KANIKI v JAIRUS (1967) ZR 71 (HC)

HIGH COURT

BLAGDEN CJ

26th MAY 1967

Flynote and Headnote

[1] Civil procedure - High Court supervisory jurisdiction. 35

Supervisory jurisdiction over subordinate courts has been conferred on the High Court by the Constitution, section 98, subsection 5.

[2] Criminal procedure - High Court supervisory jurisdiction.

See [1] above.

[3] Civil Procedure - High Court supervisory jurisdiction - Absence of rules. 40 The absence of rules regulating practice and procedure of supervisory jurisdiction does not impede the exercise of jurisdiction by the High Court.

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[4] Evidence - Ascertainment of customary law - High Court.

The High Court may refer to any publication which it considers authoritative in order to ascertain customary law. 5

[5] Evidence - Ascertainment of customary law - Subordinate court - Judicial notice - Assessors - Expert witnesses.

A magistrate cannot take judicial notice of African customary law but must sit with African assessors or receive evidence from expert witnesses.

[6] Evidence - Documentary evidence - Admissibility of Native Courts circular - Subordinate courts.

To render a Native Courts circular admissible, the subordinate court must comply with the conditions prescribed in the Evidence Act, 1966, section 3. 15

[7] Civil procedure - High Court supervisory jurisdiction - Local court proceedings - Regard to technicalities.

All matters shall be decided by High Court according to substantial justice without undue regard to technicalities in exercising supervisory jurisdiction over local court proceedings. 20

[8] Jurisprudence - African customary law - Repugnancy to natural justice.

Magistrate could properly conclude that Akamutwe custom was contrary to natural justice.

Case cited:

[1] *Chitambala v R* (1957), 6 NRLR 29. 25

Statutes construed:

Constitution (1964), ss. 98 (5) (6), 125.

High Court Ordinance (1960, Cap. 3), ss. 35 (1) (c).

Subordinate Courts Ordinance (1934, Cap. 4), s. 57.

Native Courts Ordinance (1960, Cap. 158) (repealed), s. 14 (1) (a). 30

Local Courts Act, 1966 (No. 20 of 1966), ss. 12 (1) (a), 57 (1) (D), 60, 61.

Evidence Act, 1967 (No. 8 of 1967), s. 3.

Judgment

Blagden CJ: This case has been referred to the High Court by the Resident Magistrate, Mkushi, with a request to review the judgment which he delivered. The case came before his court as an upped from a 35 decision of the Shaibila Native Court. The High Court's powers of review are derived from section 309 of the Criminal Procedure Code and are limited to the review of criminal cases only. But in addition to its review jurisdiction the High Court also enjoys a supervisory jurisdiction. Thus, under section 57 of the Subordinate Courts Ordinance, Cap. 4, it is provided 40 *, inter alia*, that:

". . . every proceeding before a magistrate shall be subject to the directions and control of the High Court."

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I would be hesitant to hold that this provision alone conferred jurisdiction on the High Court to make, of its own motion or upon reference, orders affecting the decisions of subordinate courts, but there is, in addition, in the Constitution, a clear conferment of a supervisory jurisdiction with wide powers. Subsection (5) of section 98 invests the High 5 Court with:

". . . jurisdiction to supervise any civil or criminal proceedings before any subordinate court . . . and . . . make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by 10 any such court."

It is to be noted that the definition of "subordinate court" in section 125 of the Constitution is wide and would include a local court.

Under these wide powers I clearly have the necessary jurisdiction to entertain the Resident Magistrate's reference here. [1] [2] But I 15 apprehend that before I make any order which will have the effect of varying either the Resident Magistrate's decision or that of the local court

below, I must be properly satisfied that it is necessary so to do to ensure that justice is duly administered.

[3] Provision is made, by subsection (6) of section 98 of the Constitution, 20 for the making of rules by the Chief Justice to regulate the practice and procedure of the supervisory jurisdiction of the High Court under subsection (5). None have so far been made but their absence does not impede the exercise of the jurisdiction.

The case concerns Lala customary law - in particular, a custom 25 known as "Akamutwe", which apparently exists in various forms amongst a number of tribes in Zambia. It relates to certain consequences which ensue upon the death of a spouse - in particular, to the payment of compensation by relatives of the surviving spouse to relatives of the deceased spouse. It would seem that such payments are made either upon a notional 30 concept of the responsibility of the surviving spouse for the deceased spouse's death, or as a means of purifying or releasing the surviving spouse from the deceased spouse's spirit so that the surviving spouse is free to marry again.

