IN THE HIGH COURT OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CIVIL APPEAL CASE NO. 30/2020

FAIMA YAZID.....1ST APPELLANT

JIMMY LAWRENCE.....2ND APPELLANT

VERSUS

YAZID KIBOMBO..... RESPONDENT

(Appeal from the decision of the District Court of Bukoba in Civil Appeal No. 30 of 2019)

JUDGMENT

12 & 16 July, 2021

MGETTA, J:

This is a second appeal originates from Primary Court of Bukoba Urban (henceforth the trial court) where the respondent, Yazid A. Kibombo sued the appellants namely Faima Yazid and Jimmy Laurence (henceforth the 1st and the 2nd appellants respectively) for adultery, and claimed damages to the tune of Tzs 10,000,000/= (tz shillings ten million) only. After the trial court had evaluated evidence before it, it concluded that the claim on adultery was not proved and therefore dismissed it. The said trial court judgment did not amuse the respondent. He therefore appealed to the District Court of Bukoba at Bukoba (henceforth the district court). What

is observed to be the finding of the district court, it is concurred. It upheld the decision of the trial court that there was no concrete evidence to prove the claim of adultery.

According to the district court, the dispute between parties was held to center on the parentage of the child called Shamsi and therefore on *suo moto* it resorted to the provision of **Section 36 of the Law of the Child Act, 2009** (Act No.21 of 2009) and ordered DNA test in view of solving what it observed to be the dispute before parties. It also ordered the cost for DNA to be borne by the appellants. The appeal was therefore partly allowed.

The decision of the district court did not bless the appellants. They have now come to this temple of justice to impugn the said decision. The appellants being in unrepresented lay persons had raised seven grounds of appeal but this court grasped that only one ground engulfs the rest of them and is what the appellants submitted for that:

> *the district court erred in law and fact by raising and discussing new issue, that is DNA issue, which was not an issue in the trial court and even parties did not disclose it in their sworn statement.*

When invited to amplify to the ground of appeal, both appellants were at one that what was pleaded before the trial Primary Court was damages for adultery and not DNA. That the dispute was adultery. That even the evidence given was to prove adultery but the trial court was not proved before it. They thus wondered why the district court entertained a new issue of DNA in view of proving the respondent's case. Furthermore, that the district court did not even afford them opportunity to respond on the new issue of DNA rather it ordered for DNA test.

In reply, the respondent dismissed the appellants' submission that on page 15 of the trial court judgment it was ruled that tendering a clinical card of the child bearing the name of Yazidi does not give Yazid a status of being biological father. The trial court went on that the only proof of biological father was a DNA test. The respondent conceded that he prayed for adultery as the first appellant is his legal wife and because the child was born out of wedlock. He prayed to this court to allow DNA test ordered by the district court and dismiss the appeal.

In rejoinder, the first appellant reiterated that DNA is a new issue and the second appellant has not given time period when he filed for adultery case and that of parentage/DNA before the proper court.

I have keenly considered rival arguments of both parties and also perused the entire record of this appeal. The issue for determination is therefore whether this appeal has merit. In answering this main issue, I will therefore be answering interlocutory issue of whether DNA was new issue raised at district court and the legality of the respective order by district court.

I must say from the outset of this judgment that I have found the sentiment of merit in this appeal due to the following reasons.

One, I concur with the appellants that before the trial court the issues and dispute between the parties were not a DNA test to ascertain biological father of the child and there was no any application before it rather the issue centered on a claim of damages for adultery. (see page 10 & 11 of trial Court Judgment). Therefore, I don't subscribe to the finding of the district court that the issue before parties was for DNA test to ascertain biological father of the child. What the trial Court Pinpointed after the first appellant herein had tendered the clinical card bearing the name of Yazid (respondent herein) to defend herself that she did not commit adultery with the second appellant (Jimmy Lawrence) and gave birth of the child Shamsi, it was that even if the clinic card bears the name of the father

Yazid as father of Shamsi, could not be conclusive evidence that the child is for the respondent rather if he had DNA test. The trial court was of the view that the first appellant had other defense of not committing adultery, but not of clinical card. The trial court, in fact, accepted other defenses and ruled that adultery was not proved.

