

This is a second appeal preferred by the Appellant after having been aggrieved by the decision of the District Court of Korogwe dated 20/03/2020 by Hon. Ngali RM where the Appellant was unsuccessful, and the Respondent was awarded compensation of TSH. 3,000,000/= in the appeal at the District Court against the decision of the Manundu Primary Court which awarded Respondent compensation to the tune of TSH. 6,200, 000/= for adultery of the Appellant. The latter's grounds of appeal were two:

AGATHO, J.:

Date of Last Order: 12/11/2021
 Date of Ruling: 28/02/2022

JUDGMENT

BAKARI OMARY MUYA.....RESPONDENT

-VERSUS-

JONATHAN DAVID.....APPELLANT

(Originating from decision of Civil Appeal No. 09 of 2019 of Korogwe District Court at Korogwe on 20/03/2020 Hon. Ngali RM)

(PC) CIVIL APPEAL NO. 19 OF 2021

AT TANGA

(DISTRICT REGISTRY OF TANGA)

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

- (1) That the Resident Magistrate erred in law and facts in deciding that the Respondent to be awarded TSH. 3,000,000/= as a compensation for adultery basing on void marriage.
- (2) That the Resident Magistrate erred in law and facts by deciding that the Respondent to be awarded TSH. 3,000,000/= as a compensation of adultery without showing the reasons justifying that award.

On appeal hearing date the Court ordered the parties to conduct the appeal by way of written submissions. The dates were fixed for each party to file his written submission. They complied with the schedule.

The issues to be determine and dispose the appeal are two:

- (1) Whether the Resident Magistrate erred in law and facts in deciding that the Respondent to be awarded TSH. 3,000,000/= as a compensation for adultery basing on void marriage.
- (2) Whether the Resident Magistrate erred in law and facts by deciding that the Respondent to be awarded TSH. 3,000,000/= as a compensation of adultery without showing the reasons justifying that award.

To answer the above issues, we look at the record of proceedings at Manundu Primary Court and its judgment, and the appeal proceeding at the District Court of Korogwe as well as its judgment. The law, both statutory and case law will also be examined.

Whether there was void marriage? Whether the Resident Magistrate erred in awarding TSH. 3,000,000/= while the marriage was void and hence there was not adultery.

On page 1 of the District Court Judgment, it seems there was marriage. Which lasted for few days before disputes arose. SU2, Hadija Hamisi (the Respondent's spouse) who is the centre of this case also claims in her testimony at pages 8-9 of trial court proceedings that the marriage was void because the Respondent is her brother. Therefore, it was a marriage between relatives. This does not seem to be case because the Hadija Hamisi and the Respondent were not siblings and therefore there was no incest. They are cousins. The law does not prohibit marriage between cousins. Under Section 14(1) of the Law of Marriage Act [Cap 29 R.E. 2002], prohibit marriage between siblings, parents and their children, and grandparents and grandchildren. Sections 158 and 160 of the Penal Code [Cap 16 R.E. 2019] prohibits incestuous

relationship. None of these is the case with the present appeal. The Respondent and Hadija Hamisi are cousins. They are not siblings.

The Appellant's line of argument was not that the marriage between the Respondent and Hadija Hamisi was incestuous relationship but rather it was coerced marriage. There was lack of consent from Hadija Hamisi. This seems to tally with the testimony of SU2 on pages 8-9 where she claims that she was forced to marry the Respondent. On page 3 of the trial court judgment and page 8 of the trial court proceedings contain testimony of Hadija Hamisi who says that she stayed in the marriage for 3 days thereafter she escaped to her sister. The Respondent went to pick her and brought her back to their home. On the fourth day Hadija Hamisi escaped to Oman, UAE. She stayed there for two months then she came back and stayed with the Respondent for one week then she went back to her parents. Then the couples went to court (Old Korogwe) and according to the Hadija Hamisi the Respondent claimed TSH. 4,000,000/= so that he could divorce her.

SM1 (the Respondent) did testify that they had separated for some time. But divorce was not yet granted. On pages 3-4 of trial court proceedings show that Hadija and the Respondent got married on

3/3/2017. The certificate of marriage was tendered and admitted as exhibit PB. Hadija Hamisi escaped after five days. They started reconciliation before the elders. And that they had separated. But while they were on separation on 28/7/2019 the Respondent heard that his spouse (Hadija Hamisi) is living with another man (the Appellant). When they went to BAKWATA Hadija Hamisi confessed to be seeing and living with another man. And that she was carrying his pregnancy. All that was in the minutes of the meeting before BAKATWA. The minutes were tendered and received as exhibit PA.

Hadija Hamisi testified on page 8 that she continued to stay with her parents from 2017 to 2019 and that's when she met the Appellant and started extra marital affairs. She also admitted in her testimony that as their affair continued and she became pregnant.

