

JERSEY / JUDGMENT

AG v Akhonya [2022] JRC 276 (12 December 2022)

[2022] JRC 276

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JUDGMENT

THE Commissioner: 1. The Defendant is charged with knowingly providing false information for the purpose of giving notice of intended marriage contrary to Article 76(1) of the Marriage and Civil Status (Jersey) Law 2001, that information being that his marital status was single, and secondly with bigamy contrary to the customary law in as much as he purported to contract a marriage in St Helier on 21 August 2015 during the lifetime of his wife, Agatha Ongamo, whom it is said he married on 26 March 2008 at the Registrar's Office in Nairobi, Kenya. The Defendant's trial is due to commence on Monday 12 December. 2. On 7 December, I received two applications from Crown Advocate Hallam on behalf of the prosecution. The first was an application that Ms Loyce Chebchumba Bett give her evidence by video link. Ms Bett made a witness statement on 1 September 2021, in which she described herself as employed as a senior assistant registrar of marriages in the Office of the Attorney General and Department of Justice, Registrar General's Department, Marriages Section in Nairobi, Kenya. In her statement, she indicated that she had searched the marriage records kept in the marriages registry, and found a marriage certificate in respect of the Defendant and Agatha Nabwari Ongamo dated 26 March 2008. The contentious part of her statement indicates that "The available marriage record indicates that the two, Douglas Ndenga Akhonya and Agatha Nabwari Ongamo entered into a civil marriage on the 26 March 2008 at the Office of the Registrar of Marriages, Nairobi". Ms Bett exhibited to her statement a copy of an extract from the marriage register reflecting the marriage certificate in question. 3. Advocate Boothman confirmed that he had no objection in principle to Ms Bett giving evidence by video link, nor indeed did he have any objection in principle to the production of the alleged marriage certificate. He said that that was a document the provenance of which would be admitted. His difficulty was with that part of the witness statement in which Ms Bett said that the Defendant and Ms Ongamo had entered into a civil marriage. Despite Crown Advocate Hallam's protestations to the contrary, the reasons for that objection cannot in my judgment have come as too much of a surprise to the prosecution because in three very long question and answer interviews with the police, the Defendant has said on more than one occasion that the arrangement that he had with Ms Ongamo was not a marriage properly so called but a customary law union which it was necessary to have registered to protect his access to their son. 4. The last of the three interviews was conducted on 25 November 2021. The Defendant was indicted in this

Court on 10 June 2022, and a pre-trial directions hearing was held before the Deputy Bailiff on 7 July 2022. At that time, the Court had the advantage of the defence case statement which had been signed by the Defendant on 20 May 2022. At paragraphs 6 to 8 of that defence statement, the Defendant said this: "6. The Defendant has never been married to Agatha Ongamo according to the laws of Kenya or any other jurisdiction. He and Ms Ongamo entered into a customary union on 26 March 2008 which is not a marriage in law. Under Kenyan customary law and practice an individual may enter into multiple such customary unions. 7. In the event that it is proved that a marriage came into being between the Defendant and Ms Ongamo the Defendant is not guilty in that he did not know or believe that he was married to Ms Ongamo and believed at all times that their marriage was a non-binding customary union. 8. For the aforementioned reasons, the Defendant did not, when he married Ewa Przyborowska on 21 August 2015, knowingly provide false information and did not commit bigamy as alleged in the charges." 5. Later in the defence case statement, the Defendant made plain that he and Ms Ongamo had entered into a customary marriage on 26 March 2008, which was a form of union, not a marriage, according to Kenyan law, and was made by him for the purpose of protecting his paternal rights including rights of contact with his son. 6. Before the pre-trial directions hearing, the plea and directions hearing form was completed. At Section 1B, in answer to the question whether the prosecution intended to serve any further evidence, the response was 'Yes - clarification evidence from Loyce Betts. Possible expert evidence re Kenyan matrimonial law'. 7. At Section 2E of the same document, the nature of the defence was set out again, in very similar terms to that set out in the case statement. It was said that a key issue was 'whether the Defendant and Ms Ongamo were married under Kenyan law on 26 March 2008...'. 8. In relation to experts, at Section 5A, the entries made are these: "The Crown is considering obtaining expert evidence on Kenyan matrimonial law. If such evidence is to be relied upon, the relevant application will be made. The defence is considering obtaining expert evidence on Kenyan matrimonial law and the evidence of Beatrice Otete. If relied upon, the relevant application will be made." 9. Finally at Section 6 of the form, the Crown indicated that it considered the marriage certificate produced by Ms Betts was admissible hearsay under Article 66 of the Police Procedures and Criminal Evidence (Jersey) Law, and at Section 6C, the defence indicated that it had no application to exclude evidence. 10. There is no agreement as to precisely what was said before the Deputy Bailiff on 7 July, but there cannot be any doubt about the directions which the learned Deputy Bailiff gave. 11. Paragraph 3 of the Act of Court shows that the Court 'directed that on or before by 5pm on 30th September 2022, the prosecution shall file and serve any application to adduce any expert evidence accompanied by the expert's report'. The Act goes on to state that the defence would then have until 11 November to file and serve any application to adduce any expert evidence in response. 12. Crown Advocate Hallam confirmed to me that Ms Betts has no legal qualifications. She is a civil servant employed in the Attorney General's Department, Marriages Section, and deals with administrative matters in relation to marriages in Nairobi. She would be tendered as a witness of fact and not as an expert. 13. In the course of these submissions as to whether she should be permitted to give evidence by video link, it became obvious that the real objection was in connection with the part of her witness statement in which she says that the parties entered a civil marriage. Advocate Boothman, for the Defendant, contends that she is not able to give that evidence because it is a