It is therefore apparent from the trial court record that the issue was not parentage, but adultery. DNA on parentage of the child could be an independent evidence to prove adultery upon which the burden to prove adultery with DNA was for the respondent who was a plaintiff at the trial court and not for the appellants. Practice of the courts have been to strike out new grounds at the appellate level which were not raised at the trial court. See **Samwel Sawe vs The Republic,** Criminal Appeal No.135 of 2004, (CA) (Arusha) (Unreported). The district court therefore ought to have struck out that new ground.

I am thus certain that the suit before trial Court and the issues thereon rested on adultery which could be proved in many ways including DNA of the born child in adulterous relationship, but nowhere in the records it is reflected that the respondent applied for such order and the trial court refused to order or to direct him accordingly.

Two, the invocation of the provision of **Section 36(2) of the law of the Child Act, 2009** (Act No. 21 of 2009) to order DNA test *suo moto* to ascertain biological father as required by the said law in view of proving adultery was null and void as the district court had no jurisdiction as it did not sit as a juvenile court to determine child matters in terms of **section 97 of the Law of the Child Act.** Section 3 on the interpretation section defines Courts as

> *"court" means - (a) a primary court, the District Court, the Resident Magistrates Court or the High Court;"*
>
> *(b) for purposes of adoption, the High Court; and (c) for purposes of parentage, a Juvenile court;"*

From the above quoted provision of the law, the term "court" for purpose of parentage is only Juvenile Court which has jurisdiction and not a district court. Part V of the Act in its heading deals with **parentage, custody, access and maintenance.** Under this part, **section 35(e) Law of the child Act** provides that DNA result is one of the evidences of parentage. Therefore, invoking **section 36(2) Law of the Child Act** by the district court seating as appellate court on the claim of adultery damages tried by Primary court and ordering DNA test, in fact the district

court magistrate usurped the powers of Juvenile court which it did not have. Juvenile court has its peculiar procedure under the law. Even if it is assumed that the district court had jurisdiction to order DNA still its order could be procedurally illegal and could not stand as the result of DNA (if could have been implemented) would have served no any purpose as the appeal in the district court is disposed already. In other ways the DNA report in response of the order would be rendered superfluous as the appeal is already disposed and the proceedings of the district court could not be reopened again so that DNA report can be tendered as exhibit and subject to cross examination to ascertain reliability, integrity or authentication for admissibility purpose.

If I still swing on the same assumption, and If I may say it by way of *obiter dictum*, what the district court ought to have done, if it had jurisdiction, was to stay the proceedings before it and undergo the procedure of additional evidence by ordering DNA test (as a report) as an additional evidence pending determination of the appeal before it or direct the trial court (if seized with such jurisdiction) to order or receive additional evidence. The procedure for additional evidence if the appellate court is of the opinion that it is required for proper decision of the case is well

illustrated by the Court of Appeal in the case of **Ismail Rashid vs Mariam Msati**, Civil Appeal No.75 of 2015, (CA) (DSM)(Unreported).

As the situation is now, there are no proceedings pending before district court. Surprisingly, the district court has concurred power with the findings and decision of trial Court, but yet allowed the appeal partly basing on the matter which was not even entertained by the trial court; neither was it an issue before it nor it had jurisdiction over it and finally disposed the appeal. It was actually null and void, unfounded and bad procedure in law.

In the event, I quash and set aside the judgment of the district court and its orders thereon. As the course of parentage and claim of adultery are two distinct causes of actions, the respondent is advised, if he still so desires, to pursue his matter to the forum with competent jurisdiction under proper procedure stipulated by the relevant law. As the flaw was caused by the district court, I give no orders as to cost. The appeal is accordingly allowed.

It is so ordered.

J. S. MGETTA
JUDGE
16/7/2021

COURT: This judgment is delivered today this 16th July, 2021 in the presence of both parties in persons.

J. S. MGETTA
JUDGE
16/7/2021

COURT: Right of appeal to Court of Appeal is fully explained.

J. S. MGETTA
JUDGE
16/7/2021