

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 9 OF 2019

BETWEEN

ALI YOUSUFALI ALADDIN PLAINTIFF

VERSUS

MUNAWER DHIRANI 1ST DEFENDANT

MAHJABEEN M. A. NATHAN.....2ND DEFENDANT

JUDGMENT

6th & 16th March, 2023

MWANGA, J.

The Plaintiff married the 2nd defendant on September, 1999 in Dar es Salaam. They lived in Singapore, and blessed with 3 daughters born 2003, 2005 and 2011. The marriage was stable up until the year 2013 when the plaintiff became suspicious of the 1st defendant behavior enticing the 2nd defendant into an extra-marital affair.

In the particulars for extra-marital affairs, the plaintiff alleged at paragraph 8 of the plaint that; in or around mid-2014 the 1st defendant

sent to the Plaintiff's and 2nd defendant's home in Singapore for the 2nd defendant a parcel from UK with boxes of chocolates as presents with a view to starting adulterous affair. In furtherance to their actions, in the year 2015 and 2018 the 2nd defendant, with the permission of the plaintiff, travelled to Dar es salaam and Dubai herself or for a family trip with the children.

The plaintiff recalled that, when the 2nd defendant was in Dubai their children became so distressed and traumatized due to the constant presence of the 1st Defendant. Moreover, while still in Dubai, the 2nd defendant informed the plaintiff that she will be travelling to South Africa alone immediately after her return to Singapore. To enable a trip to south Africa, the 1st defendant is alleged to arrange for an air ticket of the 2nd defendant and hotel reservation for them to party in south Africa.

The plaintiff alleged further that, while in South Africa, the 1st and 2nd defendant took some pictures. Upon her arrival in Singapore, the plaintiff checked his wife's mobile phone and managed to retrieve the WhatsApp communications and photos which were taken together by the 1st and 2nd defendants and, the same being exchanged between them. The plaintiff revealed further that such incidents made him very shocked, distressed,

and upset, hence suffered various degrees of trauma and emotional distress.

It followed that the Plaintiff confronted his wife (2nd Defendant) about the messages to which she confessed to having adulterous relationship with 1st defendant, a relationship which did not stop despite the Plaintiff's plea to the 2nd defendant to end it.

As a result of the above, the Plaintiff and 2nd defendant are no longer married and, their house was sold as an outcome of the divorce proceedings. On account of the suffering due to adultery association of the 1st and 2nd defendants, the plaintiff filed a suit in this court against them claiming for payment of general damages to the tune of \$1,200,000 (for equally split for contumelia \$600,000 and consortium \$600,000) and or any amount this honorable court may deem fit. In light of the above, the court raised the following issues: -

- i. Whether the 2nd Defendant engaged in extra-marital affair with the 1st Defendant during the pendency of her marriage?*
- ii. Whether the 1st Defendant sent some gifts and money to the 2nd Defendant as enticement?*

iii. Whether the Plaintiff has suffered distress, trauma, personal insult, emotional breakdown, and loss of family companionship with the 2nd Defendant as a result of the relationship between the defendants herein.

iv. What reliefs are the Parties entitled thereto?

In this case, the plaintiff enjoyed the service of Advocate Ms. Madeline Kimei and the defendants enjoyed the service of Mr. Steven Mwakibolwa.

When the matter came up for hearing, both respondents through their written statement of defence denied the allegations against them. In fact, the 2nd defendant Ms. Mahjabeen Nathani who testified as DW2 stated that she has known the 1st Defendant for over 20 years as a close family friend and she recalled that he joined them for a dinner in Dubai sometimes 2015 as he was invited by her father as a close family friend. It was her assertion further that, after the divorce the plaintiff and herself were given custody of the children; however, the plaintiff was given care and control of the children because of his financial strengths. She also stated that, the house jointly acquired with the plaintiff was sold as a result of divorce proceedings. It was her testimony that the proceeds of sale

were distributed at a share of 30% for her and 70% for the plaintiff. The 2nd defendant stated further that, after the divorce the plaintiff has moved into a bigger house and re-married, and he is financially stronger as he has a new job which he earns three times more. She described plaintiff as a controlling husband and person who never paid for her personal expenses both emotional and financial. Connected to that, she received USD 20,000 from her father via the 1st defendant account, as her father was not acquainted with the modern payment system.

