IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 16 OF 2021

STIVIDANA KEGOYO WEBIRO ..... APPELLANT

VERSUS

MIHAYO JOHN ..... 1ST RESPONDENT

MAGORI MBADA KIHIRI ..... 2ND RESPONDENT

JUDGMENT

15th June, & 22nd July, 2021

ISMAIL, J.

The appellant herein was a losing party in Civil Case No. 15 of 2017, instituted in the Resident Magistrates' Court of Mwanza in Mwanza. He sued for a claim of damages arising out of the alleged adulterous acts, committed by the respondents. Besides praying for a prohibition order that would prohibit the respondents from continuing with their fornicatory indulgences, the appellant prayed for payment of general damages to the tune of TZS. 50,000,000/-. These damages were intended to redress the appellant for the reputational loss and mental anguish he allegedly suffered.

The trial court's finding in respect of the claim was that the plaintiff's case had not been proved to the required standard. This finding culminated in the dismissal of the matter, hence the instant appeal.

This matter traces its background from the event that allegedly occurred on 1st March, 2014. On the said date, at around 2.30 am, the 1st respondent, a bus conductor working with a bus company known as Nyehunge Bus Company, was caught indulging in a sexual act with the 2nd respondent, the appellant's wife. The incident allegedly occurred in room 14 at Viena Guest House in Nyegezi, Mwanza city. It was alleged that the appellant received a phone call from his anonymous source, informing him that the 2nd respondent, his wife, had been seen entering into room 14 with a man. At the time, the appellant was at his rural home in Bunda District. He then travelled that same night and arrived in Mwanza at around 1.00 am. He then enlisted an assistance of the police from Nyamagana Police station wherefrom he got a few policemen and a vehicle that took them to the scene of the crime. The appellant contended that PW3 ordered PW2 to accompany them to room 14 where they knocked and got inside. They found both of the respondents in a way that suggested that they had slept together. Pictures were allegedly taken.

The appellant further alleged that the respondents were taken to the police station where they were incarcerated until the following morning. Subsequent thereto, the appellant decided to institute a civil case the decision of which bred the instant appeal. Six witnesses testified for the appellant, while the respondents had themselves as defence witnesses. Both of the respondents denied any intimate relationship that would suggest that they had an affair. With respect to the incident that fermented the trial proceedings, both of the respondents contended that they put up in separate rooms, each oblivious to the presence of the other, until around 2.30 am on the fateful day, when the 1st respondent was forcibly taken from room No. 6 to room No. 14 where the 2nd respondent was sleeping. While admitting that they knew each other, both of the respondents denied ever indulging in any sexual relationship.

Dismissal of the matter by the trial court did not go well with the appellant. He, accordingly, instituted the instant appeal, containing six grounds of appeal which are reproduced with all their grammatical challenges, as hereunder:

1. *That, the trial Magistrate erred in law for striking out the defence as the defendants did not appear on the scheduled mediation.*

2. *That, the trial court erred both in law and fact by deciding that there was no evidence of appellant and 2nd respondent that they were married couples while marriage certificate was tendered as exhibit.*
3. *That, the trial court erred both in law and fact to decide that appellant did not prove his case on balance of probability while court not properly evaluated evidence on record.*
4. *That, the trial court erred in law and fact to disregard the evidence of PW2 and PW1 which was water tight and did not evaluate and analyze the evidence of plaintiff's case only relied on defence evidence in the judgment.*
5. *That, the trial court erred both in law and fact to decide that the appellant and 2nd respondent married in 2010.*
6. *That, the trial magistrate erred both in law and fact when he disregarded the evidence of the appellant's part which was very strong.*

When the matter came up for orders, the counsel for the parties unanimously acceded to the Court's proposal to have the appeal disposed of by way of written submissions. The decision was informed by the ongoing health crisis.

The first jab was thrown by Mr. Innocent Kisigiro, learned advocate representing the appellant. With respect to ground one, the counsel's contention is that the trial magistrate erred in not striking out the respondents' written statement of defence when the said respondents failed

to appear for mediation. Such failure, the counsel contended, offended the provisions of Order VIII Rule 29 of GN. No. 381 of 2019.

