

**IN THE HIGH COURT OF TANZANIA
AT MTWARA**

**PC. CIVIL APPEAL NO. 10 OF 2005
NEWALA DISTRICT COURT CIVIL APPEAL NO. 14/2005
ORIGINAL NEWALA URBAN PR/COURT
CIVIL CASE NO. 74/2005**

SOFIA MKOTO -----APPELLANT

VERSUS

MWANAHAMISI ALLY -- RESPONDENT

EX-PARTE JUDGEMENT

SHANGALI,J.

This is a second appeal originating from a quite an interesting case. It started with a Civil Case No. 74 of 2004 at Newala Primary Court in which the current appellant SOPHIA D/O MKOTO sued the Respondent MWANAHAMISI D/O ALLY claiming for damages to the tune of Tsh.850,000 from SOPHIA for committing adultery with her husband one MOHAMEDI GEUGEU (SM2). After hearing the whole evidence from both parties the trial Primary Court deliberated in favour of the Appellant and awarded her damages to the tune of Tsh.400,000/=.

MWANAHAMISI D/O ALLY was dissatisfied with that decision and she filed an appeal to the District Court at Newala. On 15/6/2005 the District Court at Newala ruled in favour of

MWANAHAMISI D/O ALLY and reversed the decision of the trial Primary Court.

Being aggrieved with the decision of the Newala District Court, the appellant SOPHIA D/O MKOTO has preferred this second appeal.

It is pertinent to mention here that all efforts to trace and serve the respondent after filing of this appeal had proved futile. Consequently, the appellant was allowed to proceed with her appeal *ex parte* on 9th May 2006.

The facts of the case may be conveniently summarized and stated as follows; On 12th November 2005, Mohamedi Geugeu (SM2) the husband of the appellant SOPHIA MKOTO, confronted his wife with courage and confessed to her that on 10th November, 2005 at Mkunya village he was caught committing adultery with the respondent MWANAHAMISI D/O ALLY in the house of AHAMADI SAIDI LUKANGA, the husband of the respondent. The self professed adulterer husband further confessed that upon that incident he pleaded with AHAMADI SAIDI LUKANGA to settle the matter out of Court. That the agreement was reached between them and the adulterer paid AHAMADI SAIDI LUKANGA a total of Tsh.350,000 as compensation.

The appellant was irritated and annoyed with that information and she equally decided to counter attack by filing the present suit against the respondent MWANAHAMISI D/O ALLY for committing adultery with her husband (SM2) claiming damages to the tune of Tsh.850,000. Before the trial Primary Court, the appellant laboured to prove her claims by calling as witnesses the people who were alleged to have witnessed the adultery incident which was followed with the amicable settlement of the payment of Tsh.350,000 by SM2. These witnesses were SM3, SM4 and SM5. When SM4 SAIDI ALLY MASHUA appeared before the trial

Primary Court, he simply said "I don't know anything about this case". The only important witness was SM2, the husband of the appellant who testified to the effect that on the alleged day he was caught committing adultery with the respondent MWANAHAMISI D/O ALLY inside the house of her husband and later opted to settle the matter by paying Tsh.350,000. According to the evidence of SM3 and SM5, they never witnessed the actual adultery but were merely involved in the process of settling the matter at the house of AHAMAD SAIDI LUKANGA following the allegation of adultery against SM2 and his own (SM2's) pleadings to settle the matter there and then.

The respondent, MWANAHAMISI D/O ALLY categorically denied to have committed adultery with SM2, (the husband of the appellant). According to her testimony, she conceded that on the material date at about 10.00 pm SM2 who was their village Executive Officer arrived at her house and claimed that he had important information to deliver to her as one of the voter Register clerks of the area. The respondent welcome him (SM2) but when they were starting to talk SM2 changed drastically, drew a knife and demanded her to give him "chochote for assisting her to be employed as a vote Register clerk at the village. It is the evidence of the respondent that, while at that fracas her husband AHAMADI SAIDI LUKANGA arrived home and on knocking the door he instinctively suspected that there was another person in the house. Instead of opening the door and enter he locked the door from outside and called people to witness adultery incident. Several people arrived and the situation became intense to the extent that SM2 had nothing to do but to plead with AHAMADI (the husband of the respondent) and the village leaders who responded. The respondent stated that in order to calm down the situation SM2 opted to pay that huge sum of money to her husband, AHAMADI as compensation. She further claimed that, that idear was readily accepted by her husband but there was no body caught committing adultery.