Responding to the questions posed by the counsel Ms. Kimei in respect of exhibit P2; the 2nd defendant replied that the booking and hotel reservations from 4th to 9th April, 2018 as shown at page 6 of the said exhibit was not hers as she cannot find her name therein. She also insisted that, there was no exchange of photos and other WhatsApp messages or communication made between her and the 1st defendant, hence there was no encounter as such.

As to the loss suffered, it was the 2nd defendant contention that she was the one who have suffered much with emotional trauma and not the plaintiff herein who have moved to a bigger house and got a new job which he earns three times more.

On his part, the 1st Defendant Munawer Dhirani who testified as DW1 gave his testimonies virtually stating that, he resides in Dubai and that prior to 2015 he was residing in Dar es Salaam. It was her assertion that, he considered a Plaintiff as a friend and that he knew him through the family connection of the 2nd Defendant. He also knew the 2nd Defendant through her family as her father was a principal at the Al-Muntanzir Islamic school which he had attended.

It was his contention that, he had known the Plaintiff for about 20 years when he used to go to Singapore for business (dealing with computers and accessories) and that, they engaged socially a few times.

Responding to allegation of adulterous association with the 2nd defendant, the 1st defendant gave testimonies while in Dubai, he was invited by the 2nd defendant's father to have lunch together where he met the 2nd defendant, her kids and family. As to the gifts and money he had sent to the 2nd defendant, he recalled that he sent money to the 2nd defendant given by her father as he had no dollar account. Further that, the chocolates were a mere gift sent to the 2nd defendant by his ex-wife. DW1 testified further that he occasionally had social talks via phone calls with the 2nd Defendant. However, he denied all other encounters, some

stating that they were by mere coincidence. When he was shown the photos in exhibit P2, he replied that it was his photo taken together with the 1st defendant.

The plaintiff, through virtual hearing substantiated his case by producing a certificate of marriage which was tendered and admitted in court as **Exhibit 'P1**. The *WhatsApp* messages and photos were admitted as **Exhibit P2**. According to him, he was a loving husband and caring father that provided for his family throughout the 19 years of their marriage.

He testified that, since 2010 the 2nd Defendant was always glued to her phone and ultimately in 2014, she denied him all his conjugal rights. Apart from that, the 2nd Defendant travelled frequently to Tanzania and Dubai by herself and with the children, which he did not prevent her as he trusted his wife. As to the 2nd defendant trips since 2015, the children would complain that the 1st Defendant was always attached to them around and to make matters worse, while in Dubai the 2nd Defendant travelled with the children, who told the Plaintiff upon their return, that they were left alone in a villa while the 2nd Defendant had gone out with the 1st Defendant.

After conclusion of the hearing, the learned counsels filed final submissions which were filed simultaneously on 16th February, 2023 as per court order of 6th February, 2023.

In addressing the first issue, Ms. Kimei cited the case of **Jenita Hussein Hinyura & Marko Mpolenkile Vs Steven Kalenge Lubezagi**, Civil Appeal No. 01/2022 (**"Jenita Case"**) whereby the court quoted the definition of adultery from Black's Law Dictionary 8th Edition by Bryan Gesner at page 56 to mean;

"Voluntary sexual inter course between a married person and someone other than the person's spouse".

It was the counsel submission that, the Law of Marriage gives a right to claim damages for adultery against the person whom his wife has committed adultery under Section 72(1) of the Law of Marriage Act, ("LMA"), [CAP.29 R.E. 2022].

