

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC. CIVIL APPEAL NO.1 OF 2022

(Originating from Mtwara District Court in Civil Appeal No.5 of 2021)

MUHIBU SEFU MOHAMED APPELLANT

VERSUS

HAWA HEMED MALIVATA..... RESPONDENT

JUDGEMENT

27/10/2022 & 19/12/2022

LALTAIKA, J.

The appellant herein **MUHIBU SEFU MOHAMED** is dissatisfied with the decision of Mtwara District Court at Mtwara (herein after first appellate court) delivered on 29.10.2021 (**Hon. L.M. Jang'andu, RM**). The impugned decision originates from Mtwara Primary Court (herein after the trial court) in Probate Cause No 66 of 2020. At the trial court, parties were applicants for letters of administration of estate of the late SAIDI MUHIDINI CHIKWAYA. In the course of the hearing of the application the appellant proposed inclusion, in the list of heirs, two children named **RAHEEM SAIDI NUHIDINI CHIKWAYA** and **SHADYA SAIDI MUHIDINI CHIKWAYA** (a boy and a girl respectively herein after referred collectively as "the children") asserting that they were rightful children of the late SAIDI

MUHIDINI CHIKWAYA. The respondent vehemently opposed such inclusion in the pretext that the deceased never had children out of wedlock and that he shared the exact name SAIDI MUHIDINI CHIKWAYA with his elder brother making it hard to rule out who the biological father of Raheem and Shadya was. The trial court, after a protracted legal process that led to an order for a retrial from the first appellate court, decided in favour of the appellant accepting Raheem and Shadya as children of the deceased hence a part of the heirs. The respondent appealed to the first appellate court. The first appellate court allowed the appeal. It set aside the order of the trial court that Rahim and Shadya were children of the deceased Saidi Muhidini Chikwaya. The second appellate court, moreover, ordered yet another retrial directing specifically for hearing on evidence of DNA diagnosis. The appellant is dissatisfied. His appeal is premised on five grounds as reproduced below;

- (1) *That the Honourable 1st appellate court erred in law and facts for ignoring and or refusing to consider the evidence adduced by the Appellants' witnesses in its Judgement as a result it set aside the order of the trial court that, RAHEEM SAIDI NUHIDINI CHIKWAYA and SHADYA SAIDI MUHIDINI CHIKWAYA are the children of the late SAIDI MUHIDINI CHIKWAYA*
- (2) *That the Honourable 1st appellate court erred in law and facts in justifying its judgement by relying only on the evidence of birth certificates of children in dispute and ignoring the evidence of Appellant's witnesses which prove and remove doubt that the child (sic!) RAHEEM SAIDI NUHIDINI CHIKWAYA and SHADYA SAIDI MUHIDINI CHIKWAYA are the children of the late SAIDI MUHIDINI CHIKWAYA.*
- (3) *That the Honourable 1st appellate court misdirected itself to rule that, the Appellant's witnesses refused to provide samples for DNA test while it is clear from the record of the trial court that,*

*the Appellant's witnesses did not refuse to provide samples for DNA test, but they have failed due to lack of money for DNA diagnosis/test, hence **Rule 61(5) of the Law of the Child (Juvenile Court Procedures) G.N. 182/2016** used by the trial court is inapplicable under such circumstances*

- (4) That the trial court erred in law and fact by taking into consideration that the DNA test is the only proof of paternity while there was (sic) other evidence of proof of paternity (biological father) as shown and proved by the Appellant's witnesses*
- (5) That the 1st appellate court erred in law and fact by not taking into consideration the authorities elide by the trial court in its judgement.*

When the appeal was called on for hearing the appellant appeared in person, unrepresented. The respondent, on the other hand, enjoyed legal services **of Mr. Emmanuel Ngongi**, learned Advocate. In an attempt to ensure that parties still had interest in pursuing the matter in equal terms and none of them was employing delaying tactics, this court invited the parties to introduce themselves and expound on their connection to the matter. Since this is a court of record, I see no harm in penning down a part of the proceedings to that effect. Employing story telling technics, hearing from the horses' mouth (as opposed to relying mainly on the lower courts' files) has enabled this court to articulate the root cause of the controversy that dates back to 2017. It has also brought to the attention of this court that the records before it were largely incomplete painting a false picture that the matter was instituted in 2020 while in fact, as it will be discussed at length parties had been in the court corridors since 2018! The following paragraphs summarize what the parties had to tell this court.

