to that question is yes.

Under s.192 (4), that :

*".....if during the course of the trial, the court is of the opinion that the interest of justice so demand,--- direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved".*

I have gone through the relevant sections of the cited law and checked the decision of MT.7479 SGT Benjamin Holela vs R.1992 TLR No.121 (CA), which considered S.192(3) of the CPA. The decision among other issues, discussed the mandatory duty of the court when conducting preliminary hearing which includes, to read and explain the contents of the agreed memorandum to the parties, following which those facts 'shall be deemed proved under s.192 ( 4 ).

The cited law relates to the discretion of the court in the course of the trial – but clearly, a fact already agreed/admitted,

can be directed to be proved... if the interest of justice so demand:- The court of appeal decision cited above, does not change the content of subsection (4) i.e. where a matter "deemed already proved" as per court of appeal decision may be directed by the court to be proved if the interest of justice so require. Strangely both counsel's arguments did not dwell on the material issue of whether subsection (3) was complied with during the PH, and guide this court as to what should be the position, where subsection (3) was complied with, but the accused raises the argument that facts in the memorandum were never understood. But may be more important, counsels should have addressed the issue of whether the requirement of s.192 (3) discussed under the cited CA decision were complied with or not, but they did not.

In the circumstances, this court is left with its interpretation of the law, and facts adduced which I have used and reached a conclusion that, even though the PH was conducted, the court can not ignore the facts alleged by the applicant that she was ignorant. The procedure whose major purpose is to expedite trial and probably cost cutting is laudable, but that need can not override the interest of justice. The burden of proof in a criminal case is always born by the republic, and where the accused, even though belatedly, alleges that she never understood the contents of the memorandum, is entitled to that proof. After all, if the accused had kept quiet and chosen to raise this argument "in the course of the trial" I doubt a court of justice, whose duty it is in a criminal case to ensure the case is proved beyond reasonable

doubt, could have simply dismissed her argument because her opportunity had passed, .

In the circumstances, I grant this application and direct that the facts denied by the accused itemized under item 6 a-c of the sworn affidavit and item 2 of the application be proved during trial.

It is so ordered.

**R. Rweyemamu**

**JUDGE**

**8/11/2004**

Ruling delivered before both parties this 8<sup>th</sup> day of November, 2004.

**Order:** File referred to the DR to fix session hearing date.

**R. Rweyemamu**

**JUDGE**

**8/11/2004.**