technical legal matter and not a matter of fact. With some reluctance, he was prepared to accept that she could give evidence as to her search in the records of the marriage registry for a copy of the marriage certificate, and she could also say where in the marriage registry she found that entry and certificate: accordingly, if the registry were so organised as to reflect the different types of marriage which the Kenyan Marriage Act 2014 appears to recognise, such as Christian marriages, customary law marriages, civil marriages, Hindu marriages and Islamic marriages, then there could not be any objection if she were to say that she found the relevant entry in the civil section of the marriage registry. However, that would not be the same thing as giving evidence as to whether the parties entered a civil marriage, because that would be a question of law and not a question of fact. 14. This is relevant not only because of the defence which is raised in the defence case statement and on the face of the PDH form but also on the face of the marriage certificate itself, which describes under the heading 'Condition' the Defendant and Ms Ongamo as 'Married under Customary Law'. That part of the marriage certificate may simply reflect the status of the parties to the 'marriage'

- spinster / bachelor / single / divorced and so on, but it does also make it plain that there was a recognition that they were at that time married under customary law. This might be thought to have some relevance if, as the Marriage Act 2014 suggests, a marriage celebrated under customary law or is Islamic law is presumed to be polygamous or potentially polygamous, whereas as a Christian, Hindu or civil marriage is monogamous. 15. The marriage certificate shows a record of a 'marriage' between the Defendant and Ms Ongamo in 2008, and there is thus a question over whether the Marriage Act 2014 applies at all
- it is described in its long title as an act 'to amend and consolidate the various laws relating to marriage and divorce and for connected purposes', and it is noted that by Section 97 and the Schedule it repealed the previous Marriage Act in 1902, reflected in the revised version in 2008. 16. It became clear in the exchanges between counsel and the Court that the interplay between civil marriages and customary law marriages prior to 2014 was not as clear as it could be and would require expert evidence; and given that Ms Betts was not an expert witness, she would not be permitted to give expert testimony to the jury as to whether the Defendant had entered a civil marriage which continued at the date of his 'marriage' to the complainant in 2015. 17. I gave leave to the prosecution to adduce the evidence of Ms Betts by video link, but I made it plain that, to the extent that she was giving expert evidence as to whether the Defendant had entered a civil marriage, that evidence would not be permitted. Not being an expert, she would not be able to give evidence as to the validity of that marriage. 18. Crown Advocate Hallam accordingly applied to adjourn the trial on the basis that she would seek expert evidence as to Kenyan law in order that that might be put before the jury. Having heard the parties, I refused the adjournment with reasons reserved and I now give those reasons. 19. Although we have not had many prosecutions for bigamy in Jersey, there is the case of *Procureur Général v Bazille*

