

A quite proper for the applicant to file this application for revision of the trial court's order which appears to be quite irregular on the face of the said court's record.

B Therefore, I allow this application and order that Criminal Case file Number 150 of 2003 should immediately be returned to the District Court of Temeke to continue with the Criminal proceedings against the respondent in respect of the charges with which he was facing before his acquittal. The trial should continue before another
C magistrate with competent jurisdiction. It is so ordered.

D **ISIDORE NSANGU TUSEVO v. ANNETE ALTVATER
AND ANOTHER**

E **HIGH COURT OF TANZANIA
AT ARUSHA
(Rutakangwa, J.)**

F **CIVIL APPEAL No. 13 OF 2002**

(Originating from Civil Case No. 38 of 2001 before the Resident Magistrate's Court of Arusha)

G *Evidence – Facts in issue – Need to prove all facts in issue by evidence – Section 7 of the Evidence Act 1967.*

Evidence – Judicial notice – Facts not requiring proof – Section 58 of the Evidence Act 1967.

H *Evidence – Foreign Law – Proof of foreign law – Foreign law needs to be proved by evidence by an expert in such law – Section 47(1) of the Evidence Act 1967.*

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A The appellant, a Congolese national, and the first respondent, a German citizen, were married in Guatemala City. The appellant sued the first respondent and one Majid Raza, the second respondent, for general damages and for wrongful detention, alleging in his plaint that when he came to Tanzania in October, 2000 he found his wife cohabiting with the said second respondent. He approached and asked his wife to desist from continuing with the adulterous association to no avail. In his attempt to talk over the matter he went to see the first respondent but instead she called the police who detained him without bail for six consecutive days. The respondents filed two separate written statements of defence. In her defence the first respondent admitted the marriage; that she was a German citizen and that she was residing in Tanzania. She raised two points of preliminary objection: that the appellant had no cause of action against the two respondents because under German law adultery was not actionable, and that the marriage contract barred the relief sought by the appellant. She annexed a duly authenticated copy of the German law and a copy of the marriage contract to her written statement of defence. This was reiterated in the submission in support of the preliminary objections. The advocate of the appellant argued that the question of whether the marriage was governed by German law was a matter of evidence. The trial resident magistrate upheld the preliminary objection on the ground that the appellant was bound by German law and the suit was struck out. Aggrieved the appellant appealed to the High Court on four grounds but argued only one ground challenging the finding of the magistrate that the suit was incompetent because German law was applicable. The advocate of the appellant argued that no evidence had been tendered. He further cited provisions of the Law of Marriage Act 1971 which empower the courts in Tanzania to entertain matters pertaining to marriage notwithstanding that the marriage was contracted outside Tanzania.

G **Held:** (i) German law is a foreign law and its existence must be proved by evidence before any court of law in this country could act on it to determine the rights and liabilities of the parties in and legal proceedings;

(ii) The annexure to the pleading was not legal proof of the law;

(iii) **Obiter:** The Trial court ignored the fact that the appellant had another separate and distinct claim: the claim of damages for wrongful confinement.

Appeal allowed; case remitted for trial

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A Statutory provisions referred to:

- (1) The Evidence Act 1967, sections 7, 47(1) and 58
- (2) The Law of Marriage Act 1971

B *Mr Mwale* for the appellant

Mr Kimomogoro for the respondents

JUDGMENT

C

(Delivered 30 May 2005)

D **Rutakangwa, J.:** It has been aptly observed and I wholly subscribe to that observation that:

The object of legal proceedings is the determination of the rights and liabilities which depend on facts: see **Evidence in East Africa**, H.F. Morris, at pg.24.

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F These facts are either facts in issue or facts relevant to the facts in issue and these are the only facts which need be proved in legal proceedings. This, in my opinion, is the tenor of section 7 of the Tanzania Evidence Act 1967 (or the Act hereinafter). "Facts in issue" are defined in section 3(1) of the Act to be:

any fact from which, either by itself or in connection with facts, the existence, non-existence, nature or extent or any right, liability or disability, asserted or denied in any suit or proceedings, necessarily follows.

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It is a trite rule of evidence, generally, that all facts in issue and relevant facts must be proved by evidence. However, as the old English adage goes, there is no rule without an exception.

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To the above cited rule of evidence, there are two accepted exceptions. These are:

- (a) No fact of which the court shall take judicial notice need be proved (by evidence): section 58 of the Act.

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- (b) Facts admitted by the parties to the proceedings need not be proved: See section 60 of the Act.

Section 59 of the Act partly provides, in clear terms, in sub-section (1) as follows:

- (1) The court shall take judicial notice of the following facts:

- (a) all written laws, rules, regulations, proclamations, orders, or notices having the force of law now or heretofore in force or hereafter to be in force, in any part of the United Republic.

