

**SHAMAANE v CHIINZA (1968) ZR 137 (HC)**

HIGH COURT

EVANS J

16th OCTOBER 1968

**Flynote and Headnote**

**[1] Civil procedure - Assessor - Advice in open court.**

Section 60, subsection 2, of the Local Courts Act, 1966, requires an assessor to give any advice on matters of customary law in open court.

**[2] Civil procedure - Assessor - Limited function.**

An assessor is limited to giving advice on customary law in open court (*See also* [3], below.)

**[3] Civil procedure - Magistrate hearing appeal with assessor - Finding of facts and customary law.**

It is the duty of the magistrate alone to make findings of fact and of the customary law (upon advice, if sought and given in open court, of the assessor), and to determine the appeal. (*See also* [2], above.)

Statute construed:

Local Courts Act, 1966 (No. 20 of 1966), s. 60, sub-ss. 1, 2.

*Shamwana*, for the appellant.

*McLellan - Shields*, for the respondent.

**Judgment**

**Evans J:** On 8th September, 1967, the appellant lost a civil action brought by him against the respondent in the Nalubamba Local Court. His claim was stated to be for "succeeding", and it seems from the record that he claimed in effect a declaration that he was the rightful or lawful successor to his deceased's father's name and, presumably, estate. He appealed to the subordinate court of the second class, Namwala (herein after called the "subordinate court"), which court dismissed his appeal on 8th March, this year, and he now appeals to this court.

It is not necessary to refer to the grounds of appeal or to the facts and merits of the case, because I am of the opinion (and both counsel agree) that a re-hearing must be ordered under the provisions of section 57 (1) (d) of the Local Courts Act, 1966 (hereinafter called "the Act") for the following reasons.

[1] The magistrate who presided over the subordinate court sat with an assessor to hear the appeal from the local court, as he was entitled to do under subsection (1) of section 60 of the Act. However, that subsection clearly limits the functions of an assessor in these circumstances to advising on matters of African customary law, and subsection (2) of the said section provides (so far as material):

"Any advice given by an assessor on matters of African customary law shall . . . be given in open court and any party . . . shall be entitled to give or bring evidence on such matters after such advice has been given."

[2] In this case, and according to the record of the subordinate court, the assessor gave no advice during the hearing in court, but he clearly retired with the magistrate when the latter adjourned to consider his judgment, and, during such adjournment, it is apparent that not only did the assessor advise the magistrate and/or discuss with him matters of customary law but that he also took part with the magistrate in making findings of fact, for the following passages appear in the judgment:

- (a) "The court has scrutinised the evidence before it and after studying the whole story and the submissions given on behalf of the two parties, my friend and I came to the following findings of fact." (Here follow certain findings.)
- (b) "It is said that in the local customary law any of the two parties . . . had the right to succeed late Hamane."
- (c) "My friend and I have accepted without any hesitation the call of the family."

- (d) "We have therefore come to the conclusion that the estate be administered by the respondent and we have no reason to vary the decision of the local court based on the customary law of the area."
- (e) "We (not 'I' as incorrectly stated in the copy record) accordingly dismiss the appeal."

The original judgment was then signed by the magistrate and by the assessor.

[3] It was for the magistrate alone to make findings of fact and of the customary law (upon the advice, if sought and given in open court, of the assessor), and to determine the appeal, but here the magistrate wrongly regarded himself and the assessor as together constituting the court, and the proceedings were therefore conducted so irregularly that I am obliged to set them aside. I order the appeal from the Nalubamba local court to be reheard by a subordinate court of competent jurisdiction, presided over by a magistrate to be appointed by the senior resident magistrate, Livingstone.

*Appeal allowed.*