[1984] 23 PC 352, in which bigamy was charged, but the prosecution was later abandoned, albeit only because the second marriage was contracted out of the jurisdiction, which therefore at least provides some slender basis for saying that the offence is known to the customary law of the island. There may well have been other prosecutions. Having regard to the position in England and Wales, however, it is clear that, for the purposes of the common law offence of bigamy, 'being married' requires that the first marriage must be monogamous for the offence to apply. A potentially polygamous marriage may become monogamous in character, either by operation of a relevant foreign law or by the acquisition of an English domicile. If a potentially polygamous marriage has become monogamous at the date of the second marriage, the parties to the first marriage are, within the meaning of the words 'being married'. See Halsbury's Law of England 5th Edition Volume 26 at paragraph 988. 20. In terms of the evidence which is required, the entry at paragraph 991 of Halsbury is in these terms: "In proceedings for bigamy, the prosecution must prove the celebration of the first marriage and the identity of the parties; evidence of cohabitation with the reputation of being married is not sufficient. If a certified copy of an entry in a marriage register book is produced, the defendant's identity with the person named in it may be proved by any means and a witness to the register need not be called. It is not, however, essential to prove registration; it is sufficient to call a person who was present at and can describe the ceremony and identify the parties. If the first marriage is proved, its validity will be presumed in the absence of evidence to the contrary; but in the case of a foreign marriage expert evidence of validity is necessary. The prosecution must also prove that the first spouse was alive at the date of the second marriage; where there is evidence only that he or she was alive at some time before that marriage, the question whether he or she was alive at the relevant date is one for the jury and the law makes no presumption as to the continuance of life..." [emphasis added] 21. The authority for the statement that in the case of a foreign marriage expert evidence of validity is necessary is given as *R v Naguib*

[1917] 1 KB 359. Advocate Boothman produced a copy of that authority which in my judgment is particularly in point in the present case because what is put in issue by the defence case statement is the nature of the 'marriage' between the Defendant and Ms Ongamo in Kenya. In order to establish its case, the Crown must prove that it was a monogamous first marriage and expert evidence will be needed. In its absence, there would be a half time submission of no case to answer because there would be no evidence fit to put before the jury on that important prerequisite for establishing guilt. 22. In making her application for an adjournment, Crown Advocate Hallam suggested that this issue had been raised very late by the defence and it was not in accordance with the overriding objective to deny the prosecution time to remedy the problem by calling expert evidence. Accordingly the application was made to adjourn, and she suggested it might be possible that the trial could take place in February, an existing trial having been vacated. I had some doubt as to whether expert evidence on Kenyan law will be available in sufficient time for the defence to consider it and instruct their own expert with a trial date in early February, and if those

dates are not capable of being met, we are then left with adjourning the trial until the middle of 2023. 23. Advocate Boothman submitted that the application to adjourn should be rejected. The Crown has known the position since the plea and directions hearing at the very latest, but in fact it has been plain both from the defence case statement and from the Defendant's answers in interview in 2021. In his submission the Crown was required to prove its case and knew what that case was from the outset. It was the prosecution choice not to seek expert evidence and it should not be given time now to correct the mistake which it has so obviously made in failing to gather that evidence. The overriding objective included the conviction of the guilty and the acquittal of the innocent, but it was not possible to say at this stage whether the Defendant was or was not guilty; and the overriding objective also included dealing fairly with the parties and ensuring that prosecutions were brought forward expeditiously and efficiently. From the outset, the Crown knew or should have known what it had to prove and now, two full working days before trial, an application was made to adjourn in order that it could put the necessary case together. 24. I have also noted the following passage in Archbold 2022 edition: " 31-18 The second marriage is not bigamous unless the first marriage was valid; and the validity of the first marriage must be proved by the prosecution ... for the law will not presume it in the case of bigamy as it will in civil cases: *Smith v Huson* (1811) 1 Phillimore 287 ... 31-24 ... A marriage celebrated in a British colony, according to the rites and ceremonies of the Church of England, may be proved by the production of a certificate of the entry in the ecclesiastical register... It has been held, in reliance on the Evidence (Colonial Statutes) Act 1907 that a marriage in a Commonwealth country can be proved by the production of a marriage certificate, and of the local statute or ordinance making that certificate evidence of the marriage... The propriety of this method of proof has been doubted. In all other cases, it will be necessary, in addition to proof of celebration to call expert evidence as to the validity of the marriage: *Naquib* (1917) Cr App R. 187, CCA. This equally applies to a defendant who relies on the validity of a prior subsisting foreign marriage as a defence to a charge of bigamy..." 25. I note that in England there have been some statutory changes referred to in Archbold at 31-25 which have the effect that a marriage contracted outside England & Wales at any time is no longer void on the ground that it is "potentially polygamous", if in fact it was not polygamous when it was contracted, but nothing has been put before me to suggest that those statutory provisions in question have validity here. 26. I am absolutely persuaded that dealing with this case fairly and efficiently requires that there should be no adjournment. The prosecuting authorities have known about the case since 2021, and the last interview with the Defendant took place in November of that year. When the decision was made to charge him, the prosecution should have had in mind the evidence which it needed to prove that charge. To the extent that there were any doubts about that, and there should not have been, the pre-trial directions hearing in July removed them. The Deputy Bailiff expressly directed that any application to call expert evidence should be made by 30 September. These case management hearings result in orders which are intended to be complied with. 27. The proof of the validity of the first marriage was an essential plank in the prosecution case. There was a gap in the evidence