Regarding the second and fifth grounds, Mr. Kisigiro's argument is that the trial magistrate strayed into error when he held that the appellant and the 2nd respondent were not a married couple, while the marriage certificate, exhibit P1, was tendered and admitted as an exhibit in court. The counsel argued that, as the trial magistrate did this, he stated at some point in the decision that the couple was married in 2010. Mr. Kisigiro contended that such error occasioned a miscarriage of justice.

Arguing in support of grounds three, four and six, the appellant's counsel argued that it was erroneous, on the part of the trial magistrate, to disregard the testimony of PW2 and PW1 which he described as watertight, choosing instead to rely on the defence evidence in arriving at the conclusion. He argued that the testimony of PW2 was strong and credible as it gave an account of how the 1st respondent hired a room before he subsequently invited the respondent into the room, and that at no point in time did the 2nd respondent rent a different room. The counsel argued that this was cemented by the pictures and the marriage certificate which were admitted as exhibits. Mr. Kisigiro argued that the appellant himself testified to that effect, and that the testimony was corroborated by that of PW1, PW3

and PW4. He urged the Court to re-evaluate the evidence and come up with the conclusion that the appellant proved his case. The counsel supported his argument with the case of ***Gai d/o Penzule v. Sumi d/o Magoye*** [1983] TLR 289.

The respondent's rebuttal was equally concise and focused. Mr. Edwin Alon, learned counsel for the respondents, began by challenging the competence of the appeal by contending that the trial matter was filed in wanton dilatoriness. He argued that the trial matter in respect of which the cause of action arose on 2nd March, 2014 was filed on 2nd March, 2017, beyond the three-year period set for filing of the tort cases. It was his argument that a day had elapsed by the time the said suit was filed in the trial court.

Alon further argued that the said matter was placed before Hon. Siyani, J, at which an order for amendment of the plaint and retrial before another magistrate was made. The counsel's contention, whereas the said order was issued on 19th October, 2018, the amended plaint was filed on 18th June, 2019, instead of 24th May, 2019. This means that, the counsel argued, the suit was filed 18 days after the period ordered had expired, contrary to Order VI rule18 of the Civil Procedure Code, R.E. 2019. He decried the trial court's act of ignoring this fact.

With respect to non-appearance for a mediation session, the respondents' counsel argued that the respondents were represented by their counsel who entered an appearance before Ryoba, RM, and informed the magistrate that his clients had nothing to offer in mediation. He then urged the court to record that mediation had failed. It was the counsel's argument that such appearance is allowed under rules 27 and 28 of the Civil Procedure Code (Amendment of the 1st Schedule) Rules, 2019. The counsel argued that this ground lacked the basis.

With regards to grounds two and five, the contention by the respondents' counsel is that admission of the said certificate of marriage was erroneous since the same was a Photostat copy which is not admissible. He maintained that, nevertheless, such admission would not be enough in establishing his claims. He took the view that these grounds are baseless.

With respect to grounds three, four and six, the argument by the respondents is that the appellant failed to prove the case on the balance of probabilities. His argument was predicated on a number of reasons. These are: one, that the appellant failed to bring the guest house's attendance register to prove that the respondents were found in room 14 at Viena Guest House. Two, the act of taking pictures at gun point and bringing armed policemen connoted that there was a plan to blackmail the respondents, and

that the appellant failed to cross examine on this contention at the trial. Three, that the appellant failed to explain why he ordered the respondents' detention while the matter was not criminal. Four, that the appellant failed to explain why the policemen took the respondents' statements while the matter was purely a civil matter. Five, that the appellant failed to explain why the 2nd respondent was not taken to hospital for a medical test that would establish if the 2nd respondent had been carnally known. He argued that presence of the respondents in the same guest house would not be a proof of a love affair, and that the appellant did not deny that the 1st respondent who occupied room No. 6, and was forced to enter room No.14 at gun point. He argued that this fact was not contradicted.

