

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 276 OF 2020

*(Arising from Kinondoni District Court Civil Appeal No. 45 of 2020 Originating from
Manzese/Sinza Primary Civil Case No. 392 of 2019)*

KENNEDY KUNAMBI APPELLANT

VERSUS

ANSILA KIKINGO RESPONDENT

JUDGMENT

2nd November & 10th December, 2021

BANZI, J.:

This Appeal originates from Manzese/Sinza Primary Court where the Appellant, Kennedy Kunambi successfully sued the Respondent, Ansila Kikingo claiming payment of Tshs.8,201,000/= for costs he incurred to maintain a child after being deceived by the Respondent that he is the biological father of the child in question. Being aggrieved with the decision of the Primary Court, the Respondent successfully appealed to the District Court of Kinondoni, the decision which discontented the Appellant who preferred this appeal on three grounds as hereunder;

1. *That, the District Court of Kinondoni at Kinondoni erred in law in allowing the Respondent's Appeal despite a substantive error in that Written Submissions in support of the Appeal referring to a non-existent matter, namely Civil Appeal No. 45 of 2010; despite binding authority to the effect that such error is fatal.*
2. *The District Court of Kinondoni at Kinondoni erred in law in allowing the Respondent's Appeal without any legal justification in particular;*
 - (i) *It failed to appreciate that clear evidence was led on the Appellant's provision of maintenance and upkeep to the Respondent in sole anticipation that the Respondent bore the pregnancy by the Respondent.*
 - (ii) *The Respondent suffered clear damages.*
 - (iii) *The Respondent incurred direct costs arising directly out of the Respondent malicious wrongful act of misleading the Respondent into believing that the pregnancy, and the born child was begotten by the Appellant.*
3. *The District Court of Kinondoni at Kinondoni erred in law in allowing the Respondent's Appeal by taking into consideration extraneous matters neither pleaded in the Respondent's Appeal, nor being part of proceedings in the trial court.*

At the hearing of the appeal, Mr. Omary Msemo, learned counsel appeared for the Appellant whereas, Mr. Benjamin Mtwanga, learned counsel represented the Respondent. The appeal was argued by way of written submissions. According to the scheduling order, the Appellant was supposed to file his submission on 6th September, 2021, whereas, the Respondent was ordered to file his reply on 20th September, 2021 and rejoinder if any ought to be filed by 27th September, 2021. Despite the scheduling order, the Respondent filed her reply on 30th September, 2021 which is out of prescribed time and without leave of this Court. When the matter was called for mention in the view of fixing the date of judgment on 29th September, 2021, neither the Respondent nor her Advocate appeared so that they could have sought leave of this Court to file the reply out of time. As a result, the reply by the Respondent was expunged from the record.

Arguing in support of the first ground, Mr. Msemo submitted that, there was substantive error in the written submission by the Respondent filed before the District Court of Kinondoni in support of her appeal. The submission referred to Civil Appeal No. 45 of 2010 which did not exist in that registry. According to him, such error was fatal and the said submission ought to be struck out which would cause the appeal to be dismissed for want of prosecution. To support his stance, he cited the cases of **Director**

Tos Filling Station v. Ayoub and 9 Others, Civil Application No. 30 of 2010 CAT (unreported) and **Fredrick A. M. Mutafurwa v. CRDB 1996 Ltd and Others**, Land Case No. 146 of 2004 HC Land Division (unreported).

In respect of the second ground, he argued that, the District Court failed to consider the evidence adduced by the Appellant in respect of maintenance and upkeep to the Respondent in anticipation that the pregnancy and born child was begotten by the Appellant. The evidence was clear on how the Appellant was sending money to the Respondent, the fact which was admitted by the Respondent in her testimony. Likewise, the Appellant tendered various exhibits to supplement his testimony like the DNA result and for the costs he incurred for such test as well as prosecuting the case at Kisumu Juvenile Court. He added that, since the Appellant discharged his duty by proving his case on the required standard, it was gross error for District Court to hold otherwise. Reverting to the third ground, he submitted that, in arriving at its decision, the District Court considered extraneous matters like production of birth certificate which were neither pleaded nor formed part of the evidence on record. By doing so, the District Court acted beyond the applicable principle which requires the decision to be based on the evidence on record. He supported his submission by citing the case of **Michael Yohana @ Babu and Another v. Republic**, Criminal Appeal No.

95 of 2017 CAT (unreported). In that regard, he prayed for the appeal to be allowed with costs by setting aside the judgment of the District Court of Kinondoni.

After careful consideration of Appellant's arguments and grounds of appeal, I find it prudent to begin with the second ground of appeal which in the considered view of this Court suffices to dispose of the appeal. This being the second appeal, I am much aware that, the court of second appeal will not routinely interfere with the findings of the two courts below on matters of facts except where there has been misapprehension of evidence, miscarriage of justice or violation of some principles of law or procedure. (See the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A. H. Jariwalla t/a Zanzibar Hotel** [1980] TLR 31).

In the present matter, the trial Court after receiving evidence from both sides concluded that, the Appellant managed to prove his case on the required standard as his evidence was heavier than the evidence of the Respondent. However, the District Court concluded that, both parties have failed to prove their allegations on the required standard. Now the issue for determination before this Court is whether the first Appellate Court misapprehended the evidence on record.