in the absence of any expert evidence going to that issue as a result of a prosecution mistake, not because the defence position had changed. It is now, at the 11 th hour, that the prosecution have realised that mistake and seek the Court's indulgence to have time to rectify it. 28. In this case, it is true to say that the only prejudice to the Defendant is that of delay, but that understates it. The prejudice is that the Defendant faces the stress of a prosecution which is of very great personal significance to him, not just in terms of any potential custodial outcome but also as to the impact on his residential qualifications, his British Army Reserve involvement and his existing and potential employment in the future. The public interest requires that the prosecuting authorities are efficient in the conduct of their prosecutorial duties for the very reason that complainants, witnesses, the jury and defendants all have a key interest in the outcome of criminal proceedings in their different ways. 29. In this case, I have no doubt that the balance comes down in favour of refusing the application to adjourn. The trial must either go ahead or, if the Crown so resolves, the prosecution will be discontinued on such terms as are appropriate. Further application 30. On 9th December, after this draft judgment was prepared but before it was handed down, the prosecution made a further application to me - on this occasion for leave to adduce expert evidence on Kenyan law from a Ms Joan Mukoya Mwasame, an advocate of the High Court of Kenya and the managing partner of a registered law firm in Nairobi. Despite the doubts I had expressed and summarised in paragraph 22 above, a witness statement from Ms Mwasame was provided addressing the points which the Crown considered were needed to establish its case. On the face of the material provided, there did not seem any doubt that Ms Mwasame would be treated by the Court as an expert witness. 31. The material supplied to Ms Mwasame included the witness statement of Ms Betts and a copy of the marriage certificate of 26 March 2008. It did not include a copy of the defence case statement, nor the question and answer interview with the police, nor the pre-trial review directions form. Her witness statement does not therefore address all the points which would no doubt need to be addressed at trial. I assumed these would emerge if the defence obtained their own expert report, or, less conveniently for the trial process, during cross examination. 32. I recognise that the expert report reads well and that I have no qualification to address its accuracy. I limit myself to saying that I can see from the materials relied upon that there might be more than one expert view on some of the matters addressed. 33. In making her application, the Crown Advocate submitted that it would not be contentious other than by reason of its timing. I agree with that. She also indicated that I should have regard to the interests of Mrs Akonhya, the second wife of the Defendant, who was as affected by the offence as might be, for example, a householder of burgled premises. It was said that the prejudice to the Crown, namely that the trial could not go ahead, outweighed the prejudice to the Defendant and again it was submitted that I should have regard to the overriding objective of convicting the guilty and acquitting the innocent. As to the latter point, it seemed to me that, although the Crown Advocate denied it, what that submission amounted to was that I should make an assumption that the Defendant was guilty and thus it would be contrary to the objective if I refused leave with the result that the trial could not go ahead. For my part, I cannot see that this part of the