By any canon of statutory construction it would require considerable temerity to suggest, let alone to hold, that this provision of the Act, covers foreign law having no force in Tanzania. It is now elementary knowledge that in Tanzania foreign law if it is a fact in issue or relevant fact has to be proved by evidence. On this, my stance is fortified by section 47 of the Act, which provides as follows:

- 47(1) When a court has to form an opinion upon a point of foreign law, or of science, or art, or as to identify of handwriting or finger or other impressions, opinions upon that point, persons possessing special knowledge, skill, experience or training in such foreign law, science or art or question as to identify of handwriting or finger or other impressions are relevant facts.

- (2) Such person are called "*expert*" (emphasis is mine). Such expert opinion should be formally given in evidence. At this juncture it is incumbent upon me to show the relevancy of (or justify) this seemingly long preface to this judgment.

The appellant herein was the Plaintiff in Civil Case Number 13 of 2001 of the Court of Resident Magistrate in Arusha (or the trial court). The proceedings in that suit never went beyond the pleadings stage because of some legal technicalities, which I shall presently unveil. The appellant went before the trial court claiming general damages from the two respondents herein who were joint defendants in the said suit. The claim for damages was based on these pleaded facts:

- A (a) That the appellant was lawfully married to the first respondent herein on 10 January 1996 through a Civil Marriage contracted in Guatemala City.
- B (b) That while the appellant is a citizen of the Democratic Republic of Congo (DRC), the first respondent is a citizen of the Federal Republic of Germany residing in Tanzania.
- C (c) That when the appellant came to Tanzania from Germany, in October, 2000 he found his wife cohabiting with the first respondent and therefore committing adultery, which he neither consented to nor connived to.
- D (d) That he made every effort to dissuade her "from continuing to involve herself in that unholy and adulterous style of life" but all was to no avail.
- E (e) That when he attempted to follow her "for holding discussions for purpose and grounds of putting back in order all that had gone wrong", she called the police who arrested him, and detained him in police custody for six consecutive days without granting him bail.

F He was accordingly claiming damages for wrongful detention at the instigation of the first respondent only and for adultery against the two respondents jointly. The two respondents filed two separate written statements of defence but both through Mr Kimomogoro, learned counsel from Imboru Chambers, Advocates. The defence of the second respondent was a general denial of only points (c) and (e) above. In G her written statement of defence, the first respondent admitted points (a) and (b) above but vehemently denied points (c), (d) and (e) above. In the same written statement of defence, the first defendant raised two points of preliminary objection alleging that the appellant had H no cause of action against the two respondents on the basis of:

- I (a) German Law which provides that adultery is not actionable.
- (b) The marriage contract between the plaintiff and first defendant which bars reliefs sought by the former in this suit.

A The first respondent attached photocopies of the alleged German Law and Marriage contract. The alleged German Law is alluded to in a 'ANNEX A.A1 to the first respondent's written statement of defence.

B Armed with the said A.A1, counsel for the respondents convinced himself that he had no uphill struggle to sustain his preliminary objection. In his submission in support of the same before the trial court, the learned counsel said:

C Among other things, the contract provides under sub-title "Choice of Law" and we quote:

D For the legal rights on property and the general effect of our marriage, we are herewith choosing German Law for our marriage, valid from the date of marriage ... As far as possible the choice of law should also be applied outside Germany. [emphasis supplied]

E The next point for consideration is what does German Law provide on the issue of adultery or infidelity?

F Your honour annexure "A.A1" to the Written Statement of defence of first defendant is an official translation of the relevant provisions of German law. According to the said document adultery is not actionable save that the aggrieved spouse is entitled to petition the court for divorce.

Your honour, this brief submission disposes of the relief claimed by the Plaintiff under paragraph 17(a), (e) and (d) of the plaint.

G In response, Mr Buhoma, learned counsel for the appellant (the plaintiff then) from Kamara and Associates, Advocates, had this pertinent submission to make:

H *That their marriage is governed by German Law is an argument that came up in the first defendants Written Statement of Defence (it features nowhere in the Plaint). Besides whether or not this is the Law applicable or whether Plaintiff is party to annexure A.A.2 are questions of evidence.* [emphasis supplied]

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A Annexure A.A.2 is a photocopy of the alleged contract of marriage.

This submission of Mr Buhoma on the issue was found wanting in cogency by the learned trial Resident Magistrate who upheld Mr Kimomogoro.

B In striking out the suit on the basis of this point of preliminary objection only, she at first said:

C As it is, the issue of whether the plaintiff has a cause of action against the defendant is a matter of evidence. It is to be resolved in the merits of the case.

But, within the same breath she held:

D The issue is posed at this stage because of the nature of the objection raised, it is on the law applicable. A suit cannot stand without having the law upon which it is based. The cause of action is adultery

E As long as the Plaintiff chose to be bound by German Law wherever he is in as far as the marriage between him and the defendant is concerned, he cannot sue on adultery as it is not actionable. That being the case then, the preliminary point of objection is upheld; in the result the suit is struck out with costs.

F It is this order which gave rise to this appeal. The appellant personally filed a memorandum of appeal containing four grounds of appeal. He eventually engaged Mr M. Mwale, learned counsel, to prosecute the appeal. The respondents retained the same counsel as in the trial court. The appeal was argued by way of written submissions.

