

cretion in his favour notwithstanding that he had repeatedly committed adultery since January 1967. I have looked carefully into every aspect and circumstance of this case, and I have come to the conclusion that it is a case in which the discretion of the court ought to be exercised in favour of the petitioner, and I do so exercise it.

I am satisfied that the respondent committed adultery with the co-respondent in January, 1963, and that the respondent has deserted the petitioner since September 15th, 1962, and I therefore pronounce the decree that the marriage heard and solemnised between the petitioner and the respondent be dissolved by reason of the respondent's adultery and desertion. And I further order that the child Donald is not the child of the petitioner, and that the children Emanuel Adebeyi Benjamin, Ellen Letitia, Roberta Georgiana and Beryl Maribell be in custody of the petitioner. The respondent shall have access to the children twice monthly. Costs are to be paid by the co-respondent.

Order accordingly.

MORLAI v. SEDULA

SUPREME COURT (Tejan, J.): January 21st, 1970
(Mag. App. No. 5/67)

[1] **Civil Procedure—assessors—replacement of assessors during trial—replacement possible at any stage with consent of parties and approval of magistrate:** Where a civil case is being heard with assessors in a local court there must be two assessors throughout the hearing, but the parties may, with the approval of the magistrate, replace one assessor by another at any stage of the proceedings (page 7, line 33—page 8, line 1).

[2] **Courts—local courts—assessors—replacement of assessor during trial—replacement possible at any stage with consent of parties and approval of magistrate:** See [1] above.

The parties sought a declaration in a local court as to the ownership of certain land.

A dispute concerning the ownership of land was taken before a District Appeal Court, consisting of a magistrate and two assessors. During the trial one of the assessors was absent and the parties selected a replacement with the approval of the magistrate. A

decision was reached in favour of the respondent and the appellant appealed to the Supreme Court on the grounds (a) that the court was not properly constituted, having rendered itself incompetent to hear the appeal, (b) that the decision was against the weight of evidence, and (c) that the proceedings were irregular.

The appellant contended that since there was nothing in the Local Courts Act, 1963 which entitled the court to replace an assessor simply by consent of the parties, the trial had been effectively heard by only one assessor and the court was not properly constituted and its proceedings irregular. He also contended that the decision was against the weight of evidence.

The respondent maintained that in civil cases the rules of evidence could be relaxed by consent of the parties and since both parties had agreed to the replacement of the assessor and the magistrate had approved, the proceedings had been heard by two assessors throughout and the court was properly constituted.

Case referred to:

(1) *Juxon-Smith v. R.*, Sierra Leone Court of Appeal, unreported, distinguished.

Legislation construed:

Local Courts Act, 1963 (No. 20 of 1963), s.29(1):

The relevant terms of this sub-section are set out at page 7, lines 28-32.

s.33(2): The relevant terms of this sub-section are set out at page 9, lines 2-6.

Buck for the appellant;
Yilla and Thompson for the respondent.

TEJAN, J.:

This appeal is from the decision of Mr. Hume, Senior Police Magistrate, and two assessors forming the District Appeal Court in Kambia. The decision appealed against was given on December 21st, 1967.

Mr. Buck, who represents the appellant has appealed on three grounds, namely, (a) that the court was not properly constituted; (b) that the judgment is against the weight of evidence; and (c) that the proceeding in the District Appeal Court was irregular.

With regard to the first ground of appeal, Mr. Buck states that

the District Appeal Court was not properly constituted, had exceeded its jurisdiction and rendered itself incompetent to hear the appeal. In this connection, Mr. Buck refers to s.29 of the Local Courts Act, 1963. In his argument Mr. Buck states that the learned magistrate selected two assessors namely, Allie Tarawallie and Allie Morifoday, but that at p.6 of the records, Mr. Allie Tarawallie was absent, and that both parties selected one Mr. Hassan Kai to replace him. According to Mr. Buck, there is no provision in the Act which entitles the court to replace assessors with the consent of the parties and he then refers to *Juxon-Smith v. R.* (1) where it was held by the Sierra Leone Court of Appeal that where a procedure has been laid down, the provision must be complied with. Mr. Buck stresses the point that in fact only one assessor listened to the case of both parties.

In reply, Mr. Thompson for the respondent refers to *Phipson on Evidence*, 10th ed., at 11 (1963) where it is said that: "In civil, but not in criminal cases, the rules of evidence may be relaxed by *consent or contract of parties*, or *order of the court*." Mr. Thompson refers to p.6 of the records where both parties selected a common replacement which was approved by the magistrate.