overriding objective was a factor for my consideration. The decision I was asked to make, if contrary to that urged by the prosecution, was neutral on the question whether the guilty would be convicted or the innocent acquitted. That could only be resolved on a plea or at trial. 34. So far as is relevant, the Criminal Procedure (Jersey) Law 2018 provides: " 2 The overriding objective of the Law The overriding objective of this Law is to ensure that cases in criminal proceedings are dealt with justly. Implementation of the overriding objective (1) For the purposes of satisfying the overriding objective, dealing with cases in criminal proceedings "justly" includes - (a) acquitting the innocent and convicting the guilty; (b) dealing fairly with both the prosecution and the defence; (c) recognizing the rights of a defendant, particularly those rights granted under Article 6 of the European Convention on Human Rights (right to a fair trial); (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case; (e) dealing with the case efficiently and expeditiously; and (f) ensuring that appropriate information is available to the court when bail or sentence is being considered. (2) Dealing with a case justly also includes dealing with it in ways that take into account - (a) the gravity of the alleged offence; (b) the complexity of what is in issue; (c) the severity of the consequences for the defendant and for others that are affected; (d) whether the costs of the proceedings are proportionate having regard to the seriousness of the offence; and (e) the needs of other cases. " 35. In resisting the application, Advocate Boothman submitted that he had not had a chance to discuss the expert evidence with the Defendant but it was clear he would need instructions on whether or not to apply to adjourn the trial. He submitted that this application was not fair to the Defendant, who has not changed his position from the outset. If regard was had to the overriding objective, he relied on Article 3 paragraphs (1) (b), (d) and (e) and on (2) (a). As to 3(2), he submitted that it was right to reflect that this charge was one of bigamy and not one of the more serious charges of rape or indecent or grave and criminal assault. 36. At the conclusion of the hearing, I gave my decision that the prosecution would not have leave to adduce the expert evidence and that the reasons would be delivered later. This addendum to the earlier judgment provides those reasons. 37. As I have indicated above, particularly at paragraph 27, I do not take the view that the defence has changed its position but rather that the prosecution overlooked gathering the evidence needed to prove its case. That being so, there is no real difference of substance in the position now and what it was two days ago. The real issue before me today is not whether the expert whom the prosecution wishes to tender is right or not but whether it is fair and equitable to permit the prosecution to fill an important gap in its case at the 11 th hour, the effect of which will either be an application by the Defendant to adjourn, which the prosecution say they would not oppose, or a trial which proceeds without the Defendant having the ability to verify whether the prosecution is correct in what they say the law of Kenya is. I do not think the Defendant should be put into the position of having to make that choice at this stage, nor is it fair that he be required to make it. 38. In reaching this conclusion, I have had regard to the following considerations: (i) The evidence now sought to be admitted was always a necessary part of the prosecution case and should have been obtained much earlier. (ii) The defence position has always been

clear and it follows that any expert called would have to address the substance of the defence claims. (iii) This court ordered the prosecution to make any application for expert evidence by 30 September and it has failed to do so. (iv) If I were to acquiesce in the application at this very late stage, there would either be a prejudice to the Defendant that the expert evidence would not be adequately tested, or it would be tested in cross examination before the jury the result of which would leave the jury confused as to the true position, or there would be an adjournment of the trial at the last minute. (v) These outcomes cited above would not be to handle the case against the Defendant fairly, and/or would not reveal the case had been dealt with expeditiously and efficiently and/or would not respect the interests of all the participants in the criminal process. 39. For these reasons, I refused the prosecution leave to introduce expert evidence at this stage. In consequence, the prosecution indicated that it adduced no evidence against the Defendant and formal verdicts of not guilty were entered on the indictment. Advocate Boothman is acting on legal aid and is given until 10 January 2023 to determine whether he wishes to make any application for costs. Authorities Marriage and Civil Status (Jersey) Law 2001. Police Procedures and Criminal Evidence (Jersey) Law 2003. Procureur Général v Bazille [1984] 23 PC 352. Halsbury's Law of England 5th Edition Volume 26. R v Naguib [1917] 1 KB 359. Archbold Criminal Pleading Evidence and Practice 2022 edition. Criminal Procedure (Jersey) Law 2018 Page Last Updated: 29 Dec 2022 Back to top About JLIB Accessibility Contacts Disclaimer Feedback Privacy policy Site map © Jersey Legal Information Board 2001- This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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