G In his submission learned counsel Mwale chose to submit on one ground of appeal, namely:

H 1. THAT, the learned Trial Magistrate erred in Law and Fact to rule that the marriage between the appellant and first respondent is governed by German (*sic*) Law while marriage was done (*sic*) in Guatemala according to Guatemala Law.

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A Counsel submitted at length in support of this ground of complaint. The bottom-line of his submission, however, is that the learned trial Resident Magistrate "misdirected herself through speculative ideas which influenced her decision to the effect that the plaintiff chose to be bound by German Law where-ever he is in as far as the marriage between him and the first defendant is concerned". Relying on S.77 of the Law of Marriage Act 1971, the learned counsel for the appellant was of a firm opinion that the trial Magistrate misdirected herself because "there was no evidence which was tendered before the trial court so as to determine the law applicable". Section 77 of the Law of Marriage Act generally governs the right to invoke the Tanganyika Court's jurisdiction for a declaratory decree, a decree of separation, or to apply for maintenance, custody of children or for any other matrimonial relief. Sub-section (5) in particular, provides in no uncertain terms that our courts shall have jurisdiction to entertain any of these proceedings notwithstanding that the marriage was contracted outside Tanganyika. B C D E

F Learned counsel for the respondents reiterated his earlier submission before the trial court to the effect that under German Law the only remedy for an aggrieved party is to petition the court for divorce but not suing for damages for adultery.

G The only issue in this appeal is whether or not the learned trial Resident Magistrate was correct, in law, in striking out the suit on the basis of the allegation that under German Law adultery by one of the spouses or even both, to a valid marriage cannot be a cause of action for damages, as is the case here, under section 72 of the Law of Marriage Act 1997, when there was no evidence to prove the said law and if it is true that the appellant had chosen to be bound by German law "wherever he is" in relation to all affairs of his marriage with the first respondent. I shall begin with the second limb of this issue. H

I The learned trial magistrate appears to have been very resolute in her holding that the appellant had chosen to be so bound by German

A Law where ever he might be. Having carefully gone through the said Annexure A.A.2, I have the audacity to say with confidence that she was wrong. It is true that in the said document it is shown that the spouses chose German Law to govern their marriage relationship.

B But the same goes further to provide that:-

.... *As far as possible* the choice of Law should also be applied outside Germany [emphasis supplied].

C To an objective mind the language used here conveys the unmistakable impression that so long as they are in Germany, the spouses chose German law to govern their marriage relationship in every aspect. Whether that Law was to follow them while outside the boundaries of Germany this is governed by the phrase "as far as possible". Given

D its natural and plain meaning this phrase, which is open-ended, simply means that to the extent that is acceptable in the circumstances of the case that choice of law should also be applied outside German.

E So long as the parties thought it worthwhile to this circumscribe the applicability of their chosen Law, it goes without saying therefore, that German Law did not automatically apply to them while outside Germany. The party seeking to rely on this provision to buttress his/her case ought to give evidence to establish to the required standard

F that given the particular circumstances of that specific case German Law was to apply outside Germany. This is not the type of issue which could be resolved without evidence. The situation could have been different if this particular provision was reading:

G Under all circumstances, the choice of Law should also be applied outside Germany.

H In view of this, I hold that the trial court was wrong in striking out the suit on this basis.

I Coming to the other limb of the issue, I am equally settled in my mind that the learned trial magistrate erred in law in relying exclusively on "Annex AA1" as establishing the position of German Law on the issue. What the trial magistrate did was in effect taking judicial notice

A of the existence of the alleged German Law. Even if such law exists this is not one the Laws covered by section 59(1) of the Act. It is not even evident from Annex. A.A.1 when the alleged German Law, No. 1556, came into force and whether it has had in the past any force of law in Tanganyika or Tanzania. To be quite honest, it is my decided opinion, that German Law is a foreign Law in terms of section 47(1) of the Act and its existence has to be proved in accordance with the provisions of the Act, before any court of law in this country could act on it to determine the rights and liabilities of the parties in any legal proceedings. On this basis, I hold that it was incurably fatal for the learned trial magistrate to strike out the appellant's suit on the basis of a foreign law whose existence was yet to be proved or established. Annex. A.A.1 is a mere annexure to the pleading and not legal proof of the law. D

E For the purposes of completing the record, I only wish to comment in passing that the good magistrate struck out the entire suit on the basis if the alleged German Law which does not permit suing for damages in cases of adultery. She totally ignored the fact that the appellant had another separate and distinct claim: the claim of damages for wrongful confinement. For certain, this claim is not governed by German Law No. 1556. F

G All in all, I hold that the ruling of the trial court is totally unsustainable. The same is hereby quashed and set aside. The case should proceed to trial in accordance with the provisions of the Civil Procedure Code, 1966 from the stage it had reached. The appeal is accordingly allowed with costs.

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