I should turn to the question whether the marriage was void. But before examining this issue, it is crucial to state the matter before the trial Court was the Respondent seeking compensation for adultery. The adultery committed by the Appellant and the Respondent's spouse. The law provides for compensation for adultery if it is proved that there is a valid subsisting marriage. Looking at the trial Court proceedings, despite claims by Hadija

Hamisi that the marriage void because she married her brother, and two that she was forced to marry him. Looking at her testimony on pages 8-9 of trial Court proceedings it is apparent that she gave her consent to please her parents. She cannot now turn and repudiate her consent. Therefore section 16 (2) of the Law of Marriage Act [Cap 29 R.E. 2002] which deals with a need for consent does not apply because in the present case it is apparent that consent was given. There was no coercion. If she was coerced, she had ample time to report to the police or commence Court proceedings for annulment of the marriage. Therefore, I do not think the marriage was void because there was no coercion or fraud. For that reason, Section 38(1)(b) and (e) of the Law of Marriage Act [Cap 29 R.E. 2002] which deals with void marriage does not apply. For the foregoing reasons the first ground of appeal lacks merit.

Before I venture into the second ground of appeal, I should say something regarding the age of Hadija Hamisi. Although this was not brought as a ground of appeal, I have noted that Hadija Hamisi (SU2) testified that she was aged 20 years this was on 15/8/2019. She got married on 3/3/2017. There is possibility that when she got married, she was under age, that is below the age of 18 years. However, this was not the issue neither in the trial Court nor first

appellate court. I cannot deal with it now. But the Law of Marriage Act [Cap 29 R.E. 2002] also allows the under age children to be married in certain situations for instance to protect interest of the child spouse, in that case the consent is given by the parents.

Turning to second ground of appeal, we ask whether the Resident Magistrate erred in awarding the TSH. 3,000,000/= without stating the reasons to justify the award. The award of compensation has to have justification. In the present appeal and looking at the evidence on record, it is clear that the Respondent and Hadija Hamisi were and yet are lawful spouses because their marriage is still subsisting. There is no divorce that was issued. In fact, no divorce proceedings that was initiated. Therefore, the claim by the Appellant that he did not know that Hadija Hamisi was a married woman is not an excuse. Nor can he claim that Hadija Hamisi did not tell him that she is married. The law is explicit that it is a duty of a man to satisfy himself that the woman he is seeing, or he is marrying is not in a subsisting marriage. This is found in GN 279/1963 under rule 129 provides:

"Ni wajibu wa mwanaume kupata uhakika kwamba mwanamke anayetembea naye au anayemuoa hana

mume. Usemi wowote wa mwanamke hata kama akiutoa mbele ya mashahidi hauwezi kuwa ngao kama mwanaume akishitakiwa kwa ugoni."

The above provision of the law was cemented in the case of **Juma Ngosha v Amos Mtanda [1989] TLR 96** that a man must make a due satisfaction that the woman is intending to marry is a single one. It is conspicuous that the Appellant did not satisfy himself that Hadija Hamisi was a single woman. Such ignorance cannot be an excuse. A refuge cannot be sought under Section 72(2) of the Law of Marriage Act [Cap 29 R.E. 2002] because the Appellant did not thorough inquiry to find out if Hadija Hamisi was a legally married woman. He stayed with her from January 2019 and he went to introduce himself to her parents. She became pregnant and he went as far involving his parents and relatives. What is not clear is why the parents of Hadija Hamisi did not inform the Appellant about the subsisting marriage between the Respondent and their daughter Hadija Hamisi. But it is also apparent that on pages 7 of the proceedings the Appellant became aware of the relationship of the Respondent and Hadija Hamisi when the latter was arrested and remanded. The Appellant was the one who bailed her out. After becoming aware what did he do? Did he find the Respondent to

discuss the matter. The proceedings show that they went up to the District Commissioner to seek amicable resolution. The Respondent is said to forgive his spouse Hadija Hamisi and thereafter he filed the case at Manundu Primary Court. Section 72(2) of Law Marriage Act provides:

A suit brought under this section shall be dismissed if the defendant satisfies the court that he or she did not know and could not, by the exercise of reasonable diligence, have known that the person with whom he or she committed the act of adultery was married.

But we ask ourselves was the suit which became a subject of this appeal worth dismissing? I have gone through the record of proceedings I am satisfied that the Appellant did not do thorough inquiry on the status of Hadija Hamisi. Equally true Hadija Hamisi and her family did not inform the Appellant that she was married. The Appellant is also at fault for failure to inquire to BAKWATA, government leaders such WEO, chairperson of Kitongoji, neighbours, etc., if Hadija Hamisi was married or not. He was blinded and infatuated by her love. He did not exercise reasonable diligence to know that Hadija Hamisi was married.

Since the Appellant committed adultery, he is liable to pay compensation as per section 72 of the Law of Marriage Act [Cap 29 R.E. 2002]. However, in awarding certain amount of money as compensation justification must be given. It is the law under section 74(1) of the Law of Marriage Act [Cap 29 R.E. 2002] that compensation for adultery should not be exemplary or punitive in nature. We ask whether TSH. 6,200,000/= awarded by the Primary Court and TSH. 3,000,000/= awarded by the District Court are punitive or exemplary damages.

