

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

(PC) CIVIL APPEAL NO.7 OF 2021

*(C/f Civil Appeal No. 2 of 2021 at the District Court of Ngorongoro at Ngorongoro ,
Originating from Civil Case No.9 of 2020 at Ngorongoro Primary Court)*

JOHN JEREMIA SUMAWE.....APPELLANT

Vs

MELKIZEDECK CLAMSEN MWACHA.....RESPONDENT

JUDGMENT

Date of last Order: 22-6-2022

Date of Judgment: 21-7-2022

B.K.PHILLIP,J

The respondent herein sued the appellant at the Primary Court of Ngorongoro for adultery. He claimed for compensation to a tune of Tshs 10,000,000/=. It was the respondent's case that the appellant enticed his wife and had love affairs with her. He realized the same after reading romantic messages in his wife's cell phone which were sent by the appellant. He made a follow up of the telephone numbers where those romantic messages came from and confirmed that those telephone numbers were registered in the name of the appellant. During the hearing each party brought one witness. The respondent tendered in Court his wife's telephone and documents for prove of the registration of the telephone numbers alleged to belong to the appellant. (Exhibits P1-P4). The respondent's wife, (SM2) testified to the effect that the appellant enticed her and had love affairs with him. Moreover, she told the Court that on 22nd September 2020, she had sexual intercourse with the appellant in the bathroom at her residence. The appellant denied all of the respondent's allegations. His witness, one Elias Jeremia, told the trial Court that on 22nd September 2020, he was with the appellant for the whole day, thus, the allegations made by the respondent's wife was not true. At the end of the

day the trial Court ruled out that the respondent proved his case to the standard required by the law. It entered judgment in favour of the respondent and ordered the appellant to pay the respondent a sum of Tshs 10,000,000/=, being Compensation for the adulterous acts committed by the appellant to the respondent's wife.

Aggrieved by the decision of the trial Court, the appellant appealed to the District Court of Ngorongoro. His appeal did not sail through. It was dismissed with costs. Undaunted, the appellant has lodged his appeal in this Court to challenge the decision of both lower Courts on the following grounds ;

- i) That the appellant Court erred in law and fact when it upheld the decision of the trial Court without ascertaining that the trial court had no jurisdiction when it entertained the case before it.
- ii) That the appellant Court erred in law and fact when it upheld the decision of the trial Court without ascertaining that the trial Magistrate erred in law and fact when it failed to evaluate and consider the evidence adduced by both the appellant and respondent during the trial, hence reached into erroneous decision.
- iii) That the appellant Court erred in law and fact when it upheld the decision of the trial Court without ascertaining that the trial Magistrate erred in law and fact when it failed to justify the basis of ordering the appellant herein to pay compensation of Tshs. 10,000,000/= to the respondent herein.
- iv) That the appellant Court erred in law and fact when it upheld the decision of the trial Court without ascertaining that the trial Magistrate erred in law and fact when admitted evidence and continued relying on it in his judgment contrary to the procedure of tendering electronic evidence.

The appellant prayed that this appeal be allowed by quashing and setting aside the judgment of the first appellate Court and the trial Court. Costs of the appeal be provided for.

Both parties appeared in person since they were not represented. I ordered the appeal to be disposed of by way of written submission. The written submissions were filed as ordered and the same indicates that the learned Advocate Hamisi Mkindi prepared the submission for the appellant in gratis whereas the learned Advocate Nixon John Tenges was engaged for preparing the submissions for the respondent.

Submitting for the 1st ground of appeal, Mr. Mkindi argued that the Primary Court's jurisdiction to entertain claims for adultery where there is no petition for divorce against any person with whom his or her spouse has committed adultery is provided under Part V of the Law of Marriage Act, ("LMA") which deals with miscellaneous Rights of Action, specifically section 75.