"72(1) A husband or wife may bring a suit for damages against any person with whom his or her spouse has committed adultery".

The counsel made further reference to Lord Atkin in **Ross v. Ross, (1930) AC 1 at Pg. 7** where his Lordship said: -

"Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, e.g., letters and diaries, or antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence".

In furtherance to her arguments, the counsel cited the authority in the case of **Seif A. Ngakonda vs Felix Matemu**, Civil Appeal No. 10 of 2020 quoted by my learned brother **Kakolaki, J.** in the case of **Gai Ipenzule Vs Sumi Magoye 1983 TLR 289** (TZHC) that;

"It is not the law that direct evidence of persons caught in flagrante delicto is the only admissible evidence to prove adultery. Very rarely adultery is proved by direct evidence; the common practice is that adultery is proved by circumstantial evidence. "

Relying on the authorities cited, the counsel submitted further that, the adultery element of the fact is objective, and must be evidenced through an admission or by some other evidence from which the court can presume that adultery has taken place. It was her contention that this case must be regarded in the light of that principle.

The counsel pointed out that, the 2nd Defendant admitted to commit adultery through the signed confession (Plaint - Annexure AL-5), which in law nothing more was required to prove the case for the Plaintiff. As it was stated by the plaintiff, the counsel reiterated that the evidence on record as she confirmed under cross-examination the 2nd defendant had intimate pictures with the 1st Defendant taken during their trip to South Africa in April 2018. Furthermore, WhatsApp messages exchanged between them through Exhibit P2 discussing their encounter and displaying other aspects of their extra-marital affair was sufficient evidence to substantiate the claim by the plaintiff. In reference to exhibit P2, the counsel contended that, while under cross examination the DW1 and DW2 admitted to be them in the pictures.

Pointing inconsistencies in the testimonies of DW1 and DW2, the counsel submitted that, in their trip to Dubai in 2015 DW1 testified that he

met the 2nd Defendant by 'coincidence' as he was already living in Dubai whilst 2nd Defendant testified that the 1st Defendant had been in touch with her father to arrange for dinner. The counsel added that, the 2nd Defendant denied being in contact with and or having encountered the 1st Defendant throughout 2014 – 2018 (in Singapore, Dar es Salaam, Dubai, Zanzibar and SA) during cross-examination, whilst at all times, testified that the 1st Defendant would send money to her from her father. Further submission was made that DW1's re-examination corroborated this when he testified that he would have conversations with the 2nd Defendant informing her when he was sending her money. Also, that, during cross-examination, DW1 admitted that he would often communicate via mobile texts or email with DW2 and admitted that he met her while in Singapore. The learned counsel proceeded further that, while being re-examined the 2nd Defendant stated that her name was not on the South Africa hotel booking denoting that the evidence is irrelevant to the case at hand. The counsel was of the view that, the Plaintiff maintains that the booking was made by the 1st Defendant for himself and the 2nd Defendant to which the 2nd defendant's passport shows her arrival to South Africa on the 04 April 2018 on the same day as the said booking.

Apart from that, the counsel asserted that during cross examination the 2nd Defendant testified that the Singapore court granted the children's care and control to the Plaintiff based purely on the Plaintiff's financial capacity and that, the Plaintiff is well off and earns more than the 2nd Defendant hence why the Singapore court decided custody and gave "care and control" in the Plaintiff's favor. It was the counsel view that, the decision of Singapore court was reached because of evidence adduced before the court on the 2nd Defendant's adulterous behavioral issues with the 1st Defendant. The counsel concluded on the issue that, such evidence includes the act of the 1st and 2nd Defendant leaving the children alone in a villa in Dubai in 2018 alone, hence endangering their lives.