I agree with Mr. Thompson that in civil cases, the parties may relax the rules of evidence. It is quite clear from the records that both parties themselves selected the replacement and it was not the magistrate who selected the replacement. The case of *Juxon-Smith v. R.* cited by Mr. Buck is a criminal case, whereas the present case is a civil case, and as such the ruling in that case has no application to the present case.

Section 29(1) of the Local Courts Act, 1963 states:

"As from the commencement of this Act, there shall be constituted a District Appeal Court which shall consist of the Police Magistrate for each District sitting with two Assessors selected by him from a list of experts in customary law drawn up by the District Officer. . . ."

In this particular case, one of the assessors was absent. Both parties, it appears to me, were desirous to proceed with the hearing of the case, and they therefore selected another assessor who was approved by the magistrate. The magistrate did not at any time throughout the proceedings hear the case with one assessor. There have been two assessors throughout the hearing of the case as provided by s.29(1) of the Act; the replacement was done by the parties to the action, and this being a civil case, the parties were entitled to choose another assessor at any stage of the proceedings, with the approval of

the magistrate. In the circumstances, I hold that the court was properly constituted.

5 For the purposes of convenience, I shall deal with grounds 2 and 3 together namely, that the judgment was against the weight of evidence, and that the proceedings in the District Appeal Court were irregular.

Counsel for the appellant has referred me to p.1 of the proceedings and the passage of which counsel is complaining runs thus:

10 "I asked the appellant why he had trespassed and he said the bush was his. I summoned the appellant to the late Paramount Chief Kande Kolleh. He visited the bush. He decided that the Bramaia people (*i.e.* the appellant) had trespassed on the Shekaia land. From that time, he ruled that the Maligie stream was to be the undisputable boundary between us. He then returned to Kukura. One Alikali Momoh of Bramaia insisted that an oath should be taken to find the true owner of the disputed land. The bush in dispute was the one the appellant brushed when he came across the Maligie stream to Shekaia land. Alikali Momoh took oath on the Holy Koran. As a result, the Paramount Chief gave him the disputed bush for the Bramaia people."

25 According to the appellant's counsel, the learned magistrate and the two assessors ought to have accepted the above passage, but they failed to do so and the verdict was against the weight of the evidence. I entirely disagree with appellant's counsel. This is a question of fact, and it is the function of the magistrate to determine questions of fact. Moreover, at the same p.1 of the proceedings, there is this piece of evidence:

30 "Before Alikali died, he realised that he had falsely claimed the bush and he returned it to me. One Brima and another Lamina Sillah (both called and identified) were present. There was one Elder Foday whom Alikali Momoh selected to be chief witness of the handing over."

35 It appears to me that the magistrate and the assessors accepted this piece of evidence, and accordingly decided in favour of the respondent.

Counsel for the appellant also complained that the proceedings before the magistrate were irregular, and in this connection, he repeated substantially the argument he pursued under ground 1. I have already ruled that there was no irregularity, but even if there was irregularity, the appellant is debarred from complaining under

s.33(2) of the Local Courts Act, 1963, which reads thus:

"Notwithstanding that the Appeal Court is of the opinion that a point raised on appeal might be decided in favour of the appellant no process or proceedings of a Local Court shall be set aside or declared void by reason of any defect in procedure or want of form or any other reason of a purely technical nature. . . ."

I agree entirely with the findings of the magistrate and assessors. I accordingly dismiss the appeal with costs assessed in the sum of Le 200.00.

Appeal dismissed.

HEDJAZI v. FAHS

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): January 21st, 1970
(Civil App. No. 29/69)

[1] **Arbitration—award—effect of award—will not estop further action between parties if cause of action arises after award:** A judgment on an arbitration award does not estop one of the parties to the arbitration from bringing a further action if the cause of action arises after the award was made and involves matters outside the scope of the arbitration (page 13, lines 20–24; page 14, lines 34–41).

[2] **Arbitration—award—enforcement—summary procedure only followed where issues clear—must be by action in doubtful cases:** An arbitration award may be enforced summarily where the issues are reasonably clear and any objections raised may be easily disposed of, but in doubtful cases, as where there are matters which may gravely affect the validity of the award, a party seeking to enforce it must be left to his remedy by action (page 14, lines 5–23).

[3] **Civil Procedure — judgments and orders — enforcement — Supreme Court not bound to enforce order of Court of Appeal made per incuriam:** The Supreme Court is not bound to enforce an order of the Court of Appeal which was made *per incuriam* (per Marcus-Jones, J.A., page 19, lines 29–31).

[4] **Civil Procedure—pleading—matters which must be specifically pleaded—special damage—amount of certainty and particularity must be reasonable according to facts of case—allegation of general loss of business may be sufficient:** A claim for special damage in tort must be specifically pleaded, sometimes with arithmetical particularity, but