The Appellant queries the District Court decision to award TSH. 3,000, 000/= without justification. It is interesting that this ground of appeal is repeated as it was raised against the decision of trial court to award TSH. 6,200,000/= that the amount was not justified. And the District Court was persuaded and hence lowered the figure from TSH. 6,200,000/= to TSH. 3,000,000/=. But unfortunately, the District Court on pages 4-5; and 7-8 of its judgment apart from criticizing the trial court decision to grant the said amount without justification it did not justify granting of TSH. 3,000,000/=. Perhaps it thought it was high. It should be remembered that the Respondent claimed compensation for adultery. That cannot be easily equated in any monetary terms. The Respondent did not claim

specific damages that need to be proved specifically. He claimed general damages. On page 4 of trial Court proceedings the Respondent said he claimed compensation for expenses he incurred for the wedding, and that was TSH. 4,000,000/= . This is confirmed by SU2 (Hadija Hamisi) in her testimony, and SU1 on page 7 to the trial Court proceedings. The trial Court awarded TSH. 6,200,000/= . Whether that amount was not justified, and whether the amount granted by the District Court also lacked justification. Nevertheless, the Court must consider the circumstances of each case. In awarding compensation for adultery as per section 74(2) of the Law of Marriage Act [Cap 29 R.E. 2002], one has to consider the relevant custom of the community to which the parties belong. See also **Gai Ipenzule v Sumi Magoye [1983] TLR 289**. It is strange though for the Court to demand proof of reputation of the Respondent. It should be noted that the present appeal is not about divorce or anything else than compensation claim for adultery. That cannot be easily monetized. The respondent claimed TSH. 4,000,000/= for compensation for the expenses he incurred for the wedding. This was not compensation for adultery. Again, it lacks bearing because this is not divorce proceedings. But the TSH. 4,000,000 was claimed

from Hadija Hamisi so that the Respondent could grant divorce as the matter was referred to BAKWATA.

The Respondent is electrical engineer, he has relatives and friend, they know him as a man who deserve respect. They had their wedding celebration public. It can hardly be said this person was not hurt with what the Appellant and Hadija Hamisi did. Worse enough Hadija Hamisi is pregnant, and as we speak, she might have a baby with the Appellant. Such pain cannot be compensated with any amount of money. But warning has been given by the law (Section 72(2) of the Law of Marriage Act [Cap 29 R.E. 2002]) that compensation for adultery should not be exemplary or punitive. If find the decision of the Primary Court to award TSH. 6,200,000/= be unreasonable and though claimed to based on the custom of parties and also the reputation of the Respondent, neither the custom nor the reputation of the Respondent was explained. Granting of compensation basing on explained custom of the community to which the parties belong is in line with the decision in **Gai Ipenzule v Sumi Magoye [1983] TLR 289** where payment of 10 head of cattle was held to be fair according to Sukuma customs. We do not know which custom the Respondent and Hadija Hamisi and the Appellant prophecy. Are they Sambaa? It is unclear. The

proceedings are silent on this matter. The District Court did not give any justification for awarding TSH. 3,000,000/=. Regard to customs of the parties in assessing quantum of damages is a requirement set by the law under Section 74(2) of the Law of Marriage Act [Cap 29 R.E. 2002]. It is true though that the customs of the parties were not explained. In some tribes the custom may be that of paying little sum of money and five or ten head of cattle as was held in **Gai Ipenzule v Sumi Magoye** (supra). But since in the present appeal that was not stated, but the pains that the Respondent endured it worth compensation. That compensation though should not be exemplary or punitive.

I thus award TSH. 4,000,000/= which I find to be reasonable considering the pains and suffering the Respondent sustained to find his spouse living with another man and already been impregnated him (the Appellant). This amount is neither exemplary nor punitive.

I further find the District Court decision to award TSH. 3,000, 000/= was low and without clear justification. The Primary Court decision to award TSH. 6,200,000/= compensation to the Respondent is equally problematic because no custom of parties was explained. Moreover, in assessing quantum of compensation for adultery as per

Section 74 of the Law Marriage Act [Cap 29 R.E. 2002] regard is not on reputation of the person claiming compensation. Rather on the custom of the community to which the parties belong.

For the reasons stated herein above, the appeal lacks merits. Consequently, it is dismissed, and the compensation given by the District Court is varied by elevating it to TSH. 4,000,000/= which I find to be fair and reasonable in the premises of this case.

DATED at TANGA this 28th Day of February 2022.



Date: 28/02/2022


Coram: Hon. Agatho, J

Appellant: Present

Respondent: Absent

B/C: Zayumba

Court: Judgment delivered on this 28th day of February, 2022 in the presence of the Appellant, advocate Mathias Nkingwa holding brief of advocate Switbert Rwegasira, and in the absence of the Respondent.


U. J. AGATHO
JUDGE
28/02/2022

Court: Right of Appeal fully explained.



U. J. AGATHO
JUDGE
28/02/2022