On the second issue, Ms. Kimei respectfully submitted that there is ample evidence to prove that the 1st Defendant enticed the 2nd Defendant into committing adultery. She referred to the gifts such as chocolates, clothes, luxurious holiday trips and money being sent to the 2nd Defendant by the 1st Defendant over the period of their affair without any consideration over the effect it would have ended her marriage with the Plaintiff, who was neglected, denied his conjugal rights and alienated at all times.

It was the counsel assertion that, the 1st Defendant's was sending the gifts directly to the 2nd Defendant since he had already divorced his wife in or around 2014 whom he asserts to have been the one sending the gifts. Basing on evidence of PW1, the counsel explained that upon investigating the 2nd defendant accounts, the plaintiff established that over \$20,000 was sent to the 2nd Defendant by the 1st Defendant (***Bank Statement -Annexure AL-4 to the Plaintiff***).

From the above observations, the counsel posed several questions that; the 1st Defendant in his testimony explained that he has been living in Dubai since 2015, how then could the 2nd Defendant's father transfer the said money to the 1st Defendant and not opt for direct transfer to her in Singapore? Why would there be a need for the use of a third party for transfer of funds whilst the third party is also in another jurisdiction which would involve bank logistics that the 2nd Defendant's father was not familiar with as claimed? With the questions posed, it was the counsel view that an act of enticement is sufficiently established.

With reference to the third issue, the learned counsel submitted that; **one**, the Defendants have had their adulterous relationship for over 4 years in front of their families, the 2nd Defendant's parents, brother and

friends to the extent that the children were also exposed to such behavior, which has resulted to the Plaintiff emotional breakdown since throughout the period he was the only person unknowing of the affair. **Two**, as a result of the divorce the family home of the plaintiff and 2nd defendant built for 19 years had been sold. **Three**, it was insult for the 2nd Defendant to have been receiving money from the 1st Defendant without his knowledge. **Four**, the plaintiff was unaware of the affair until he realized his children's concerns after the 2018 Dubai trip whereby the 1st and 2nd Defendant had hotel rooms next to each other. The children become scared that the 1st Defendant would constantly show up during their holidays and would tell the Plaintiff that "uncle is everywhere". The affair having been exposed to the children has resulted to the youngest daughter needing to get counseling and the oldest having anxiety issues.

Making reference to Exhibit P2, the counsel was of the view that the Plaintiff was traumatized by the text images of a "rose gold mini massager" such as "*I just packed the lube and toy*"; "*I miss my nyonyo*"; "*we are like young married couple when together*"; and "*I was used to shagging you every day*" are explicit and foul. Further to that, more distressing to the

Plaintiff was the fact that the 1st Defendant encouraged the 2nd Defendant in the text messages "*don't pay attention*"; "*come to me*" and "*be brave*".

In furtherance to the issue, the counsel underscored the "Shia" marriage values, specifically Rules regarding permanent marriage, Rule 2421 of the Al-Sayyid Ali Al-Hussein Al -Sistani stating that;

"As long as she does not fail in her duties, it is obligatory on the husband to provide for her food, clothes and housing"

It was the counsel submission that, the Plaintiff lived up to such obligation only to find out that the 2nd Defendant was taking money from the 1st Defendant and had derailed her duties as a wife hence unable to claim any entitlement in accordance to Shia principles.

In the fourth and last issue, the learned counsel submitted that damages are meant to compensate for the occasioned *contumelia* and loss of consortium. Contumelia incorporates the injury, insult and indignity suffered by the Plaintiff whilst loss of consortium relates to the loss of comfort, society and service of the wife as a result of the adultery committed by the Defendants. The counsel referred to section 73 of the

Law of Marriage Act [Cap. 29 R.E 2022] which provides for the right to damages that;

"(1) A husband or wife may bring a suit for damages against any person who has, for any reason, enticed or induced his or her spouse to desert him or her".

(2) 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."

Further reference was made by the counsel in section 74 of the same Act which provides for the assessment of damages for adultery or enticement, that;

"(1) Damages for adultery or enticement shall be in the discretion of the court but shall not include any exemplary or punitive element.

