

**KANGWA v LWANDO (1967) ZR 61 (HC)**

HIGH COURT

BLAGDEN CJ

12th May 1967

**Flynote and Headnote**

**[1] Courts - Local Court - Transfer of proceedings to Magistrate's Court - 30 Representation of parties as reason for transfer - Complexity of issues.**

A local court should only make an order transferring a case to a subordinate court to enable parties to be represented by counsel when the case is of a sufficiently complex nature so that there is a need to have it argued by professional lawyers. 35

**[2] Legal Profession - Representation of parties - Grounds for transfer of proceedings from local court - Complexity of issues.**

See [1] above.

**[3] Courts - Local court - Transfer of proceedings to Magistrate's Court - Defendant's wish for representation - Not grounds for transfer. 40**

It is for the plaintiff to choose the court in which he brings his action, and the wish of the defendant to be legally represented is not, in itself, a sufficient reason to justify a transfer.

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**[4] Legal profession - Representation of parties - Defendant's wish for representation - Not grounds for transfer from local court.**

See [3] above.

**[5] Courts - Local court - Jurisdiction - Action for slander arising out of 5 criminal proceedings.**

A local court has jurisdiction to hear an action for slander under local customary law, even though the alleged slander arises out of a complaint made by the defendant to the police resulting in criminal proceedings against the plaintiff. 10

**[6] Customary law - Slander - Jurisdiction of local court - Complaint resulting in criminal proceedings.**

See [5] above.

**[7] Courts - Local court - Authorised officer's power to revise orders - Local Courts Act, 1966, s. 54 (3) - Parties' right to appeal against order - 15 Authorised officer must allow time for appeal.**

An authorised officer exercising powers of revision of an order of a local court conferred on him by s. 54 (3) of the Local Courts Act, 1966, must allow an opportunity for the parties themselves to appeal against the local court's order before exercising his powers. 20

[8] **Administrative law - Authorised officer - Power to revise orders of local court - Must allow parties time to appeal against order.**

*See* [7] above.

Statutes construed:

Constitution of Zambia (App. 3), ss. 98 (5), 125. 25

Local Courts Act, 1966 (No. 20 of 1966), ss. 53 (1), 54, 56, 62.

**The plaintiff in person.**

*Mkandawire*, for the defendant

**Judgment**

**Blagden CJ:** This matter has been put before me with a view to my exercising the High Court's supervisory powers, conferred on it by 30 section 98 (5) of the Constitution and section 62 of the Local Courts Act, 1966.

Section 62 of the Local Courts Act reads:

"Every President or other local court justice and every proceeding before such President or other local court justice shall be subject 35 to the orders and directions of the High Court."

By section 98 (5) of the Constitution:

"The High Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court - martial and may make such orders, issue such writs and give such 40 directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court."

It is to be noted that by the wide definition given to "subordinate court" in section 125 of the Constitution, the High Court has jurisdiction

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to supervise the proceedings of local courts. The Chief Justice is empowered by subsection (5) of section 98 of the Constitution to make rules to regulate the implementation of this jurisdiction. None have so far been made but their absence does not impede its exercise.

It is clear from the wording of the relevant provisions that the High 5 Court's supervisory powers are extensive and virtually unfettered, the sole criterion being that any order made in their

exercise should be ". . . appropriate for the purpose of ensuring that justice is duly administered . . ." in the court in question.

The history of the matter is as follows: on the 28th November, 1966, 10 the parties appeared before the Kitwe local court, Wusakili Division, at the suit of the plaintiff claiming damages for slander. Particulars of his claim are endorsed on the case record in these terms:

"Slander in that you accused me falsely of having assaulted you and as a result I was detained in a police cell for no reasons." 15

The court heard the plaintiff, who explained that his case was that on the 14th October, 1966, after the defendant had been beaten up by unknown persons, he, the defendant, went and lodged a complaint at the police station that it was the plaintiff who had beaten him up. Thereafter the plaintiff was arrested by the police and detained for four days. Then, when 20 the plaintiff appeared before the court (the record does not indicate what court), he established an alibi and was acquitted.

The defendant, when called on by the Wusakili court, denied these allegations. He maintained that the plaintiff had indeed assaulted him on the 14th October, 1966. He admitted that the plaintiff had been arrested 25 and later acquitted, but contended that the plaintiff was merely bringing this action in order to defeat the defendant's own claim for the damage caused to his property and the injuries to his body by the plaintiff's assault.

The defendant informed the Wusakili court that he had engaged 30 lawyers to represent him. On receipt of this information the Wusakili court then made an order, which was recorded in the case record in the following terms:

"Court adjourns the hearing and transfers the case to the Resident Magistrate's court, where the defendant will be represented by his 35 lawyers, but the date of resumption of the case not delivered to the parties concerned in this case. No fees collected from the parties concerned in the case."

