CHAPTER II

THE NATIVE COURTS

A common saying is that the Native Court should not be hampered by any rules of evidence, nor tied by any other judgement, nor bound by what the Native Courts said or did before. The Native Court, it is said, listens to both parties, takes a general view of the case and pays little attention to little things. The chiefs and village headmen have their own way of reaching a decision.[1] This is very often correct and the Native Court is a court of common sense and equity rather than that of strict legal interpretation. The procedures are simpler too.

All witnesses in the Native Court give their evidences under oath. There is no swearing to the Bible or Koran. The oath is administered by a Ketua Kampong. It goes like this, "I swear in this court, before the presence of the Native Chief that I will tell the truth and nothing that is false. If I lie, I will be cursed." It should be noted that in the Native Court the same oath is made whether a person is a believer in a religious doctrine or a "free thinker". In the Magistrate Court, a non believer takes an affirmation and a believer, an oath. Sometimes in the Native Courts, a member of the public is called to be an interpreter and he does not take an oath. In the Magistrate Court, all assessors and interpreters need to take one.

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[1] Page 3, Guide for Sabah Native Courts, Stephen R. Evans, Borneo Literature Bureau, 1967.

Formality is maintained in the Court. Before the President of the Court enters the Court, he will be announced by a Ketua Kampong and all present will be required to stand. The plaintiff and the defendant will be led to a stand near the President of the Court and his assessors. The plaintiff will be called to give his evedence first and he begins after he takes the oath. All the time the President and his assessors will remind the witness and all those giving evidence that such evidence must be direct and not hearsay. After the plaintiff has finished the President will ask the defendant whether what was said is true. There seems to be a great anxiety on the part of the Court to get the accused to say yes or no and thus not to lengthen the whole proceedings. I strongly felt that this practice should not be allowed to continue. Many times, I observed that the defendant intended to say that part of the evidence is true. In the case of Gadid bin Aruk v. Saian Tabian and Katherine Gadid[2], the first defendant was accused of being the father of the child the second defendant was bearing. When asked whether what the plaintiff said is true, the trial goes:

Defendant: I admit that I had sexual intercourse with the second defendant but I need not necessarily be the father of the child as she may have performed the same act with other men.

The President: If you have sexual relations with her, how could you say that you are not responsible for the child she is now bearing?

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[2]Kota Kinabalu Native Court Case 53/76.

After that very little was attended to what the defendant really meant. The evidence in that case should have been based on the question of assessibility of the first defendant to the second defendant.

The defendant to the case will only give evidence after the plaintiff finishes.

The question of cross examination would seem to be not of right. In the case of Gadid bin Aruk v. Saian Tabian and Katherine Gadid and the case of Pongkai bt. Balani v. Tiap Tai,[3] there was no cross examination but in Noriani Tani v. Tony Simol,[4] there was cross examination by the defendant to one of the plaintiff's witness. This is because the defendant asked for it. It is proposed that cross examination must be of right as the present system will lead to some getting a better and more satisfactory trial than others. It would be more appropriate if the Native Chiefs were to ask the parties if they want to cross examine each other than for them to ask for it. Most of the natives, especially the elder ones are not aware of the right. Re-examination also need to be requested before it is given.

Parties to the case and all witnesses are required to give their names and their Identity Card Numbers. However, their evidence will be accepted even if they did not bring their identity cards. The age, kampung, district of the witnesses will also be noted. The witness need not remember the exact date of the incident in dispute. In Pongkai's case,

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[3]Kota Kinabalu Native Court Case No. 52/76.

[4]Kota Kinabalu Native Court Case 55/76.

the second witness for the plaintiff only remembered that the incident in question occured on a Tuesday of December 1975.

When a plaintiff or defendant has more than one witness, there is no rule that the witness cannot give evidence inthe presence of another witness. In the case of Noraini Tani v. Tony Simol, all the witnesses were told to leave when a fellow witness is giving evidence. In that case, the plaintiff was alleging that the defendant was the father of the child. She was suing him for breach of promise to marry. The defendant wanted to prove to the court that after the conception of the child, the plaintiff continued to mingle with other men. A male witness for the plaintiff was alleged by the defendant to be seen in the plaintiff's company. A second witness for the plaintiff was a close friend of the male witness. It was necessary that their evidence must be consistent to establish the defendant's guilt. They gave evidence in the absence of each other.