(2) In assessing such damages, the court shall have regard-

(a) to any relevant custom of the community to which the parties belong; and

(b) in cases of adultery, to the question whether husband and wife were living together or apart."

It was the learned counsel view that, in consideration of Section 74 and the celebrated case of ***Musa Mwalugala vs. Ndeshe Hota [1998]*** TLR 1 the plaintiff is entitled to damages. In the cited case, the court held that: -

“Damages for adultery are always compensatory only, not exemplary or punitive, and the grounds upon which they are awarded are the actual value of the wife lost, compensation to the husband for injury of his feeling, to his honour and hurt to his family”.

For the above decision, the learned counsel submitted that, damages for adultery being awarded on the discretion of the court, the same should be awarded basing on assessment by the court of the injuries suffered by the Plaintiff (**Jenita Case**).

In her conclusion, the counsel invited the court to look into the fact that based on the evidence on record the Defendants committed adultery. She added that, the 1st Defendant, who, with knowledge, intruded into the marriage institution, ought to compensate the innocent spouse for the injury occasioned.

It was the counsel view that, adultery is almost always debilitating for the victimized spouse who suffers indignity and hurt because of the adultery and that, any deliberate intrusion into the marriage institution is an attack on the dignity of an innocent spouse which ought to be sanctioned by the law. It was her further assertion that, the Defendants have caused the Plaintiff a tremendous amount of pain, hardship, emotional distraught, and financial loss. That, they have also tarnished the plaintiff reputation and have caused unnecessary legal expenses for these adulterous proceedings to which they should pay for.

Finally, the counsel stated that, from the strength of the foregoing arguments, the Plaintiff prevails and is entitled to *damages*, not only for the loss of consortium but also on the ground of the *contumelia* or insult, done to him by the 2nd Defendant by reason of the adultery.

Per contra, Mr. Mwakibolwa learned counsel submitted that; the plaintiff in presenting his case relied on his own testimony and presented four documentary evidence; that is marriage certificate (**Exhibit P1**), WhatsApp messages (**Exhibit P2**), copy of a bank statement (**Exhibit P3**) and a demand note admitted as **Exhibit (P4)**. It was the counsel

argument that, the plaintiff has no case built on him and accordingly have failed to prove how liable the defendants are.

The counsel contended that, according to Section 110 of the Law Evidence Act, [Cap. 6 R.E 2022] **"he who alleges must prove"**. In that regard, the plaintiff has failed to discharge that duty on the basis that; **One**, the plaintiff has failed to prove his allegations under paragraphs 7, 8, 9 and 10 of the plaints that the 1st and 2nd defendant were having intimate relationship over the years. **Two**, he has also failed to prove that the children of the plaintiff and the 2nd defendants were terrified and constantly harassed by the actions of the 1st defendant.

The counsel referred to section 110 (1) of the Evidence Act, that;

"whoever desires any court to give judgment as to legal liability dependent on the existence of facts which he asserts must prove that those facts exist."

From the above provision, it was the counsel view that the plaintiff did not; according to the law bring before the court the evidence that the defendant was liable to compensate him.

On his effort to water down the credibility of annexure **"AL1"** which was filed at the time of lodging the plaint, and produced by PW1 in court

as **exhibit P2**, the learned counsel stressed that those string of WhatsApp messages are not reliable as they were altered and manipulated since they contain some narrations in between the messages clearly showing that the messages were tempered. He furthered the argument that, the plaintiff did not tell the court how those messages were acquired, produced and stored as per the requirement of Section 18(2) of the Electronic Transactions Act, [Cap. 442 R.E 2022].