The local court's jurisdiction to transfer this case could only be derived from section 53 (1) of the Local Courts Act, 1966, which, omitting 40 words irrelevant to the issues in the instant case, reads as follows:

"Where any proceedings . . . have been commenced in a local court such local court . . . may at any time before judgment, either with or without an application from any interested party in that behalf,

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by order, and for reasons which shall be recorded in writing on the record of the case, stay such proceedings and . . . transfer such proceedings . . . to a Subordinate Court of the first or second class within whose area of jurisdiction the local court . . . is situate." 5

On the same day, 28th November, 1966, an authorised officer, purportedly exercising the powers of revision conferred upon him by section 54 (1) of the Local Courts Act, made the following order:

"Case transferred to the subordinate court of the second or first class in terms of Section 53 (1) of the Local Courts Act, the reasons 10 given by the court refers to Section 15 (1) of the Local Courts Act. Transfer confirmed."

The effect of this order was to confirm the local court's order of transfer but to bring it more closely into line with the provisions of section 53 (1) by substituting for the Resident Magistrate's court, as the transferee 15 court, "the subordinate court of the second or first class".

The powers of inspection and revision conferred upon an authorised officer by section 54 of the Local Courts Act enable him to send for and inspect the record of "any proceedings" before any local court within the area of his jurisdiction "for the purpose of satisfying himself as to the 20 correctness, legality or propriety of any judgment, order, decision or sentence recorded, made or imposed by such court, or as to the regularity of such proceedings." These powers are wide and I am satisfied that the words "any proceedings" and "order" are wide enough to include the proceedings which resulted in the order for transfer here.

As 25 I indicated at the commencement of my judgment, the High Court's supervisory powers in relation to this order of transfer made by the local court and confirmed on review by the authorised officer, are wide, but they should not be exercised by way of quashing or varying that order, except where such a course is ". . . appropriate for the purpose 30 of ensuring that justice is duly administered . . ." by the court affected thereby.

The matters which require consideration in the light of the foregoing can be conveniently set out in the form of four questions:

(1) Was the local court's order of transfer made validly in accordance 35 with the provisions of section 53 (1) of the Local Courts Act, with particular reference to the requirement of that provision that the reasons for the order of transfer should be recorded on the record of the case?

(2) Was the local court's order of transfer proper, having regard 40 to the fact that it was purportedly made on the grounds that the defendant wished to be represented by a legal practitioner?

(3) Was it proper for the local court to have assumed jurisdiction to deal with the case at all, in view of the fact that the plaintiff's claim was in respect of an alleged slander arising out of 45 a complaint made by the defendant to the police, as a result of which criminal proceedings were instituted?

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(4) What was the effect of the authorised officer's order on revision confirming the local court's order of transfer?

On or about the 30th January, 1967, the parties to this action were apprised by the Registrar by letter of the fact that the High Court was proposing to exercise its supervisory powers. They were at the same time advised of the issues which I have just related, and they were invited to make representations in writing within a period of fourteen days from the date of the receipt of the Registrar's letter. Both parties have availed themselves of this opportunity and made representations.

The representations made by the plaintiff relate almost entirely to the facts of his dispute with the defendant - that is to say, matters which are really for the court of trial - and do not really deal with the issues now before the High Court. This is not surprising, as the plaintiff is not legally represented and cannot be expected to appreciate the niceties of legal issues.

The defendant's representations were submitted in writing by his lawyer, Mr Mkandawire.

The first of Mr Mkandawire's representations is to the effect that:

". . . as the allegations against . . . Mr. John Lwando arise from criminal prosecution against the complainant and the said complainant claims damages for slander, the local court would not have jurisdiction over this matter;"

No reason is given for this assertion, which I am unable to follow, but it is followed by a more telling submission that, even if the local court had got jurisdiction, it was still "proper" for this case to be transferred to the Resident Magistrate's court under the terms of section 53 (1) of the Local Courts Act. It would seem, although this is not entirely clear, that in using the word "proper" Mr Mkandawire does not mean "proper" in the sense of "appropriate" so much as in the sense that the local court, having regard to its powers under section 53 (1) of the Act, was empowered to make the order of transfer. Undoubtedly the local court did have jurisdiction to make an order of transfer, but the question is, did it exercise that jurisdiction in accordance with the terms of the statute conferring it and, if so, was the order of transfer a proper one having regard to the paramount interests of the justice of the case?

I will now deal seriatim with the four issues in the case which I have already set out:

(1) *Was the local court's order of transfer made validly in accordance with the provisions of section 53 (1) of the Local Courts Act, with particular reference to the requirement of that provision that the reasons for the order of transfer should be recorded on the record of the case?*

From the record of the local court it is apparent to me that the reason for the local court's order of transfer was the circumstance that the defendant had engaged lawyers and was anxious to be represented by them. Although

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this reason is not very clearly stated in the local court's record it is, in my view, sufficiently clearly stated for it to be said that the local court, in making its order, complied with the provisions of section 53 (1) of the Local Courts Act. 5

(2) *Was the local court's order of transfer proper, having regard to the fact that it was purportedly made on the grounds that the defendant wished to be represented by a legal practitioner?*

[1] [2] This poses the difficult question of whether it is right to make an order of transfer of a case from a local court to a subordinate court for the purpose of enabling the parties, or one of them, to be represented by counsel. In my view, the resolution of this question is closely related to the complexity of the case and the need, in consequence, to have it argued out before a relatively senior forum and by professional lawyers. Where a case is of such a complex nature than \* there might well be good grounds for transferring it from a local court to a subordinate court.