However, in Pongkai bt. Balani v. Tiap Tai, the witnesses were present. Here, the plaintiff was demanding compensation for shame brought unto her by foul words used by the defendant in describing her. The defendant had a quarrel with the plaintiff's husband when he was buying some vegetables. In the midst of the quarrel the defendant said that the plaintiff [illegible] is behaving indecently with other men in Kota Kinabalu. The plaintiff claimed that such an allegation could separate her from her husband. The witness for both parties were onlookers who happened to be at the market place during the incident.

The difference that can be found is that in Meraimi Tani's case, the two witnesses have a special relationship. The President of the Court felt that they would have special interest to see that Tony Simol would bear the responsibility of the child when born. In Pongkai bte Balani's case, the parties are unrelated and were present at the scene of the incident by mere chance. It was felt that the giving of evidence by the witness in the presence of each other would not hamper the administration of justice.

Datuk O.K.K. Taib, President of the Native Court in Kota Kinabalu, who presided over both cases assured me that oath taking is a particularly solemn affair to the natives especially those from the rural areas as in Pongkai binte Balani's case and it would never occur to them to lie under oath.

However to my mind, it would be better if a uniform system is introduced so that in all cases, all those giving evidence must do so in the absence of each other. This system would go in line with the system in the Magistrate and High Courts.

If however, a witness is told to leave the court and he refuses, he may be punished by the court for contempt. The court may still hear his evidence but its value will be lower. The fine for contempt is $25 or one month's imprisonment.[5]

Before a case is closed, each side is asked in turn if he has any more witness to call. When each side has called all its witness, a note

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[5]Section 12 Native Court's Ordinance.

is made on the record to the effect that the plaintiff and defendant has closed his case or his defence.

The reason for this is that on appeal one or other of the parties often wants to call some witness not called in the Lower Court. If the record is complete the appeal court can then make an order rejecting the application to call more witness.

No member of a Native Court should try a case in which he is interested. If a Native Chief be concerned personally in a land case, he cannot try the case. It is also impossible for a person to be a judge and witness at the same time. If he has only small interest, such as previous knowledge, and if all parties agree that he should try the case, he may then proceed to do so.[6]

The Native Court often records that one of the witness is a liar. If the court wishes to take a further action against the witness, the case should be referred to the District Officer for trial before a Magistrate Court. The District Officer must be a Magistrate of the first class as a Magistrate of the second or third class has no jurisdiction to try perjury offence.

Witnesses, if they cannot give the year can make specific reference if possible to some occurance such as the death of a famous chief as that of Datuk Anthony Undan Andulag in 1975, the smallpox epidemic which ravaged Sabah in 1905, the Rundum War in 1915 or the Japanese Occupation of Sabah in 1942. Such dates as these need not be

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[6] Stephen R. Evans: page 8.

proved and the court takes the occurrence as fact without calling witnesses about them.

The names of the members of the court are written at the beginning of the record. After making the order and after giving judgement the members sign their names and do on. The record of the evidence of each witness is signed either by the President of the Native Court or by whom it is recorded.

If a document, a weapon or anything is put in by a witness it should at once be numbered and the corresponding number entered in the record. Exhibits are kept with cases pending appeal. After the time for appeals has passed, exhibits are usually returned to the owner.

Each case is kept in its own dockets or folders. The outside contains the number of the case, the names of the parties, the place and date and a few words about the nature of the case and the judgement. The documents are properly secured.

The judgement is written in chambers and delivered, signed and dated in the Court. It contains the points and the reasons for the decision. In a question of Native Law or custom, the Court's view of the Law or custom is also given.

Appeals can be made to the District Officer and then to the Native Court of Appeal.

If a person is not satisfied as to the decision of the Native Court of the first instance, he can appeal to the District Officer, within the period of appeal. This period is usually fourteen days from the date of the judgement. As a rule, the District Officer upon receipt of an appeal, studies the case docket and may then decide to do any of

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the following:

(1) to uphold the judgement

(2) to quash the sentence with due reasons being given

(3) order a retrial by the Native Court

(4) reduce or increase the penalty

(5) conduct a retrial with the District Officer himself presiding.

