

IN THE HIGH COURT OF TANZANIA

AT TANGA

DC. CIVIL APPEAL NO 5 OF 2012

*(Originating from the District Court of Tanga at
Tanga in Civil Case No. 37/2009)*

SALUM MSAMI ALLI.....APPELLANT

VERSUS

WILLIAM MADUNDO.....RESPONDENT

JUDGMENT

Rugazia, J.

The appellant in this appeal was plaintiff in the District Court of Tanga in Civil Case No. 37 of 2009. By his plaint, the appellant brought a claim against the defendant for alleged adultery with his wife one Mrs. Fatuma Adinali Zayumba. The appellant alleged that in the year 1999 he married Fatuma Zayumba under Islamic law and that out of the union between them, they got one child. The appellant further alleged that, his wife was employed by defendant in the year 2006 as a nurse in defendant's hospital known as Medicare. In the year 2008, he stated, his wife's behavior started to change characterized by returning home during

late hours and drunk. To make matters worse, she started to demand for divorce which was strongly resisted as the appellant was not ready to lose her. Upon appellant's investigation, he discovered that, she had a love affair with the defendant as he used to see the defendant with his wife at different bars within the city of Tanga, and to add salt to injury, he lured her and his child from their matrimonial home to his house. Due to this development, he suspected that it was the defendant who lured his wife to claim for divorce. As a result of the unlawful act, the appellant prayed for judgment against the respondent for declaratory order that the defendant had committed adultery with his wife; second, he claimed for damages for adultery Tshs. 100,000,000/=; costs of the suit and any other relief the trial court deem fair and just to grant.

In proving the said allegation, the appellant featured PW2 Sergeant Salma, who testified to have called the respondent to her office at the police station and warned him on his relationship with appellant's wife. PW2 deponed that appellant's wife told her that, her husband deserted her and married another woman in Dar es Salaam, as a result of which he stopped providing maintenance for her. PW3 August Kimath, testified to have seen the respondent and appellant wife at the Raskazone Hotel sitting

in the bar drinking. He testified further that on 6/8/2009 they found the appellant's wife at the respondent's house but upon seeing them she run away. On that material day he was with PW4 and appellant. He lastly featured PW5 who had not much to say than to have seen the adulterers at Fen's Inn Bar and on another day at Railway Club. That was the end of the evidence for the appellant.

The defendant was very brief in his denial. He testified to be the owner of TANGA MEDICARE, and he is the one who employed Fatuma Zayumba. He claimed to have not known her marital status until when he heard from Chumbageni Police Post that she was married to appellant. He did not dispute to have relationship of employer-employee with her. He did not also refute to have been moving around with her in different bars after office hours and that she even used his car for official purpose as she was procurement officer. He also admitted that she had the freedom to visit him anywhere even in his house to give him information concerning the office. What he refuted is to have love relationship with her. In support of his defence he featured Fatuma Zayumba (appellant's wife), who testified that, the appellant married her in year 1999 as a second wife. After one year she discovered that he had a third wife and failed to

provided for her. She complained to his brother without success and, thereafter, she complained before BAKWATA where the appellant was called but refused to attend. The appellant, according to her, once attempted to sodomize her before he deserted her. Further that, after his refusal to attend, BAKWATA heard case and granted her a divorce letter. All in all, she denied having any love affair with the respondent. DW3 Abdallah Zayumba, testified that, the appellant and her sister are one longer living together as the appellant deserted her more than four years now. He tried to confront him to resolve the disputes but the appellant did not co-operate. He claimed to be the one who paid her sister's rent at Kange area where she lives until now.

After full hearing, the learned trial magistrate found evidence to prove adultery lacking and dismissed the suit with costs. The appellant felt aggrieved by the judgment and appealed to this court on the following grounds:-

a) That the trial magistrate erred in holding that there was divorce

- b) That the trial magistrate erred in law and fact in disregarding evidence of PW1, PW2, PW3 and PW4 who proved adultery as against the respondent*
- c) That the learned trial magistrate erred in law in admitting Exh. D.1 which was not tendered by the authors therein*
- d) That the learned trial magistrate erred in law in preparing and delivering a judgment which contravenes the law as on contents therein*
- e) That the learned trial magistrate erred in law in not analyzing issues framed and evidence adduced thus delivering a summary judgment.*

At the hearing of the appeal, the appellant appeared in person whereas the respondent had the service of Mr. Sangawe advocate. Parties applied for and were granted leave to argue the appeal by way of written submissions. It is the appellant's submission that, the letters admitted by the trial court from BAKWATA was improperly admitted as the maker was the one who supposed to tender them. On the second ground, the appellant contended that, all his witnesses have proved adultery. He further faulted the trial magistrate for writing half a paragraph for his decision. He referred to the

case of **Mbushuu Alias Dominic Mnyaroje and Another vs. R** (1995) TLR 97; and **Order XX Rule 4 and 5** of the *Civil Procedure Code Cap. 33 R.E. 2002*. In light of the above, he prayed this court to quash the decision of the trial court.

Counsel for the respondent submitted that, when the alleged appellant's wife was employed at Tanga Medicare Service, the respondent was not aware that she was appellant's wife. He further submitted wondering whether there was evidence available to prove adultery which entitled the appellant compensation. He started with the issue of divorce, claiming that there is nowhere in the entire judgment of the trial magistrate where the issue was dealt with as the claim was for compensation and not divorce. However, under Islamic law, Counsel contended, spouses are allowed to leave their marriage depending on circumstances available. Further submission was that appellant's evidence and his witnesses was to the extent that the respondent was seen with appellant's wife but they did not say exactly whether the way they saw them was in a manner suggesting adultery. He further submitted that, the appellant's case that they saw a woman at respondent's house and she run away should not be taken as conclusive that the respondent committed

adultery. He contended that the case cited by appellant **Mbushuu** (*supra*) is not relevant to the matter at hand as it deals with corroborating of evidence. He finally submitted that although the decision of the trial court was short, but still it did not contravene Order XX Rule 5 of the Civil Procedure Code. He prayed that the appeal be dismissed with costs.

