IN THE HIGH COURT OF TANZANIA

AT MBEYA

(PC) CIVIL APPEAL NO. 17 OF 1997

(From Original Civil Appeal No. 79 of 1996 of
the District Court of Mbeya District at Mbeya

Before: M.S. Lwabutiti - District Magistrate)

ROZI SANGA ..... APPELLANT

Versus

EDWARD SANGA ..... RESPONDENT

JUDGMENT

MOSHI, J.

This is a second appeal. The respondent, Edward Sanga, instituted the suit at Mbalizi primary court against the appellant, Rozi Sanga, claiming shs.300,000/= as compensation for maintaining a child born of the appellant he had not sired. The primary court granted the claim as prayed, but the district court of Mbeya, upon an appeal thereto by the appellant, reduced the award to shs.100,000/= holding at the award made was excessive on account of that the respondent had not brought evidence in its support. The appellant still felt aggrieved, hence this second appeal in which both parties entered appearances before me and argued their respective side of the matter themselves.

The parties got married in April 1978. At that time the appellant was four months pregnant by a man called Juma. The appellant claimed that the respondent knew about her condition at the time of the marriage and accepted her in that condition. But the respondent claimed that he was unaware of her condition. The appellant gave birth to the child in dispute they called Lita in May 1979. It was a female child, and the appellant claimed that the respondent was her father and caused the clinic card to be entered the name of the respondent as the father of the child.

The respondent then maintained, and took care of, the appellant and the child as usual. In 1982 they separated, but the respondent remained with the child until 1985 when the appellant took her from his custody.

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Soon after separating, the appellant petitioned for divorce before Utengule Usongwe primary court Civil Case No. 55/82 which was granted on 5.7.82. In later years the petitioner raised claims that the child was not fathered by the respondent, hence the suit which was instituted on 18.12.95. The child was, at the time of the suit, a fully grown up woman who had delivered twice, and Juma, at the time of the suit, had died ten years earlier.

With respect, I would allow this appeal on four grounds. Firstly, the claim by the appellant that she was four months pregnant at the time of the marriage was clearly a sham, as was her claim that the child was not sired by the respondent. It was, as I shall demonstrate, a futile attempt by her to unjustifiably disentitle the respondent to the partenity of the child. But the facts spoke for themselves, and it was a surprise that the respondent had bought the story. The child was born in May 1979 which was about ten months after the marriage was solemnized. The birth, which was normal, was therefore within the legally accepted period of gestation. In fact, it was much more likely than not that the child was conceived after the marriage was solemnized. So the appellant could not have been pregnant when the marriage was solemnized, let alone four months pregnant.

Secondly, the child was born within the marriage, that is, before the marriage was dissolved. As such, the respondent was, in law, presumed to have been the legal father of the child who owed a legal duty to look after its maintenance. The presumption is made as a matter of public policy undertaken to safeguard the sanctity of marriage. So the respondent had maintained the child which, in law and fact, was his child, as a matter of a legal and a fatherly duty.

Thirdly, there was no proof, let alone strict proof, of the expenses incurred by the respondent in the maintenance of the child. The district court was of the same view. The late Mwakasendo, Ag. J. (as he then was) said, and I respectfully agree with him, in Murisho v.

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Halima (1971) HCD No. 256:

> "While I concede that there may be circumstances in which it is possible for this court to order one of the parties to a suit to reimburse the other for expenses incurred for the advancement and maintenance of the children of the marriage, this court cannot agree that it would be entitled or justified to do so capriciously. Evidence must be led to establish the specific claims lodged and it would, in my judgment, be absolutely wrong in principle to make an order for maintenance merely on the unsubstantiated word of the claimant."

In this case, there was only the unsubstantiated word of the respondent on the claim, and the district court, having thus realized and held, ought to have allowed the appeal and rejected the claim in its entirety.

I accordingly allow the appeal, quash and set aside the orders for maintenance made by both courts below, and hereby declare the respondent to be, and to have been, the lawful father of the child, who was, in law, duty-bound to provide for its welfare and maintenance. In the circumstances of this case, I make no order as to costs of this appeal.

THE HIGH COURT OF TANZANIA

AT MBEYA.

B.P. MOSHI
JUDGE.

28 November 1997.

- For Appellant: Present.
- For Respondent: Present.

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

DISTRICT REGISTRAR.