If he chooses to hear the appeal he would have the power to

(1) recall the witnesses

(2) call additional evidence and

(3) appoint assessors to advise him.[7]

The appellant should do the following if he wants to appeal to the District Officer. Firstly, he has to apply for a copy of the proceedings of the Native Court. Through the proceedings he might submit the reasons for appeal. He next sends to the District Officer a petition of appeal. The District Officer will then fix a date for hearing if satisfied with the grounds of appeal. There will be no preliminary hearing before the appeal. The number of assessors for the District Officer is not fixed. An interpreter will be invited to assist in the proceedings if necessary and an expert in Native Law.[8]

Appeals then lie from the District Officer to the Native Court of Appeal. The Native Court of Appeal is composed of a judge of the

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[7]Section 10(2) of the Native Court Ordinance.

[8]Interview with Henry Sawaring, Chief Clerk of the Kota Kinabalu District Office.

High Court, a Resident of the Residency in which the original proceeding took place and a Native Chief chosen by the Yang di-Pertua Negara Sabah usually for his knowledge of the customs or law involved. A Dusun or Kadazan Native Chief will be chosen where Dusun or Kadazan customs are involved.

An appeal to the Native Court of Appeal only lies as of right if the ground of appeal is based on Native Law or custom. If the ground of appeal involves a question of fact alone or mixed law or fact or is against a sentence of imprisonment, the prior permission of the Resident to appeal must first be obtained.[9]

The procedure for appeal to the Native Court of Appeal is as follows:

(1) If in the opinion of the District Officer the nature of the ground of appeal required that it should first be referred to the Resident for permission to appeal, he will forward the petition of appeal together with the original records of the proceedings and all relevant documents to the Resident, who will in turn return the docket with his decision on whether or not an appeal is permitted;

(2) If the ground of appeal involves Native Law or Customs or if, in other cases, the Resident has given permission to appeal, the District Officer will forward to the Resident for presentation to the Native Court of Appeal both the original records of the proceedings and typescript of English translation together with all other relevant documents with translation as requisite. All translation and copies are certified by the District Officer as "certified correct."

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[9]Section 10A (2) of the Native Court Ordinance.

(3) Appeals should be made within sixty days of the order of judgement. If the expiry date is Sunday the appeal will be in time if sent on the Monday. [10]

Before a case goes to the Native Court of Appeal, the High Court Judge, the Resident and the Native Chief will decide whether or not the case should go for appeal.

The fee for an appeal from an order of the Native Court to the District Officer is $10 and from an order of the District Officer to the Native Court of Appeal is $50. Any appeal fee may be waived or refunded by the District Officer or by the Native Court of Appeal as the case may be, on the ground of poverty of the person appealing. If an appeal to the District Officer, or to the Native Court of Appeal is successful, the whole or any part of the appeal fee may be refunded at the discretion of the District Officer or the Native Court of Appeal as the case may be. [11]

To ensure, as far as possible, that there is no miscarriage of justice, the district officers may quash or vary proceedings and direct a new trial. The powers of inspection and revision of an assistant District Officer who is not a magistrate of the first class are restricted to succession cases and to cases where the fine does not exceed $25 or imprisonment of one month. He must send other cases to the District Officer for inspection. The District Officer

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[10] Section 10(2) of the Native Court Ordinance.

[11] Native Court (Fees) Rules 1954 Rule 2.

must refer to the Resident any sentence of imprisonment of over one year. Administrative officers then place their initials on the dockets of any cases inspected by them.

It is the discretion of the District Officer after inspection to frame specific questions to be answered by the Native Court. Justice can be furthered in this way since it also helps to clarify the Native Law or customs involved. The District Officer will satisfy himself both in civil and criminal cases when inspecting the records that the Native Courts have jurisdiction to hear the cases.

An appeal by the District Officer on revision lies to the Native Court of Appeal. The Native Court itself has no right of appeal from a revisionary order.[12]

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[12] Stephen R. Evans, page 16.