It is undisputed from the evidence on record that, the Appellant and the Respondent were not living in the same roof as husband and wife. According to the Appellant, the two were having an affair whereby, in 2016, the Respondent conceived and she assured him that, he was the father. Basing on such information, he kept on maintaining her and after she gave birth in 2017, he continued to maintain her and his child. The appellant produced financial statement of his Tigo pesa account to substantiate his claim. His testimony further revealed that, his efforts to introduce himself formally to her family and to baptise his child proved futile. Furthermore, when he wanted to follow up the process of birth certificate, the Appellant told him that, they should go for DNA test. After that, the Appellant and his brother went to the Respondent's family whereby after a meeting, her uncle advised them to resolve their matter. Since then, the Respondent ignored his calls, as a result he instituted parentage suit before the Juvenile Court of Dar es Salaam at Kisutu where under the Court's order, the DNA test was conducted and a report confirmed that, the Appellant was not the biological father as it is shown in Exhibits P3 and P4.

On the other hand, it was the evidence of the Respondent that, their love affair began in 2011 and they parted ways in 2013, when she was transferred to Mtwara. In 2014, she was transferred back to Dar es Salaam

whereby, the Appellant looked for her and they revived their relationship. In 2015, they parted ways once again after the Appellant told her that, he cannot marry her due to religion differences. On 30th April, 2016, she met with another man, a Zanzibarian and conceived. In December, 2016 when she was eight months pregnant, the Appellant returned and asked her to start over their relationship. She refused due to the pregnancy but he promised to marry her and take care of the child after birth. After she refused, the Appellant went away and never returned. According to her she gave birth on 24th January, 2017. She insisted to had never told the Appellant that she was carrying his child. After giving birth, the child was maintained by his biological father and not the Appellant. Although she admitted about receiving money from the Appellant through Tigo pesa but she claimed that, she has never asked for that but she received his money because they were lovers and not for maintenance of her child. She further testified that, the Appellant resurfaced when her child was one year and six months whereby, after she rejected him, he went to her family and introduced himself as the father of her child. She further contended she has never received anything in material form from the Appellant for the benefit of her child but she admitted to receive money for maintenance in 2018.

I have carefully considered the evidence of both sides. As stated herein above, there is no dispute that the Appellant and the Respondent were not living under the same roof. While the Appellant claimed to be deceived and humiliated by the Respondent, the Respondent claimed that, the Appellant knew from the beginning that it was not his pregnancy. As correctly observed by the trial Court that, in normal circumstances, no man can maintain and take care of a pregnant woman while knowing that he is not responsible for such pregnancy. If the Appellant knew about the fact of not being the father from the beginning, he could not have insisted to undergo the process of DNA test or to ask for an order for the second test after the report was read out before the Juvenile Court. This in itself does not establish prior knowledge on Appellant's side as claimed by the Respondent.

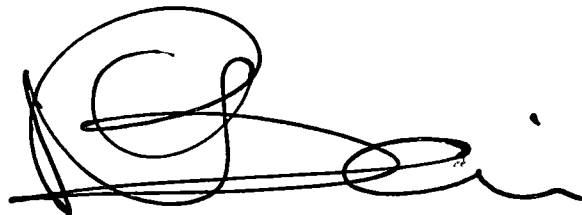
Apart from that, the Respondent claimed that, after the Appellant returned in December, 2016 and being rejected by her, he left and never returned until when the child was one year and six months. Conversely, Exhibit P5 shows that, the Appellant was sending money to the Respondent even before she gave birth. He kept on sending money to her immediately after she gave birth. This conduct does not tally with the conduct of a person with fully knowledge from the beginning that he is not the father. If the Appellant had disappeared from December 2016 as claimed by the

Respondent, then who was sending money to her and she kept on receiving the same without any hesitation! Bad enough, the Respondent never denied this fact or cross-examined the Appellant on this aspect which ordinarily connotes, she accepted the veracity of the Appellant's testimony. Moreover, The Respondent and her witness (SU2) gave contradictory testimony which raises doubt on their credibility. While the Respondent claimed to give birth on 24th January, 2017, SU2 claimed to know the Respondent since 2017 when she was in her early stages of pregnancy. One wonders what early pregnancy does SU2 was referring to because at the time she knew her in 2017, the Respondent was due for delivery. This is a clear indication that, the testimony of the Respondent was nothing but an afterthought. Had all these been considered by the first Appellate Court, it could have upheld the decision of the trial Court.

Thus, from the evidence on record, it is apparent that, the Respondent had deceived the Appellant thus causing him to believe that he is the biological father of her child. Relying on that deception, the Appellant incurred costs by providing maintenance to the Respondent and her child. Likewise, she caused him to incur costs for DNA testing while she well knew right from the beginning that the child was not his. This deception amounts to a civil wrong which is redressable by an action for unliquidated damages.

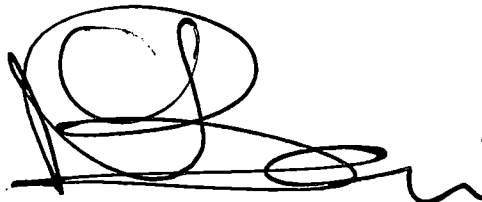
With this finding, it is the considered view of this Court that, the first Appellate Court misapprehended the evidence on record and arrived at a wrong decision.

That being said, I allow the appeal by quashing and setting aside the judgment and decree of the District Court of Kinondoni and I hereby uphold the decision of the Primary Court. Each party shall bear its own costs.

A handwritten signature in black ink, appearing to read "I. K. Banzi".

I. K. BANZI
JUDGE
10/12/2021

Delivered this 10th day of December, 2021 in the presence of Ms. Hadija Aron, learned counsel for the Appellant and in absence of the Respondent.

A handwritten signature in black ink, identical to the one above, appearing to read "I. K. Banzi".

I. K. BANZI
JUDGE
10/12/2021