

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**JUDGMENT**

**Case No.: CA 04/2017**

In the matter between:

**IRUMKARD CICILIE GAMISES**

**APPLICANT**

and

**TANGENI JOHANNES KAKUTI**

**RESPONDENT**

**Neutral citation:** *Gamises v Kakuti* (CA 04/2017) [2017] NAHCNLD 102 (20 October 2017)

**Coram:** CHEDA, J

**Heard:** 20 October 2017

**Delivered:** 20 October 2017

**Flynote:** A failure to afford a litigant an opportunity to cross-examine a witness and/or to explain the purpose thereof results in the proceedings being adjudged to be irregular and therefore will be set aside.

**Summary:** In a civil trial, the court did not afford the parties an opportunity to cross-examine each other and further failed to explain the said procedure and its purpose. The proceedings were deemed to be irregular and were set aside.

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### ORDER

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1. The proceedings in this matter of the 3<sup>rd</sup> of February 2017 at the Magistrates' court, Tsumeb be and are hereby set aside;
  2. The matter is referred back to the Magistrate Court, Tsumeb, for a trial *de novo* before a different Magistrate;
  3. The hearing in this matter should be held and concluded on/or before 17<sup>th</sup> of November 2017 as it involves a minor child; and
  4. In the event that any of the parties is not happy with the decision of the said court, the appeal shall be heard before this court on the 7<sup>th</sup> of December 2017 at 09h00.
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### JUDGMENT

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#### CHEDA, J

[1] This is an appeal from the magistrate court sitting at Tsumeb. Respondent had applied for custodianship of a minor child who was born out of his union with the applicant.

[2] On the day of the hearing I notice that the record of proceedings omitted certain steps which should have been followed by the court *a quo*. Both parties took oath, gave evidence, but, none of them were given an opportunity to cross-examine each other. The court *a quo* did not even explain the purpose of the cross-examination. Immediately after the parties had given evidence, the learned trial magistrate referred the matter to the social worker for investigation. The social worker indeed carried out his/her investigations and recommended that the now respondent should be awarded custody of the said minor child.

[3] Upon receipt of the report the learned trial Magistrate ruled in favour of the respondent. In his judgment he did not refer to the credibility or otherwise of the witnesses. This is understandable because they were not tested. The cross-examination of a witness cannot be over emphasised and the courts have dealt with this aspect for time without number, see *Carroll v Carroll* 1947 (4) SA 37 (W) at p 40 where Henochsberg AJ said:

‘The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.’

[4] It is trite that a witness who elects to give evidence must be tested by cross-examination by the opposing party unless the said opposing party elects not to exercise that right. It, therefore, follows that a court which fails to explain and/or avail such an opportunity to a litigant will have committed an irregularity. It is the duty of the trial court to explain to unrepresented litigants their rights to cross-examination and its purpose and such duty cannot be delegated to an interpreter, see *S v Malatji & another* 1998 (2) SACR 622 (W). A litigant should not only be given an opportunity to cross-examine, the purpose of the said cross-examination should also be explained to him. At the hearing of the appeal, appellant raised the issue of having not been accorded an opportunity to cross-examine the respondent. This was indeed confirmed by respondent who was also not given that opportunity. In fact the record is silent with regards to that aspect.

[5] Article 12 (1) (a) of the Namibian Constitution reads:

*‘In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.’*

[6] It therefore grants all citizens a right to a fair trial and the aspect of this right finds itself in the right to adduce and challenge evidence. Failure to give the parties that opportunity is a serious and gross misdirection which vitiates the whole proceedings, see S

*v Mgudu* 2008 () SACR 21 (N) of 77; *S v Mcolweni* 1973 (3) SA 106 (E) and *R v Ndowo & others* 1961 (1) SA 16.

[7] The parties' constitutional rights were seriously violated and as such the said proceedings should not be allowed to see the light of day. The courts are urged to pay more attention to these requirements as failure to do so plays havoc on peoples' rights.

[8] In conclusion, I find that there was a serious irregularity in these proceedings.

[9] It is ordered that:

1. The proceedings in this matter of the 3<sup>rd</sup> of February 2017 at the Magistrates' court, Tsumeb be and are hereby set aside;
2. The matter is referred back to the Magistrate Court, Tsumeb, for a trial *de novo* before a different Magistrate;
3. The hearing in this matter should be held and concluded on/or before 17<sup>th</sup> of November 2017 as it involves a minor child; and
4. In the event that any of the parties is not happy with the decision of the said court, the appeal shall be heard before this court on the 7<sup>th</sup> of December 2017 at 09h00.

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**CHEDA, J**