The appellant stated that he was an uncle to the deceased **Saidi Muhidini Chikwaya**. He recalled that the deceased was an employee of the Tanzania Electricity Supply Company commonly referred to by its acronym TANESCO. Upon the death of the deceased, the appellant narrated, a family meeting appointed him administrator of estate of his late uncle, but the wife of the deceased objected his appointment in court. As the trial court decided in his favor the wife appealed to the District Court. The District Court on its part, stated that the case had already been decided by the same court.

Later on, the appellant stated, the trial magistrate directed that a DNA test be carried out. He recalled that the case had at some point been ordered for retrial. It was heard before a different Magistrate who decided in his favour whereupon the respondent appealed to the District Court and the latter insisted on a DNA test. The appellant concluded that he was not ready to go to the Primary Court for a third time and that was another reason he preferred this appealed.

The **respondent** on her part, stated that the late **Saidi Muhidini Chikwaya** was her brother-in-law married to her younger sister **SAIDA HEMED MALIVATA**. The respondent recalled that when her late brother-in-law got sick, he was transferred to Muhimbili and later to India. In October 2017 he passed away five days after her younger sister had returned to Mtwara where she was also a teacher hence needed permission from her employer. Bearing in mind that her late sister needed frequent permission to attend her sick husband, which permission was not easy to obtain as a teacher, the respondent averred, she (the late Mrs. Chikwaya) decided to

ask another member of the Malivata family a younger sister called **Furaha** to attend the then ailing Chikwaya.

The respondent recalled that when the deceased passed away, she accompanied her younger sister (now also deceased) to Dar where upon TANESCO assisted them in transporting the body of the deceased to Newala through Mtwara where he was living and had properties such as houses. The respondent narrated further that after burial, they left Newala because it was chaotic. After about 40 days, the appellant and his other uncle also called **Saidi Muhidini Chikwaya** followed them (the respondent and her sister) and claimed that they had a family meeting and appointed the appellant to be administrator of estate to which the Malivata's disagreed arguing that the meeting was supposed to involve both sides of the family that is the husband's and the wife's relatives.

Harmony was restored, recalled the respondent, and the meeting appointed the wife of the deceased and proposed that she worked with the one who had hitherto been appointed namely the current appellant. As the duo went to institute a probate cause, in the course of the hearing, the respondent recalled, the appellant proposed that other children be listed as heirs which came as a surprised even though she could remember that they [the Chikwaya's] started mentioning the children during burial and that is why the respondent and her younger sister left Newala for Mtwara immediately.

The respondent insisted that her late younger sister had objected all along inclusion of the children she was not aware of, but the Primary Court

hurriedly accepted that the children (boy and girl) belonged to the deceased to which her sister appealed. The magistrate was surprised that the name Saidi Muhidini Chikwaya was shared by two people who are related, recalled the respondent on what transpired in the District Court, hence he (the Learned Magistrate) proposed that a DNA test be conducted. The appellant was given time to bring the DNA test results but failed in the pretext that he had no money. By that time, the respondent recalled, her younger sister had passed away and she took over on her place. The respondent concluded that to her dismay, the trial court ended up accepting a letter in lieu of the DNA test results hence she appealed to the District Court where upon the Magistrate at the District Court also insisted that a DNA test be conducted. The Magistrate, however, indicated that there was a right to appeal, narrated the respondent, adding that when she went to inquire the status of the same at the District Court, she was told that the appellant had appealed to the High Court.

Having enlightened the court sufficiently on the backdrop of the suit and their roles thereof, parties were ready to move on to hearing but the court was inclined to adjourn the same for hearing after lunch break. It should be noted that earlier on before court sanctioned introductions and indication of connection to the matter, the appellant had indicated unwillingness to moving to hearing of the appeal on merit. He had stated that he was not ready for hearing because according to an earlier order of this court, parties were directed to produce evidence and a letter. Needless to say, that no such order was ever made by this court and appellate courts do not normally make such orders related to evidence. He raised other excuses for example,

that his lawyer, whose name he could not remember, had passed away. To add salt into injury, the appellant seemed to suggest, he was injured while working with DAWASCO in Dar-es-Salaam carrying water pipes to the University of Dar es Salaam.

The appellant did not mention the exact date that the accident took place nor how and where he was hospitalized. Lamenting even further, the appellant had stated that his daughter called Pili Muhibu had a heart decease and he had been struggling with all the above problems. The appellant added that he was on his way to Newala to look for money, but he was not sure whether the money he was looking for in Newala was for engaging a lawyer or his other family predicaments. Luckily, however, after the above introduction and historical backdrop to the matter, the appellant looked rejuvenated, ready, and willing to proceed with hearing of the appeal whose genesis could be traced as far back as 2017 when the deceased passed away.