As I have pointed above it was upon that evidence the trial Primary Court decided in favour of the appellant and awarded her Tsh.400,000 as damages for adultery committed by the respondent. On appeal to the first appellate District Court, the decisions of the Primary Court was reversed on the ground that there was no sufficient evidence to prove the case to the required standard of proof which is on the balance of probabilities.

In her memorandum of appeal to this Court the appellant is simply complaining that the first appellate District Court failed to assess and evaluate the available evidence in favour of the appellant and erroneously reversed the decision of the trial Primary Court.

Before I proceed to determine this appeal, it is not out of context to state here that I am aware that this is a second appeal and the stance of the law is that such appeal has to be based on point of law or there must be obvious misdirection or non-direction in the lower courts decision on the evidence adduced before it.

One important aspect is that there is no point of law to be determined in this appeal. Secondly, honestly speaking, the facts and circumstances of this case raises an eyebrow and several questions about its genuiness. I have been asking myself on whether the appellant and her husband(SM2) opted to file this case out of revenge to recover the money paid to the husband of the respondent as compensation or damages.

Be as it may, after a careful perusal of the lower courts records, I was drawn to agree with the first appellate District Court that the case was not proved to the required standard in civil cases. It is on record that no person witnessed the alleged adultery. Upon his arrival at his house, the husband of the respondent suspected that there was a person inside his house and quickly without any efforts to find out what kind of person and what he was exactly

doing in his house, he locked the door from outside and confined the person inside and then called people to witness adultery. Therefore, the only available evidence is that of SM2, the husband of the appellant who had, not only all reasons to give evidence in support of the appellant but also reasons to give embellished evidence in expectation of returning his money and to appease his wife, the appellant. SM2 is a witness with interest to serve. In law his evidence should have been corroborated with evidence of another independent witness. See the case of ASIA IDDI VS. R (1989) TLR 174 and ABRAHAM SAIGURAN VS. (1981) TLR 265.


On the otherside, the explanation given by the respondent is not something to be simply brushed aside because the story is probable. There is possibility to believe that when the husband of the respondent arrived no adultery had been committed although that could have been SM2's intentions. Realising that his intentions had been discovered and indeed caught in the house of the respondent's husband and the fact that he was one of the leaders in the village and many-people had already gathered at the place to witness the adulterer; he sensed dangers of mob justice against him, panicked, pleaded for mercy with his accuser and other village leaders promising to pay a huge sum of money to settle the matter. Therefore, the conducts of SM2 and his subsequent efforts to settle the matter amicably by paying Tsh.350,000/= does not alone legally prove the existence of adultery.

I do understand that in adultery cases sometimes it is not possible to get direct evidence of persons being caught ready-handed "in flagrante delicto" but at least there must be sufficient credible circumstantial evidence to establish on the balance of probabilities that the respondent committed adultery. See GAI IPENZULE VS. SUMI MAGOYE (1983) TLR 289. In the present case, such evidence is lacking and I am persuaded to hold that the

trial Primary Court's decision was based on speculative and suspicious evidence. That applies also to the question of damages granted by the Trial Primary Court because the record is silent on how it reached that amount of Tsh.400,000/=. Section 74(2) of the law of Marriage, Act 1971, provide that in assessing damages for adultery the court should have regard to any relevant custom of the community to which the parties belong.


For the above reasons I see no reason to depart from the decision of the first appellate District Court. That decision is hereby affirmed and appeal dismissed with costs.

It is so ordered.


M. S. Shangali
JUDGE
24/11/2006

Judgement delivered todate 24/11/2006 in the absence of the appellant who has failed to appear in two consecutive occasions. Copy of the judgement to be supplied to both parties.




M. S. Shangali
JUDGE
24/11/2006.