

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: MMILLA, J.A., NDIKA, J.A. And LEVIRA, J.A.)**

**CIVIL APPEAL NO. 226 of 2017**

**WILSON ANDREW .....APPELLANT**

**VERSUS**

**1. STANLEY JOHN LUGWISHA }  
2. TATU JOSEPH } .....RESPONDENTS**

**(Appeal from the Judgment and Decree of the High Court  
of Tanzania at Mwanza)**

**(Makani, J.)**

**dated the 29<sup>th</sup> day of October, 2015**

**in**

**(PC) Civil Appeal No. 20 of 2012**

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**JUDGMENT OF THE COURT**

20<sup>th</sup> & 25<sup>th</sup> March, 2020

**LEVIRA, J.A.:**

The appellant, Wilson Andrew, was a losing party in (PC) Civil Appeal No. 20 of 2012 before the High Court of Tanzania at Mwanza (Makani, J.) where the respondents herein, Stanley John Lugwisha and Tatu Joseph, appealed against the decision of the District Court of Nyamagana at Mwanza in Miscellaneous Civil Appeal No. 15 of 2010. In its decision the District Court upheld the decision of the trial court, Mwanza Urban Primary Court in Civil Case No. 53 of 2010

where the appellant had successfully sued the respondents for compensation for adultery. However, the District Court substituted the compensation of Tshs. 3,000,000/= awarded by the trial court with the award of seven head of cattle to the appellant. In doing so it relied on section 74(1) of the Law of Marriage Act, Cap 29 R.E. 2002 (LMA) which in essence deals with assessment of damages for adultery.

In determining the appeal before it, the High Court dealt with a single issue as to whether or not the Primary Court had jurisdiction to entertain a claim of damages for adultery. It is noteworthy that the High Court relied on section 18 of the Magistrates' Courts Act, Cap 11 R.E. 2002 (MCA) to conclude that powers of the Primary Court to deal with proceedings of a civil nature are only exercisable where and when the law applicable is either customary law or Islamic law. Therefore, the learned High Court Judge was of the view that since the Primary Court Magistrate did not apply any customary law in deciding the matter before her, she had no jurisdiction. For that reason, she nullified the proceedings and decisions of both the Primary and District Courts.

Upon being dissatisfied with that decision, the appellant lodged a notice of appeal to the Court. He simultaneously successfully filed an application for certification of point of law as mandatorily required by section 5 (2) (c) of the Appellate Jurisdiction Act, Cap 141 (the AJA) which provides that:

*"Notwithstanding the provisions of subsection (1), **no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order.**"*

[Emphasis added].

It is settled position of law that, all appeals originating from Primary Court to the Court must be scrutinized by the High Court to ascertain the point of law involved. Otherwise, the Court will have no mandate to entertain them. Part III of the MCA provides for the jurisdiction and powers of, and appeals from Primary Courts. Therefore, as shown above, every point of law which comes to the Court from the decision of the High Court in exercise of its appellate powers in a matter originating from Primary Court must be certified

by the High Court. In **Haji Mradi v. Linda Sadiki Rupia**, Civil Appeal No. 24 of 2016 (unreported); the Court did not consider two of the three grounds of appeal on account that they were not certified by the High Court. The excerpt from the Court's decision reads:

*"Given the nature and substance of the points certified by the High Court, it is clear that, only one point of law was certified which constitutes the first ground of appeal. Thus, for reasons stated, the certificate is not valid in respect of the second and third grounds of appeal. In this regard, before the Court, there was nothing placed for determination in respect of the second and third grounds of appeal which were lodged in violation of the provisions of section 5 (2) (c) of the AJA which requires an appeal originating from Primary Court to be upon a certified point of law."*

Before us the appellant has presented four grounds of appeal challenging the decision of the High Court as follows:

1. That, the learned Appellate Judge erred in law and misdirected herself, when he held that, the trial Primary Court Magistrate had no jurisdiction to try a case of adultery damages between appellant and Respondents.
2. That, the learned Appellate Judge, erred in law and fact, when she failed to take into consideration that the Primary Court Magistrate had jurisdiction to try adultery cases under provisions of paragraphs 106, 107, 108, 109, 10, 111, 112, 113 and 114, 115A, 115B, 116, 117, 119, 120, 121, 122, 124, 125 ABC, 129 130, 131, 132 of the Declaration of Local Customary Law GN 269/1963.
3. That, the learned Appellate Judge, also erred in law and fact when she failed to take into consideration the provisions of section 76 of the Law of Marriage Act Cap 29 R.E. 2002 in which the Primary Court Magistrate, the Court of a Resident Magistrate, the District Court and the High Court had concurrent original jurisdiction in matrimonial proceedings.