At the hearing the appellant was still unrepresented. The respondent was accompanied by her counsel Mr. Ngongi who ended up becoming more of a spectator than a counsel to the respondent. Not only was the court still interested in hearing from the horse's mouth but also, it seems, the learned counsel was taking seriously the wisdom packed saying of the sage **"ndugu wakigombana shika jembe ukalime"** (when relatives start fighting against each other concentrate on your own business). Since parties had started addressing each other less formally and even exchanging smiles, the learned counsel could not possibly know what else was in store and chose

to seat back and watch instead. I cannot help but commend the learned lawyer for his extraordinary composure.

Arguing on the first ground of appeal, the appellant stated that he submitted birthday certificates of the children along with a letter from the Executive Director of TANESCO to Mtwara Primary Court indicating that the deceased had registered such children as his own. Based on such evidence, the appellant averred, he was convinced that the same would suffice to prove parentage (paternity). The appellant added that he had the letter and copies of the birth certificates with him right there.

Responding to the ground, the respondent asserted that the two Magistrates in the District Court did not refuse the birth certificates and letters. All they said, averred the respondent, was that there was another member of the family with the same name as the deceased. Had they refused them, reasoned the respondent, they would not be in the court file. Nevertheless, argued the respondent the District Court Magistrates thought the DNA test results would be a better proof, but the appellant never complied hence this appeal.

Moving on to the second ground of appeal, the appellant averred that the mother of the children was summoned from Kilwa and testified that the disputed children were the children of CHIKWAYA of TANESCO. The appellant conceded that there was another Saidi Muhidini Chikwaya, a farmer who was still alive and were brothers with the deceased also named Saidi Muhidini Chikwaya. The appellant averred that Chikwaya the farmer was also summoned and testified in the trial court that the children in dispute

were not his. He testified further, the appellant recalled, that his last child was at the University of Dar es Salaam. The appellant emphasized that, as it is with all women, the mother of the children was the one who knew exactly who among the two CHIKWAYA's had fathered the children.

The respondent, on her part, averred that when the woman [referring to the mother of the children] was summoned she failed to link up events and explain to the court when exactly the late Chikawa fathered the children. She averred further that it was customary for the people in the Southern part of Tanzania to offer children for a traditional ceremony "Unyago". Failure to make that link, argued the respondent, led the District Magistrate to develop doubts on claims of paternity.

On the third ground, the appellant asserted that he decided not to go for DNA test because, if the employer had accepted the children, he thought that was enough. The appellant emphasized that he thought TANESCO was the ultimate DNA. Sometimes the DNA may not tell the truth, stated the appellant thoughtfully, but DNA were issues of God who decides which child to give which DNA. He emphasized that he was convinced that the evidence of the mother of the children, sibling to the father "Baba Mkubwa" and TANESCO was enough.

Responding equally thoughtfully, the respondent stated that science was everything adding that even God had His own science and had ordained DNA to solve many puzzles. The respondent argued that even when a person dies, DNA is used to tell who that person was. She averred that such importance of DNA was the reason the government was insisting that young

people study science. That "TANESCO science" stated the respondent jokingly, was not science at all. She quipped that she was utterly surprised that the respondent (referring him as "son of my sister-in-law") was refusing science. She concluded that she was convinced that his evidence was insufficient.

Arguing on the fourth ground, the appellant averred that to him the REAL DNA was the word of the Director of TANESCO who had seen his staff taking the birth certificates of the children. In his opinion, the appellant reasoned, it was not possible to fake such records. He added that the mother of the children was the one who knew who had fathered the children.

It should be noted, the appellant reasoned, that the deceased and his wife had lived together for 25 years without getting children. However, when the deceased was transferred to Kilwa, averred the appellant, he met a woman with whom they got a baby girl named **Shadya Saidi Muhidin Chikwaya** born on 22.06.2011. Later on, recalled the appellant, the duo was blessed with a baby boy called **Raheem Saidi Muhidini Chikwaya** born 12.08.2014 adding that the entire Chikwaya's family knew everything about the children.

The respondent on her part recalled that, when "that woman" was asked how they lived with the deceased she responded that they never lived together. She asserted that her brother-in-law was always in Mtwara for weekends that is why it came as a surprise to hear later that he had children. The woman, argued the respondent, was not even able to identify the appellant and the court was surprised.

Arguing the 5th and last ground averred that although all exhibits had been tendered the court did not respect them, he was still forced to go for the DNA test. He insisted that true DNA was that [letter] from TANESCO as DNA were issues of God.