He implored upon the Court to dismiss the appeal with costs.

In his rejoinder, Mr. Kisigiro began by playing down the objections raised by the respondents' counsel, arguing that these objections ought to have been grounds of cross-appeal that the respondents ought to have raised. He considered the objections as untenable.

Submitting on ground one, the counsel argued that the fact that only the counsel appeared for mediation means that the respondents lost their right of defending the matter. He argued that appearance of the parties to a mediation session is mandatory. The counsel argued in respect of the rest

of the grounds that the respondents were found in room 14, ruling out the allegation that there was a blackmail. He denied the contention that a gun was pointed at the respondents, as he denied the contention that the appellant and the 1st respondent were enemies.

Deducing from the parties' submissions the broad issue for determination is whether the appeal presents any meritorious chances to make it succeed. I will tackle the appeal in the same sequence the grounds of appeal were argued.

Before I get to the heart of the counsel's arguments in respect of the grounds of appeal, it is pertinent that the disquieting issue raised by the respondents be addressed. This relates to the contention that the suit ought not to have been entertained because it was time barred. In my hastened view, this contention is devoid of any merit. The incident complained about in the suit occurred in the night leading to 2nd March, 2014, while the suit was filed on 2nd March, 2017. This was exactly within the three-year period prescribed for suits on tort. With regards to amendment of the plaint, it is quite clear that the order for amendment was granted on 11th June, 2019 while amendment in respect thereof was filed on 18th June, 2019. This was within the fourteen-day period which was granted by the Court. In view of

all this, I find nothing justifying the contention that the suit was time barred. Consequently, I reject this point out of hand.

Moving on to the substance of the appeal, the argument in ground one is that non-appearance of the respondents to a mediation session ought to have resulted in the striking out of the written statement of defence. The respondents are opposed to this view, contending that mediation was marked failed before Ryoba, RM., and that this was consistent with Rule 27 and 28 of the CPC Amendment Rules of 2019.

Dismissal of a suit is one of the remedies that are available under rule 29, in case a party fails to attend a scheduled mediation. This remedy is exercised by the trial magistrate or judge, and it is granted at the instance of a party. In this case, the prayer for adverse orders against the respondents, for what is perceived to be a non-appearance, ought to have been made by the appellant. Going through the proceedings (pages 30-33) what comes out is that when the matter was slated for mediation Mr. Rugaimukamu, learned counsel, appeared for the appellant (then plaintiff) while Mr. Mhoja, learned advocate, appeared for the respondents (then defendants). Then the following transpired:

"Rugaimukama:

The matter scheduled today for the mediation but the defendants are not present as usual hence I pray the

mediation be marked failed and the case be returned to the presiding magistrate.

Steven Mhoja:

I have no objection.

Court:

Mediation is marked failed

Order:

(i) M on 17/2/2020 at 8:3-AM

(ii) The case be return back to the presiding magistrate."

It is imperative that when the matter came before the presiding magistrate on 9th March, 2020, no prayer was made for the striking out of the defence or any adverse order that may be deemed to have been refused by the trial court. It is inappropriate to apportion a blame to the trial court for orders which were not contemplated by the parties themselves. I hold the view that this ground of appeal is hollow and I dismiss it.

Grounds two and five query the trial court's finding that the marriage between the appellant and the 2nd respondent was not proved. The counsel argued that such finding was made in defiance of the marriage certificate which was tendered as exhibit P1. The argument by the respondents' counsel

is that the said exhibit was a secondary evidence which shouldn't have been admitted.