4. That, the learned Appellate Judge erred in law and in fact, when she failed to take into consideration the fact that, the Primary Court which held (sic) original jurisdiction under the marriage Act which deals with all matrimonial matters including adultery under section 109 of the Law of Marriage Act Cap. 29 R.E. 2002; the Primary Court Magistrate and the Appellate District Court were therefore seized with jurisdiction to entertain a case for damages for adultery.

Basing on the above grounds of appeal, the appellant prayed for the appeal to be allowed with costs and that the decisions of the District and Primary courts be restored.

At the hearing of this appeal, both parties appeared in person, unrepresented. Upon being engaged in brief dialogue with the Court on reflection of the grounds of appeal as opposed to the decision of the High, the appellant dropped the second ground of appeal which in essence was preferred out of context and in fact, was not certified by the High Court as a point of law to be determined by the Court. Based on the above stated position of the law, we are settled that

the appellant properly dropped the second ground of appeal for lack of certification by the High Court.

The appellant commenced his submission by adopting the remaining three grounds of appeal and the written submissions he filed in Court on 13<sup>th</sup> March, 2017. Having done so, he argued so valiantly that the High Court Judge erred in law when she decided that the Primary Court had no jurisdiction to try a suit on a claim of damages for adultery. Being fortified by his written submissions, he said, in terms of sections 109 and 76 of the Law of the LMA the Primary Court is seized with jurisdiction to entertain such claim. However, we wish to note here that the appellant acknowledged to us that he was yet to be married to the second respondent but that they had lived together for six years as husband and wife.

Finally, the appellant prayed for his appeal to be allowed with costs; the decision of the High Court to be quashed and set aside and the judgments of the Primary Court and the District Courts to be restored.

In reply, both the first and second respondents had no much to submit. They only supported the decision of the High Court saying that the Primary Court had no jurisdiction to entertain a claim of compensation for adultery. We take note that the first respondent filed written submissions which in essence support the decision of the High Court as he cited the case of **Seleman Ramadhan v. Ali Juma** [1984] TLR 49. The respondents urged us to find that the High Court's decision was right and dismiss this appeal with costs.

The appellant reiterated his submission in chief while making a rejoinder.

Having considered the record, the submissions by the parties and the grounds of appeal, we find that the contentious issue in this appeal centers on the jurisdiction of the trial court as opposed to the nature of claim presented before it. This is reflected in all the three grounds of appeal which can be reduced into one issue leading us to determine, whether or not the Primary Court had jurisdiction to try a suit on a claim of damages for adultery.



As a starting point we observe that the appellant's grounds of appeal are based on sections 109 and 76 of the LMA, perhaps this is the outcome of the decision of the High Court (Maige, J.) in Misc. Civil Application No. 109 of 2015 where the appellant applied for certification on the points of law to be determined by the Court and the High Court indicated those provisions in its Ruling. The excerpt from the decision in the said application reads:

*"I have examined the depositions in paragraph 4 of the affidavit and gone through the judgment. I am satisfied that the affidavit demonstrates one important point of law namely; **whether the primary court has jurisdiction under section 109 read together with section 76 of the Law of Marriage Act to deal with civil claim arising from adultery.**"*[Emphasis added].

As it can be observed from the above certification, the only point of law certified by the High Court involved jurisdiction of the Primary Court in dealing with a claim arising from adultery. It has to be clear at the outset that, both sections 109 and 76 of the LMA indicated in the certificate do not apply to the circumstances of this

case due to the fact that, the status of marriage between the appellant and the second respondent was not certain before the Primary Court. As it is, section 109 of the LMA provides for power of the court on claim to damages for adultery in proceedings for divorce, which is not the case here. It provides as follows:

*"109 (1) Where, **in a petition for divorce**, damages for adultery have been claimed against a co-respondent-*

*(a) if, after the close of evidence for the **petitioner**, the court is of the opinion that there is no sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or*

*(b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and the co-respondent has been proved, the court may award the*

*petitioner damages against the co-respondent.*

*(2) The provisions of section 74 shall apply to the assessment of damages awarded under this section.*

*(3) The court may award damages against a co-respondent under this section notwithstanding that the petition is, as against the respondent, dismissed or adjourned.*

*(4) The court shall have power, when awarding damages under this section, to direct that such damages, or any part of them, be vested in trustees upon trust to apply to income thereof for the benefit of the infant children, if any, of the marriage or, where the petitioner is required to pay maintenance to the respondent, in or towards the payment of that maintenance, and subject thereto in trust for the petitioner.”* [Emphasis added].