Responding, the respondent opined that in general, the District Magistrates did not want to show any bias but only wanted justice to be done that is why they insisted on the DNA test. The respondent averred that the woman purported to have had the blessing of the issues with the deceased was not married and used to visit both brothers. To that end, the respondent argued, the magistrates wanted the DNA test proof in order to remove any doubt.

In a brief rejoinder, the appellant asserted that the children of the late CHIKWAYA were living in a difficult situation in Kilwa. He averred further that TANESCO had agreed to pay for their education but since the matter was still in court, that could not be done.

I have **dispassionately considered** the rival submissions in the light of the grounds of appeal. I have also **carefully examined the lower courts' records**. The issue for my determination boils down to proof of parentage. In essence, the appellant is complaining that he had done all that he could to prove paternity of the deceased children, but the lower courts disregarded or accorded little weight to his evidence hence this appeal. My deliberation, therefore, will center on that aspect and, for reasons that will become obvious later, defer other issues.

Controversies on proof of parentage (whether mother or father) are as old as humanity. In the Holly Books, a story is told on how King Solomon (Suleiman) had solved one of the most challenging parentage disputes in history involving two women. For obvious reasons, I am not going to retell that story. Suffices it to say Solomon had fewer options at his disposal. There was, probably, no such an elaborate legal framework as it is today and, most certainly, the amazing science and technology of DNA was yet to be discovered.

Unlike Solomon who was a free thinker, however, the learned Magistrates in the courts below were obliged to justify their decision with the applicable law with or without technology. I am equally restrained. I cannot use my own imagination or inspired dream to arrive to a decision without legal backing. Consequently, I will start off by an exploration on the legal framework.

What does the law say about proving parentage in Tanzania? The answer is to be found under section 35(a)(b)(c)(d) and (e) of **The Law of the Child Act [Cap 13 R.E. 2019]** as quoted below.

"The following shall be considered by a court as evidence of parentage.

- (a) *any marriage performed in accordance with the Law of Marriage Act*
- (b) *the name of the parent entered in the Register of Births kept by the Registrar-General*
- (c) *performance of customary ceremony by the father of the child*
- (d) *public acknowledgement of parentage*
- (e) *DNA results."*

Deoxyribonucleic acid (DNA) results, from a legal point of view are a form of forensic evidence aimed at proving the identity of an individual. It is worth emphasizing that DNA testing fall under the larger box of evidence for identification. Any person may be identified by either his or her *phenotypic* or *genotypic* aspects. Phenotypic are the physical aspects such as height, skin color, physic etc. while genotypic aspects are unique modes of identification based on hereditary traits in genes.

In law, DNA tests serve two main purposes: administration of criminal justice and proof of parentage especially paternity. This distinction is very important not only from a legal but also a bioethics standpoint. It raises a very important concept that underlies use of Human genetic data namely Prior Informed Consent (PIC) and, sometimes, even property rights to one's genetic information. Whereas in criminal justice the state is usually empowered to collect DNA samples from suspects to prove the link between a given suspect and a crime committed, in civil cases consent of the donor of samples for DNA testing is very important.

In Tanzania the applicable law is the **Human DNA Regulation Act No 8 of 2009**. Although this law is by and large in conformity with the minimum international standards for dealing in Human Genetic Data, the situation is likely to change worldwide in the near future due to growing sensitivity to genetic privacy and even commercial value of such information of uniquely endowed individuals. Strict legal mechanisms must be put in place as it is increasingly becoming clear that genetic data may be abused by insurance companies or even prospective employers by refusing to employ a person who is likely, due to his hereditary genetic information, to develop a certain

decease. While in criminal justice it is entirely upon the investigative machinery to decide when to use DNA testing as evidence, in civil cases DNA should be used sparingly. This is because DNA test results usually come with unintended consequences that may fuel enmity in the community. Ordering a third party to be tested violates fundamental human rights related to the use of human genetic data.

Some Bioethicists argue that DNA testing is a form of strip search. It is perpetual strip search where one's information, unless destroyed, remains open forever. Whereas in normal searches such as in one's car or house somethings are "out of reach" because they are considered completely private, DNA testing does not normally allow that room. It exposes one's entire family including those yet to be born to unimaginable risk of violation of their genetic privacy. Understanding this conception of Human genetic data among judicial officers is important to ensure they play their role of protecting rights of individuals not only in their physical (phenotypic) but also in their DNA (genetic) form. Whether the legal framework to protect that information will depend on the interpretation of courts of law.