He went on submitting that in the case in hand, during the hearing at the trial Court it was not disclosed whether the respondent's marriage with SM2 was contracted under either customary law or Islamic form. He maintained that since the form /type of the marriage between the respondent and his wife was not disclosed, the Primary Court was not supposed to entertain the case. To cement his arguments he cited the case **of Wilson Andrew Vs Stanley John Lugwisa and another, Civil Appeal No.26 of 2017**, (unreported) in which the Court of Appeal of Tanzania had this to say on the jurisdiction of the Primary Court in matters involving claims founded on adultery;

" In the circumstances , it is obvious that since the marriage form of the appellant and the second respondent was not disclosed, the Primary Court could not have assumed jurisdiction to entertain the claim of damages for adultery which was placed before it. This is more so because , it cannot be said with certainty that the couple under discussion contracted either customary or Islamic marriage which would have justified its jurisdiction.

In the light of the above observation, we agree with the learned High Court Judge that the Primary Court had no jurisdiction but for different reasons. While she based her decision on section 18 of the MCA which in our view was not correct, we are saying it had no jurisdiction on account of the provision of section 75 of the LMA as stated above.."

In rebuttal, Mr.Tenges, submitted as follows; That the respondent and his wife were married under customary law. In her testimony, the respondent's wife, (SM2) testified in Court to that effect and the respondent in his testimony stated that his marriage with his wife was contracted under customary law. He went on submitting that when responding to questions posed to her by assessors, SM2 said that her marriage with the respondent was conducted under customary law.

In addition, Mr. Teges was of the view that the issue concerning the form of the respondent's marriage is new and if entertained at this stage will be tantamount to re-opening matters involving evidence which is legally wrong. He insisted that the law should be applied to promote justice and technicalities should not be entertained in the dispensation of justice. He implored this Court to dismiss the appeal. In rejoinder, Mr. Mkindi, reiterated his submission in chief.

First and foremost, it is a common ground that the jurisdiction of the Primary Court in matters involving adultery in a case where there is no petition for divorce is governed by the provision of section 75 of the LMA, which requires that the marriage of the party alleging the commitment of adulterous acts must be contracted under either customary law or Islamic form. For ease of understanding and clarity let me reproduce the provision of section 75 of LMA hereunder;

Section 75. *"A primary Court shall have jurisdiction to entertain a suit under this part where the **parties were married in accordance with customary law or in Islamic form** or in case of a suit under section 69 or section 71, if the court is satisfied that had the parties proceeded to marry they would have married in accordance with customary law or in Islamic form"*

(Emphasis is added)

The pertinent question here is whether at the trial Court the respondent disclosed that his marriage with his wife (SM2) was conducted under customary law as contended by Mr. Teges in his submission. I have perused the proceedings of the primary Court. The truth is that in his testimony the respondent did not disclose the form of his marriage with SM2. Likewise, in her testimony SM 2 did not state the form/type of her marriage with the respondent.

Pursuant to the section 75 of the LMA and on the strength of the decision of the Court of Appeal in the case of **Wilson Andrew** (supra), it is the finding of this Court that the Primary Court of Ngorongoro had no jurisdiction to entertain the respondent's case.

In addition to the above, I have noted that the 1st appellate Court made a finding that the issue on jurisdiction was supposed to be raised at the trial Court only. The position of the law is that the issue on the Court's jurisdiction can be raised in appellate stage. [See the case of **Mwanaisha Rashid Vs Meri Dede and Odero Dede, PC Civil Appeal No.14 of 2021** (unreported)].

Having made a finding that the Primary Court had no jurisdiction to entertain the respondent's suit, I do not see any plausible reasons to continue with the determination of the remaining grounds of appeal. I hereby nullify the proceedings of the Primary Court of Ngorongoro and set aside its judgment as well as the judgment of the District Court of Ngorongoro. In the upshot, this appeal is allowed. Due to the nature of this case and the reason for allowing this appeal, each party will bear his own costs.



Dated this 21st day of July 2022

B.K.PHILLIP

JUDGE