Also it can be observed that section 76 of the LMA falls under Part IV of the Act which deals with matrimonial proceedings. It reads:

*"76. Original jurisdiction **in matrimonial proceedings** shall be vested concurrently in the High Court, a court of resident magistrate, a district court and **a primary court.**"*[Emphasis added].

The above quoted provisions suggest that the Primary Court is vested with jurisdiction to entertain claims of damages for adultery in situations where there is a petition for divorce in matrimonial proceedings which is not the case in the present appeal.

The jurisdiction of the Primary Court to entertain claims of damages for adultery where there is no petition of divorce against any person with whom his or her spouse has committed adultery are provided under Part V of the LMA which deals with Miscellaneous Rights of Action. For ease of reference, we reproduce section 75 which falls under this part as follows:

***"A Primary Court shall have jurisdiction to entertain a suit under this part where***

***the parties were married in accordance with customary law or in Islamic form or, in the case of a suit under section 69 or section 71, if the court is satisfied that had the parties proceeded to marry they would have married in accordance with customary law or in Islamic form.***" [Emphasis Added].

In the current matter, it is not stated whether the appellant and the second respondent contracted a marriage either under customary law or Islamic form. When the suit was before the Primary Court, the appellant who testified as SM1, only stated that, on 10/3/2010 upon coming back to his home from Bukoba where he went to take care of his sick mother, he caught the first respondent sleeping naked on the bed in his bedroom and his wife (second respondent) was also inside the house. Likewise, when the second respondent (SU2) was defending herself before the trial court, she referred the appellant as her husband but she did not reveal whether they married or the form of their marriage.

In the circumstances it is obvious that, since the marriage form of the appellant and the second respondent was not disclosed, the Primary Court could not have assumed jurisdiction to entertain the

claim of damages for adultery which was placed before it. This is more so because, it cannot be said with certainty that the couple under discussion contracted either customary or Islamic marriage which would have justified its jurisdiction.

In the light of the above observation, we agree with the learned High Court Judge that the Primary Court had no jurisdiction but for different reasons. While she based her decision on section 18 of the MCA which in our view was not correct, we are saying it had no jurisdiction on account of the provisions of section 75 of the LMA as stated above.

As indicated earlier, the appellant did not petition for divorce before the Primary Court, he only claimed to be paid damages for adultery between the respondents. In the circumstances therefore, the Primary Court ought to have refrained from entertaining that suit on account that it lacked jurisdiction in terms of section 75 of the LMA.

In addition, it is a settled position that where a man and a woman live together for a certain period of time (2 years period)

there is a presumption under section 160 of the LMA that they are husband and wife. However, the said presumption is rebuttable and as such, it does not fall under the category of marriages which the Primary Court is vested with jurisdiction to entertain as demonstrated above. In **Jumanne Jingi v. Njoka Kiduda** (1984) TLR 51; the High Court faced a similar situation where the appellant therein had lost in the Primary Court and the District Court in an action for damages for adultery and therefore appealed to that court. In his decision, the High Court Judge (Lugakingira, J. as he then was) had this to say which we subscribe that:

*"At any rate, the burden was on the appellant to prove that he had been validly married to this woman before he could be heard to complain of adultery. This burden was not discharged as the appellant adduced no evidence of the circumstances in which he came to cohabit with her...."*

All said and done, we are settled that this appeal has no merit. Though with different reasons, we uphold the decision of the High Court as we are satisfied that in the circumstances of this matter, the Primary Court had no jurisdiction to entertain a claim of

damages for adultery. Consequently, we dismiss the appeal. Each party shall bear its own costs.

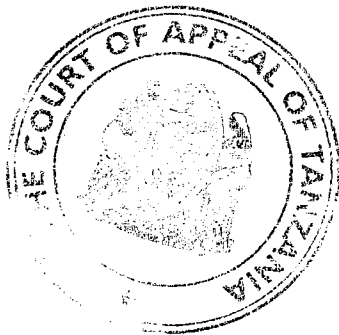
**DATED** at **MWANZA** this 25<sup>th</sup> day of March, 2020.

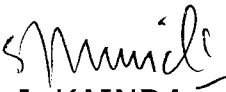
B. M. MMILLA  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

The Judgment delivered this 25<sup>th</sup> day of March 2020, in the Presence of the Appellant and the Respondents, all unrepresented, is hereby certified as a true copy of the original.



  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**