In the instant matter, the learned first appellate court, and I say this with so much respect, has exaggerated the importance of DNA testing. In Tanzania we are yet to reach a stage where DNA is considered the panacea of all our problems. As a form of expert evidence, DNA results are merely of persuasive value in a court of law. More importantly, our courts should not project a picture that DNA technology has taken over all other forms of evidence in criminal and civil matters. That would be stretching forensics too far and criminalistics in general, too far.

I am inclined to add here, albeit in passing, that sometimes DNA is the weakest evidence of all, depending on the peculiarity of a case. For example, scientists agree that identical twins share 100% similar DNA. As an identical twin myself, I would probably be a little suspicious of any attempts to overemphasize on DNA results over other equally plausible forms of evidence. I would probably resist such attempts to avoid being implicated. Assuming the issue is proof of who between two identical twins is the biological father of a given child, a court should, logically, refrain from DNA issues and expand the horizon by opening up more pages of the Book of Evidence. Indeed, other forms of evidence such as "public acknowledgement of parentage" (See section 35(d) of **The Law of the Child Act (supra)** merit consideration. If too many fingers point towards a certain person as being the father, then that person is most likely the father, or so the quoted section of the law seems to suggest.

After going through the record of this matter, I have discovered that there was another matter of the same nature with the title **Civil Case No.34/2018** which was entertained by the District Court of Mtwara vides Confirmation Cr. Appellant/Revisional Jurisdiction, Civil Probate Case No.3 of 2018 (**Original Probate/Civil Case No.34 of 2018**). However, in that matter the parties were **Saida Hemedi Malivata** (the wife of the deceased) vs **Muhibu Seif Mohamed**. Surprisingly, there is no record availed to this court concerning the Civil Probate Case No.3 of 2018 and Original Probate Case No.34 of 2018.

It does not take much thought to realize that absence of the records of the said case, makes it difficult at this juncture for this court to know how

the trial court at first instance appointed the parties of that case as administrators and how it dealt with the objection of the deceased. Moreover, it is also unclear to me how the matter went to the District Court before **Hon. M.F. Esanju, RM.** Even reading through that decision including the heading, it is equally unclear whether the District Court was sitting as the first court with original jurisdiction or appellate court or revisional court. It is also unknown if the matter went to the District Court upon application by the late Saida Hemedi Malivata or by the District Court acting *suo moto*.

To my utter amazement, I am availed with the record of the new Probate Cause No.66 of 2020 and Civil Appeal No.5 of 2021. Probate Cause No.66 of 2020 was filed by Muhibu Sefu Mohamedi as the applicant of the Probate of the late Saidi Muhidini Chikwaya. However, on 23/02/2021(See page 7 of the typed proceedings) is when the respondent was included as a co-applicant to the estates of the late Saidi Muhidini Chikwaya. The present respondent having been aggrieved by the decision of the trial court knocked the doors of the District Court before Hon. Jang'andu who overruled the decision of recognition of two contested children.

To cut the long story short, what the trial court was required to do was to proceed with the same file of **Probate Cause No.3 of 2018** and implement what was directed by the District Court and **not opening Probate Cause No.66 of 2020.**

In the circumstances, an order for retrial cannot be avoided. I am alive to the settled position of the law that an order for a retrial arises when the appellate court finds out that the judgment of the trial court is defective for

leaving contested material issues unresolved and undecided which error or omission renders the said judgment a nullity and incapable of being upheld. See, **Stanslaus Rugaba Kasusura & Attorney General vs Phares Kabuye** [1982] T.L.R. 192. See also **Fatehali Manji versus Republic** (1966) EA 344.

Based on the above observation, anything done out of the original file of the first instance is illegal or defective. Consequently, **I nullify and set aside all judgments and orders in Civil Appeal No.5 of 2021, Probate Cause No.66 of 2020 and Original Probate/Civil Case No.34 of 2018.** Further, I order Probate Cause No.3 of 2018 be retried with the following directives: **one**, appointment of present respondent must abide to the law stipulated herein above and the reasons for her appointment should be clearly seen on that file. **Second**, the issue of determination of the paternity of the two children should take cognizance of the discussion above and widen the horizon beyond DNA results.

It is so ordered.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

JUDGE
19.12.2022

Court

This judgement is delivered today in the presence of Mr. Emanuel Ngongi, counsel for the respondent, Mr. Ali Kassian Mkali who has appeared for the appellant, the appellant and the respondent.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

JUDGE

19.12.2022

Court

The right to appeal to the Court of Appeal fully explained.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

JUDGE

19.12.2022