

IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

PC. CIVIL APPEAL NO. 20 OF 2018

[Arising from Civil Appeal No. 10 of 2018 at Urambo District Court and Original Civil Case No. 16 of 2018 at Urambo Urban Primary Court]

NYANGU MASUNGA APPELLANT

VERSUS

NDILANHA LUKELESHA RESPONDENT

JUDGMENT

Date of Last Order: 18/06/2021

Date of Judgment: 19/07/2021

AMOUR S. KHAMIS, J.

At the Urban Primary Court of Urambo, the respondent herein, Ndilanha Lukelesha, instituted a civil suit against the appellant, Nyangu Masunga, claiming a total of Tshs: 9,000,000/= (Nine Million Shillings) being compensation for separation from his family which was a backbone for a tobacco farming business caused by Nyangu Masunga, the appellant.

After a full hearing of the suit, the learned Primary Court Magistrate came up with a decision that, the respondent, Ndilanha Lukelesha deserved to be paid a total of Tshs. 4,000,000/= (four million) as compensation for disturbance and loss suffered.

Aggrieved with that decision, Nyangu Masunga appealed to the District Court of Urambo asking the Court to quash the trial court's decision and orders for a reason, among others, that the family referred to did not belong to the said Ndilehwa Lukelesha as alleged or at all.

Dismissing the appeal, the District Magistrate concluded that the case originated from an unlawful and malicious act of adultery by Nyangu Masunga towards Ndilahwa Lukelesha's wife, and thus upheld a decision and orders of the Primary Court.

Determined to pursue his legal rights, Nyangu Masunga appealed to this Court on seven grounds of appeal;

- 1. That, the learned Resident Magistrate erred in law by entertaining a suit which was res-subjudice at the dispute between the parties were conducted at the same time in Civil Cases No. 119/2017 and Civil Case No 16/2017 before the same Court.*

2. *That, the learned Resident Magistrate erred in law and fact to rule that the appellant committed adultery towards respondent's wife.*
3. *That, the learned Resident Magistrate erred in law and in fact in the evaluation of the evidence on record and thereby reached a wrong decision.*
4. *That since it was not proved that the respondent was once married to appellant's wife the learned Magistrate erred in law in upholding the decision of the primary Court.*
5. *That, the learned Magistrate erred in law and facts when it deliberately ignored the evidence adduced by appellants witnesses.*
6. *That, the learned Magistrate erred in law in holding that the respondent evidence had proved the case on the balance of probabilities.*
7. *That, his decision was against the weight of evidence.*

With leave of this Court, parties argued the appeal by way of written submissions. However, for reasons best known to himself, the respondent did not file written submissions as scheduled by the Court.

Submitting in support of the appeal, the appellant raised an issue of jurisdiction contending that, the Primary Court had no jurisdiction to hear and determine a claim for damages arising from adultery in absence of a petition for divorce or proof by the petitioner that he contracted either an Islamic or Customary Marriage with the adulterer (woman).

He cited the case of ***Wilson Andrew vs Stanley John Lugwisha, Civil Appeal No. 226/2017 CAT*** (unreported) where the Court of Appeal held that,

“The jurisdiction of the Primary Court to entertain claims of damages for adultery where there is no petition of divorce against any person with whom his or her spouse has committed adultery are provided under Part V of the LMA which deals with Miscellaneous Rights of Action”

He contended that, the trial magistrate could not have assumed jurisdiction to entertain the claim for damages on adultery because the form of marriage between the appellant and the adulterous wife was not disclosed.

It was the appellant's submission that, in absence of a petition for divorce, the respondent ought to have proved to Court on existence of either an Islamic or customary marriage. He moved this Court to quash a decision of the trial Court and that of the District Court.

Submitting on grounds 2, 3, 4, 6 and 7 in unison, the appellant argued that, since the issue in question was adultery which was one of the grounds for divorce under the Law of Marriage Act, the plaintiff should either be a wife or husband, and that existence of a marriage must be proved to form a ground for adultery to stand.