As I tackle these grounds of appeal, it behooves me to remind the parties of the legal position with respect to certificate of marriage. This is to the effect that a marriage certificate can constitute a *prima facie* evidence of the existence of a marriage. This is in terms of section 55 (a) of the Law of Marriage Act, Cap. 29 R.E. 2019 which provides as hereunder:

> *"The following documents shall be admissible in evidence without proof in any court or before any person having power under any written law to receive evidence, as being prima facie evidence of the facts recorded therein–*
>
> *(a) a marriage certificate issued under this Act or any law in force before the commencement of this Act."*

Going through the trial proceedings, it is gathered that on 11th May, 2020, the appellant, through PW1 tendered exhibit P1, a marriage certificate that purportedly evidenced the fact that the appellant and the 2nd respondent were husband and wife whose marriage was contracted on 19th October, 1994. This document was admitted without any objection by the counsel for the respondents. In the absence of any evidence to the contrary, the justified conclusion is that the 2nd respondent was legally married to the appellant, and that, at the time of the incident that bred the instant appeal, the duo's

marriage was in existence. There has been a talk of misunderstanding between the spouses prior to the incident. But this was a casual statement which was not backed by any evidence to that effect. Even assuming that the parties were in such a sour state, my contention is that nothing took away the fact that the marriage was still in subsistence.

With respect to the date of the marriage, I note that the trial magistrate held that the appellant and 2nd respondent were married in 2010.whilst I take note of this discrepancy, I refuse Mr. Kisigiro's temptation of constructing a mountain out of a molehill on this aspect. This is so because the difference in dates has little or no significance, given the fact that the alleged incident of adultery occurred in 2014, when the appellant and his wife had exchanged their vows. It is my conviction that the discrepancy of the years is of trifling effect and I choose to play it down. In the whole, I find these grounds meritorious and I allow them.

Grounds three, four and six punch holes in the trial court's decision. The contention is that the trial court erred in disregarding the watertight testimony adduced by the appellant and his witnesses. It should be noted that the appellant's claims were that the respondents were involved in an adulterous act for which damages were claimed. This required him to prove the existence of the said acts. Related to this is the claim of damages for

what is alleged to be the pain and mental anguish suffered as a result of the respondents' immoral acts.

As I delve into evaluating the testimony adduced by the appellant, let me underline the known and established position. This is to the effect that, like in all other civil cases, proof of the claim of adultery lies with the person suing for that claim. The enduring principle was underscored in ***Jummane Jingi v. Njoka Kiduda*** [1985] TLR 38, in which the Court held as follows:

> *"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."*

See also ***Wilson Andrew v. Stanley John Lugwisha & Another***, CAT-Civil Appeal No. 226 of 2017 (unreported).

The testimony that constituted the appellant's case was that of the appellant himself, PW2, PW3 and two other witnesses. There is also exhibit P1. The testimony of PW1 was to the effect that he was married to the 2nd respondent and that such marriage was evidenced by exhibit P1. His further testimony is that he got a tip-off on the respondents' sexual indulgence and that he succeeded in nabbing both of them in room 14 of the Viena Guest House. This account of facts was corroborated by PW2, the guest house attendant who witnessed the incident, and that on that fateful day the

respondents checked in and were allocated room 14 where they were found when the appellant and his police team invaded the room. PW4, the occupant of the neighbouring room 13 cemented the contention, as he witnessed the incident when he was called to observe what was unfolding in the next room. Same line of argument was narrated by PW5.

The totality of this testimony convinces me that: ***one***, the appellant and the 2nd respondent were, at the time of the alleged incident, a married couple and that their marriage was still subsisting. ***Two***, that the respondents were found in room 14 in a manner that left no other inference but that they were indulging in fornication. This leaves no doubt, in my view, that the respondents were in an adulterous position that justified the appellant's decision to found an action for damages for adultery. It was erroneous for the trial magistrate to hold that a case against the respondent had not been proved.

But even assuming that the evidence that linked the respondents was not direct as alleged by the appellant, the fact that circumstances under which they were found raises a suspicion of a fornicatory relationship is sufficient to hold them culpable of adultery. This contention gains credence from the decision in ***Gai Ipenzule v. Sumi Magoye*** [1983] TLR 289, wherein it was held:

"It is not the law that direct evidence of persons caught in fragrante delicto is the only admissible evidence to prove adultery. Very rarely adultery is proved by direct evidence; the common practice is that adultery is proved by circumstantial evidence."