In the instant case it was the husband who died. It seems to have 35 been accepted by the parties that compensation was properly payable, but they could not agree as to *quantum,* and the matter came before the Shaibila Native Court where the respondent, Lot Jairus, suing on behalf of the relatives of the dead husband, obtained judgment against the appellant, Beluti Kaniki, the brother of the widow, for the payment of 40 £12 damages and £1 hearing fee.

Beluti Kaniki appealed against this decision on the grounds that the compensation awarded was too high. Both under the Native Courts Ordinance, Cap. 158, which was in force when the case was heard by the Shaibila Court, and under the Local Courts Act, 1966, which was in force 45 when the appeal was heard, it was incumbent on the court of first instance

to administer the customary law applicable to the matter before it, but only so far as such law was "not repugnant to natural justice or incompatible with the provisions of any written law". (See Native Courts Ordinance, Cap. 158, Section 14 (1) (a); Local Courts Act, 1966, Section 5 12 (1) (a).)

The learned Resident Magistrate, after reviewing the history of the case and referring to various aspects of the customary law, came to the conclusion that the custom itself was repugnant to natural justice and therefore could not be enforced in a court of law. In coming to this conclusion 10 he was largely guided by certain passages in a document purportedly issued by the Native Courts Department of the Ministry of Justice on the 20th August, 1964 (under ref.: NC/L) as Circular No. 2, under the heading of "Law of Persons: Marriage and related subjects: General Principles".

[4] It 15 is for consideration what use the learned Resident Magistrate was entitled to make of this document. Such a publication could be consulted in the High Court under the provisions of

section 35 (1) (c) of the High Court Ordinance, Cap. 3. But there is no equivalent provision in the Subordinate Courts Ordinance, Cap. 4. The magistrate could, of course, 20 take judicial notice of the Laws of Zambia, and also of the English common law and doctrines of equity, which by virtue of section 2 (a) and (b) of the English Law (Extent of Application) Ordinance, Cap. 11, are in force in Zambia, and likewise of any English statutes made applicable in Zambia by the British Acts Extension Ordinance, Cap. 27, section 2 and 25 the Schedule thereto. But he could not take judicial notice of African customary law (*see Chitambala v R* [1] per Somerhough, J, at page 39 [5].) To acquaint himself with African customary law he would either have to sit with African assessors and seek their advice (section 60 of the Local Courts Act, 1966) or receive the evidence of witnesses expert in African 30 customary law (section 57 (1) (b) of the Local Courts Act, 1966) or both.

[6] He did not sit with assessors and he received no evidence. Native Courts Circular No. 2 of 20th August, 1964, was not evidence. It did not prove itself. To have rendered it admissible as evidence the conditions prescribed by section 3 of the Evidence Act, No. 8 of 1967, relating 35 to the admissibility of documentary evidence as to facts in issue, would have to be complied with; and they were not.

It follows that, technically, the learned Resident Magistrate should not have taken the circular into account but, having done so, he came to the conclusion that the Akamutwe custom was "contrary to natural 40 justice and morality". He went on to say in his judgment:

"This does not mean that it is an offence to observe this custom; it merely means that it is not enforceable in a court of law".

He allowed the appeal and set aside the order of the Shaibila Court.

Section 61 of the Local Courts Act, 1966, prescribes that: 45

"No proceedings in a local court, and no warrant, process, order or decree issued or made thereby, shall be varied or declared void.

on appeal or revision solely by reason of defect of procedure or want of form, but every appellate court or person exercising powers of revision shall decide all matters according to substantial justice without undue regard to technicalities".

[7] I would hold that in the exercise of its supervisory jurisdiction 5 the High Court was bound to conform to this direction. I would regard the learned Resident Magistrate's omission to have the contents of the Native Courts Department's Circular No. 2 of 20th May, 1964, properly proved in evidence before him as a technicality. [8] On the material, including this circular, before him, I think the learned Resident Magistrate 10 could come to the conclusion that the compulsory observance of the Akamutwe custom - that is, its actual enforcement, - was contrary to natural justice, even though its voluntary observance might not be.

In these circumstances, and bearing in mind that by the combined effect of the provisions of section 98 (5) of the Constitution and section 61 15 of the Local Courts Act, 1966, the High Court, in exercising its supervisory jurisdiction, is enjoined to ensure that justice is duly administered but without undue regard to technicalities, I have come to the conclusion that I would not be justified in interfering in the case. I accordingly make no order. 20

Order accordingly