He added that, the respondent ought to have proved to Court that the person with whom adultery was committed was his wife.

The appellant contended that, mere words that the respondent inherited a wife from his demised brother were not sufficient to prove existence of a marriage. He cited Section 68 of the LMA which states that: -

“Notwithstanding any custom to the contrary, a woman whose husband has died shall be free
a) To reside wherever she may please; and

b) To remain unmarried, or, subject to the provisions of Section 17, to marry again any man of her own choosing.”

Again, the appellant referred to Paragraph 62 of the Local Customary (Declaration) Order, GN No. 279/1963 which states that: -

“the widow is to be asked if she agrees to be taken over by the brother of the deceased....”

From that posture, the appellant submitted that the entire judgment of the trial Court did not show or state on how the respondent followed the procedures set out in the above quoted law.

As to the 5th ground of appeal, the appellant contended that, the learned magistrate ignored the evidence adduced by his witnesses especially one Mkera Shija who testified that she was not wife of the respondent. He moved this Court to allow the appeal with costs.

I have painstakingly gone through the record of this case and failed to understand at what point in time did the respondent's claims changed course from a normal civil suit to an adultery claim.

Passing an eye on the Primary Court records, the respondent's claims were different from what was submitted to this Court. The respondent's claim reads;

"Mdai anathibitisha kwamba anamdai mdaiwa fidia ya Tsh. 9,000,000/= kutokana na usumbufu wa kuachanisha familia ya mdai, Hivyo mdai ameathirika kisaikolojia na kumfanya ashindwe kuzalisha kilimo cha Tumbaku na pia familia hiyo ndiyo ilikuwa nguzo ya uzalishaji. Hivyo anaiomba Mahakama imuamuru mdaiwa amlipe fidia hiyo"

Records further show that in the Primary Court, the respondent testified on the claim but did not mention any adulterous act committed by the appellant. Rather, he stated as follows:-

"Ninamdai mdaiwa Tsh 9,000,000= kwa sababu aliutorosha mji wangu ambao ulikuwa unanizalishia kiasi hicho: yangu na watoto hao ndiyo nilikuwa ninawategemea katika uzalishaji"

From the claim presented by the respondent, and the submission subsequently made by him, I find no clue on the relationship of the appellant and his alleged wife.

In his judgment, the District Court's Magistrate stated that:

“This is an appeal arising out of unlawfully and malice act of adultery by the appellant towards respondent’s wife”

In my careful perusal of the records, I didn’t see a base for the learned magistrate to conclude that the appellant committed adulterous acts. That reason alone, in my view, suffices to set aside the impugned judgment of the appellate Urambo District Court as it based on a finding that was not supported by the trial court’s records.

As regards to the judgment and orders of the trial Court, the respondent claimed compensation of Tshs. 9,000,000/= allegedly because the appellant fled with his family. Out of that claim, the trial Court awarded him Tsh: 4,000,000/=.

The trial court’s records show that no evidence was led to prove an allegation that the disputed woman was the wife of Ndilanha Lukelesha and further, no evidence was produced to show how the respondent suffered the alleged loss.

For the reasons stated herein above, I allow this appeal and hereby set aside decisions of the trial Primary Court and of the District Court of Urambo. Each party to bear own costs.

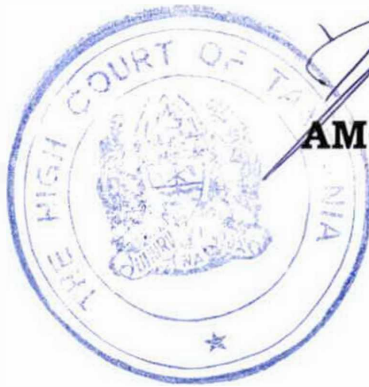


AMOUR S. KHAMIS

JUDGE

17/7/2021

Judgment delivered in open Court in the presence of Mr. Kanani Chombala, learned advocate for the respondent and in absence of the appellant. Right of appeal explained.



AMOUR S. KHAMIS

JUDGE

17/7/2021