There has been an argument that the appellant failed to bring a guest house register to prove that the respondents hired one room in which they were found. This comes from the respondents' contention that each of the respondents checked into different rooms, and that the 1st respondent was forcibly taken from his room to room 14. While this fact requires some proof, I consider this to be a fact that is especially within the knowledge of respondents, and that the burden of proving that fact is upon the said respondents. This is a requirement under the provisions of section 115 of the Evidence Act, Cap. 6 R.E. 2019. Thus, while adverse inference can be drawn in such a case, that can only operate against the respondents who alleged that they were in two different rooms, and that the 1st respondent was dragged into room 14 by the appellant and the police officers who accompanied him.

It is my conviction that the evidence that was tendered by the appellant was ample, credible and sufficient to support the allegation of adultery. I find the grounds of appeal meritorious and I allow them.

The appellant's allegation of the respondents' indulgence in adultery bred a claim of damages to the tune of TZS. 50,000,000/-. From the parties' submissions, the question that can be distilled is whether the claim of damages is justified.

It should be noted that award of damages is a discretionary matter which is a domain of the trial court. Where the parties to the proceedings are from the same community then customs of the community that the parties belong take a prominent role in determining the damages to be paid. This was held by the Court (Mapigano, J) in ***Mafuru Magabanya v. Joseph Mulya*** [1987] TLR 9, in which it was held:

> *"Under the law of damages for adultery or enticement it is in the discretion of the court, and in exercise of its discretion the court is obliged to pay due regard to any relevant custom of the community to which the parties belong, and in the question of adultery, to the question whether the husband and the adulterous wife were living together or apart at the time of the commission of the adultery."*

The position in the just quoted excerpt traces its origin from the provisions of section 74 of the Law of Marriage Act, Cap. 29 R.E. 2019, the substance of which states as follows:

"(1) Damages for adultery or enticement shall be in the discretion of the court but shall not include any exemplary or punitive element.

(2) In assessing such damages, the court shall have regard–

(a) to any relevant custom of the community to which the parties belong; and

(b) in cases of adultery, to the question whether husband and wife were living together or apart."

In the instant case, it has not been shown that the appellant and the 2nd respondent were living together or apart. This means that assessment of damages has to take the normal way of doing things. As stated by the Court of Appeal in ***Razia Jaffer Ali v. Ahmed Mohamed Sewji & 5 Others***, CAT-Civil Appeal No. 63 of 2005 (unreported), assessment of damages is by no means easy. It involves an understanding of what the damages are intended to do when pleaded and granted. In the old case of ***Livingstone v. Rawyards Cool Co.*** (1880) 5 App. Cas. 25, Lord Blackburn defined damages as:

"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting this compensation or reparation."

This principle was echoed in ***Victoria Laundry v. Newman*** [1949] 2 KB 528 wherein Asquith, L.J. held that *"the purpose of damages is to put the plaintiff in the same position, so far as money can do so, as if his rights had been observed."*

The question that follows is, would the claim of the sum of TZS. 50,000,000/- advanced by the appellant put the appellant in the same position he would be if he had not allegedly suffered for wrong he is craving for compensation? Ordinarily, this would be answered by the trial court had it held that the appellant had proved his case. In my view, the claimed sum is by far excessive and going beyond the compensatory effect of what damages would do. In my view, the sum of TZS. 10,000,000/-, is an adequate recompense for the pain suffered and I grant it.

In the upshot the appeal is allowed with costs.

It is so ordered.

DATED at **MWANZA** this 22nd day of July, 2021.

THE HIGH COURT OF TANZANIA
MWANZA

M.K. ISMAIL

JUDGE

Date: 22/07/2021

Coram: Hon. C. Tengwa, DR

Appellant: Present

Respondent: Mr. Paschal Josph, Advocate

B/C: J. Mhina

Court:

Judgment delivered today in the presence of both parties.

C. Tengwa

DR

<u>At Mwanza</u>

22nd July, 2021