To start with, my attention is immediately directed to the fourth and fifth grounds of appeal. The appellant strongly faulted the lower court judgment for not complying with the legal provision pertaining to judgments. It was his assertion that judgment was not reasoned at all as it consisted of one paragraph only. This, according to the appellant, was contrary to Order XX rule 4 and 5 of the Civil Procedure Code which provide:

"4. A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.

5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons thereof upon each separate issue"

I entirely share the views expressed by the appellant because a look at what is called a judgment would leave even a law student wondering. It becomes even more serious considering that the responsible trial magistrate is a Principle Resident Magistrate. The fact that the appellant who is not a trained legal mind could so openly poke holes in the so-called judgment, leaves me wondering if Mr. Sangawe learned advocate was being honest with himself when he defended that judgment if we can call it so. As an officer of the court and a long time member of the bar, I have no doubt he can differentiate between a judgment and a perfunctory one.

Pursuant to Order XX rule 4 and 5 of the Civil Procedure Code a judgment has to be reasoned. In the particular judgment, issues were framed but no attempt was made to analyse any of them. This is what the trial magistrate wrote in what he thought was a judgment!

"we now turn back and solve the frame issues. They shall be solved in stratum (sic)

As to the issue whether there is adulterous association as between the plaintiff's wife and the defendant there is no thread of evidence proving so. It is in evidence that the Defendant was seen in the company of

FATUMA ZAYUMBA (DW2) but it is yet in evidence that DW2 as a procurement officer (sic). This issue is very easy. Since the 1st issue answered to the negative the plaintiff is not entitled to any compensation from the defendant.

As to the 3^d issue as to what reliefs if any are the parties entitled to, the suit is hereby dismissed with costs. It is so ordered.

*Signed: L. J. Mbuya, PRM.
02/04/2012"*

By whatever yardstick, this cannot qualify to be called a judgment. Thus, as the first appellate court, I now step into the shoes of the trial court to analyse the evidence. I have not adopted this course on the authority in the case of **Shaban Amiri v R** Criminal appeal no. 18 of 2007 CAT Arusha (unreported).

And this is more so since I know the trial magistrate has since left the Bench otherwise I would have remitted the record for him to write a proper judgment. In the first place, there is no dispute that, the appellant Fatuma Zayumba got married in the year 1999, and, they were blessed with one

child and still, their marriage subsisted when the matter was filed in the trial court in 2009. From the evidence by both the appellant and his witnesses, they alleged to have seen the respondent and appellant's wife on different occasions such as in bars, at the house of respondent and even seen her driving the respondent's car.

Now on the issue of adultery. It should be noted that sexual intercourse is not a *sine qua non* to establish adultery but sexual intimacy can be enough proof of it because, obtaining evidence of the commission of the act by the testimony of eye witnesses, is not that possible, and, so, direct evidence is not necessary to establish it. It has already been stated in the case of **Gai Ipenzule vs. Sumi Magoye** (1983) TLR 289, that adultery may be proven by circumstantial evidence. That means, it establishes both a disposition to commit the offence and opportunity to do so, as by its nature, it is an act which take place in private. Proof must be sufficiently definite to identify the time and place of the act and circumstances under which it was committed. It follows, therefore, that the act of the appellant and his witnesses to have seen the respondent and his wife together on several occasions without an overt act does not warrant the conclusion that they committed adultery. On all the occasions,

no evidence of romantic or sexual overtures such as kissing, hugging, hand holding or any romantic demonstrations between the respondent and appellant's wife was adequately tendered to establish the claim.

Since as expected, the respondent and Fatuma Zayumba denied adultery, the burden of proof lies on the appellant. The standard is the same as in all civil cases on balance of probabilities. It is not on a standard required in criminal cases which is proof beyond reasonable doubt. Proof must be clear from the evidence tendered as the allegation is grave. Thus, adultery being a serious moral offence, the probabilities must be clearly established. Basing on what was laid before the court, there was no direct evidence of adultery against the respondent. All evidence which was undoubtedly circumstantial from which the appellant needed this court to draw an inference from all surrounding circumstances such as familiarity, being seen together, using respondent's car and visiting respondent's home is not strong enough to warrant the inference.

It should not be taken that adultery might have been place, but, it should have actually taken place. Even if we take into consideration the photograph annexed to the plaint through not produced during hearing at the trial court, still, that is not enough because in the absence of evidence

of who the photographer was and, in what circumstances the photograph taken, I do not find it safe to draw an inference basing on that photograph. By using this I mean, one has to establish whether it was taken in circumstances suggesting the claims levelled against the respondent.

In my view, basing on the evidence presented, it cannot be found strong enough to establish adultery. The appellant may have suspected that the respondent was having illicit relationship with his wife, but suspicion, however well founded, is not substitute for reliable evidence. Having found so, all grounds of appeal crumble and, in the result, this appeal is devoid of merit and hereby dismissed with costs.



**P. A. RUGAZIA,
JUDGE
19/8/20214**

DATE: 19/8/2014


CORAM: P. C. MKEHA – DR

APPELLANT: Present

RESPONDENT: Absent

C/Clerk: Kombo

Court: Judgment is delivered in the presence of the appellant but in the absence of the Respondent.


P. C. MKEHA-DR
19/8/2014