In the present case, if both the parties had been legally represented, I feel I would have supported the order of transfer. [3] [4] But difficulties arise where, as here, only one of the parties is so represented and the other party cannot afford such assistance. Primarily, it is for the plaintiff to choose the forum in which to bring his action. If he chooses to bring a highly complex matter before a local court he takes a certain risk. The resolution of the complexities involved may prove beyond the capabilities of the local court. Mistakes may be made which can only be remedied by an appeal and its attendant expenses; or the local court, appreciating the difficulties, may in any case transfer the hearing of the action to a subordinate court.

Actions for slander, under the English law, can on occasions prove highly complex and they can also involve questions of law of some difficulty. But in the present case the plaintiff is not suing for slander under English law. He is suing for slander under African customary law. Ordinarily, such an action would be heard in a local court, but it could also be tried in a subordinate court with the presiding magistrate sitting with assessors.

I have examined the allegations and counter-allegations made in this case in as much detail as I can from what appears on the record, and although there may indeed be considerable conflict in the evidence as to the facts, I cannot say that I find the issues complex or deserving of transfer to a subordinate court on that account. In any event the local court did not transfer the case because the issues were likely to prove complex. From the record - and I do not see that I should go outside it even if such were possible - it is clear that the only reason for the transfer was because the defendant had engaged, and wished to employ, a lawyer to represent him. In my view this reason, standing by itself, is insufficient to justify a transfer. I do not think it would be in accordance with justice to allow a defendant to have the case in which he is sued removed from the forum which, subject to considerations of jurisdiction, the plaintiff is

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entitled to choose, and transferred to another forum simply to enable the defendant to enjoy the advantages of legal representation in court which the plaintiff cannot or does not wish to afford.

(3) *Was it proper for the local court to have assumed jurisdiction to deal with the case at all, in view of the fact that the plaintiff's claim was in respect of an alleged slander arising out of the complaint made by the defendant to the police, as a result of which criminal proceedings were instituted?*

[5] [6] It must be remembered that the plaintiff was seeking redress against the defendant under local customary law. Had he been guided purely by considerations of English law he would most likely have sued for damages for malicious prosecution and possibly also for false imprisonment. As it is, he has framed his action as a claim for damages for slander. The fact that the actions of the defendant, of which he complains, resulted in criminal proceedings being taken does not seem to me to affect in any way the plaintiff's right to take proceedings for damages to compensate him for the injuries he has suffered; and this he could do in either a local court or in a subordinate court.

(4) *What was the effect of the authorised officer's order on revision confirming the local court's order of transfer?* 20

As I have already indicated, the authorised officer had jurisdiction to revise the local court's order of transfer and to exercise the powers conferred on him by subsection (3) of section 64 of the Local Courts Act. Basically, these comprise the power to revise any order of the local court under paragraph (a), or to quash any of its proceedings under paragraph 25 (b). We are not concerned here with the power to quash. The power to revise under paragraph (a) is a power to "revise any . . . order . . . of a local court . . . in respect of which no appeal has been validly entered, or no application for leave to appeal out of time is pending . . . by reversing, amending or varying in any manner such . . . order . . .". There is a *proviso* 30 relating to awards of a civil nature which, in my view, is not relevant here as I would not regard an order of transfer as coming under the category of an "award".

[7] [8] What the authorised officer has done here is to vary slightly the local court's order. The words "transfer confirmed" are otiose. Section 35 54 confers no power of confirmation upon revision and such is not needed. But there is one aspect of the authorised officer's order on revision that requires comment. It has been made too soon and without allowing the parties the opportunity to appeal, if they so wished, against the local court's order. The right of appeal is conferred by section 56 of the Local 40 Courts Act which, omitting irrelevant words, provides that:

". . . Any interested party who is aggrieved by any . . . order . . . of a local court . . . made in the case in which he was concerned, and which has not been revised, may appeal therefrom to a Subordinate Court of the first or second class within whose area of jurisdiction such local court is situate".

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An appellant normally has thirty days within which to enter his appeal (see subsection (3)). But it would appear that upon the strict construction of section 56 (1) of the Local Courts Act the authorised officer's action in revising the local court's order precluded either of the parties from appealing 5 against the local court's order at all. However, each would have the right to appeal against the authorised officer's order on revision, in pursuance of the provisions of section 56 (2) (a).

Earlier in my judgment I said that undoubtedly the local court did have jurisdiction to make an order of transfer in this case, but the question 10 was, did it exercise that jurisdiction in accordance with the terms of the statute conferring it and, if so, was the order of transfer a proper one having regard to the paramount interests of the justice of the case? I would answer "yes" to the first half of that dual question, and "no" to the second.

Accordingly, 15 in the exercise of the powers of supervision conferred on the High Court, I order that the local court's order of transfer dated 18th November, 1966, and the authorised officer's order of revision of the same date be quashed and that this action be tried in the Wusakili 2 Division of the Kitwe Local Court. 20

*Order quashed*

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\* "than" should read "then"