In view of his submission, the counsel insisted that annexure, **"AL1"** or exhibit P2 should be disregard or ignored as it is incompetent and inadmissible under the law. In support of his argument, the counsel cited the High Court decision in **Christina Thomas V Joyce Justoshimba**, PC Civil Appeal No. 84 of 2020 whereby Mgeyekwa, J. held that;

'...Section 18 (3) and (4) of the Electronic Transactions Act, No. 13 of 2015 has laid a procedural requirement in the admissibility of electronic documents. The admissibility of the evidential weight of data messages are clearly stated under the Electronic Transactions Act, of 2015 specifically section 18 (3) of the Act... based on the above provision of law, it is crystal clear that the respondent did not follow the required procedure in

tendering electronic documents in the court of law. The authenticity of the said SMS are questionable...'

From the above authority, it was the counsel argument that in absence of Exhibit P2 the case of the plaintiff, there is no other piece of evidence showing that there was any affair or sexual relationship between the 1st and the 2nd defendant. In the event, the marriage certificate produced and admitted as P1 is only there to prove that there was marriage between the plaintiff and the 2nd defendant, which was never disputed. Again, that and a demand note that was produced by the plaintiff and admitted as P4 does not by any means prove injury or justification for the payment of the claimed amount to the plaintiff.

The counsel added further that, a bank statement (P3) which was produced by the plaintiff to show that the 2nd defendant received money from the 1st defendant, was a transaction which was explained by both witnesses of the defense, (DW 1 and DW 2) that; the said money was sent by the 2nd defendant's father through the 1st defendant because the 1st defendant being a businessman can easily send money abroad from Tanzania.

Under the circumstances, it was the counsel view that there is no evidence in this court, be it circumstantial or concrete, to prove that the 1st and 2nd defendants had a sexual relationship and as a result the plaintiff suffered damages. Addressing on the issue of damages, the counsel submitted that ever since the plaintiff divorced the 2nd defendant, he got a better paying job, moved to a bigger house and re-married. Hence, there was no justifiable evidence before this court as to why he is entitled to the sum claimed in the plaint.

The counsel, quoted the case of **Partap vs. State of Uttar Pradesh**, A.I.R. 1976 S.C. 966 at page 969, that,

"a person who brings another before a judicial tribunal, must succeed by the strength of his own right and the clearness of his own proof, and must not rely on the want of right or weakness of proof of his opponent."

I have seriously considered the evidence on record and fully applied my mind to the submission by counsel for the plaintiff and the respondents. I have also fully considered the authorities availed to me in the submissions and for which I am grateful.

The Law of Marriage Act, Cap.29 R.E 2022 provides the right to damages for enticement. It is couched in the following words;

"S. 73-(1) A husband or wife may bring a suit for damages against any person who has, for any reason, enticed or induced his or her spouse to desert him or her".

From the above provision of the law, it is obvious that the plaintiff who felt aggrieved by the actions of the 1st and 2nd defendant had the right to bring an action against them for compensation and, a successful party shall be awarded damages.

As was pointed out in the authorities cited, the award of damages is the discretion of the court and, aim at compensating the injured party and not to penalize the party at fault. That is, in case of successful litigation, an injured party will be paid for the actual loss suffered as a result of the adultery and damages for injury to the aggrieved party's feelings and marital behavior emanating from adulterous affair.

In view of the above, Section 74 of the Law of Marriage Act provides for the assessment of damages for adultery or enticement, that;

"S. 74(1) Damages for adultery or enticement shall be in the discretion of the court but shall not include any exemplary or punitive element.

(2) In assessing such damages, the court shall have regard-

(a) to any relevant custom of the community to which the parties belong; and

(b) in cases of adultery, to the question whether husband and wife were living together or apart.”

Whether the plaintiff is entitled or not entitled to damages is the question of evidence. That is, he has proved his case on preponderance of probability. Such evidence shall be in accordance with what the plaintiff has pleaded in the plaint and evidence adduced at the hearing. That was the position taken by the court in the case of **Makoni J.B Wassanga and Joshua Mwakambo & Another** [1987] TLR 88 where it was held that;

‘In general, and this I think elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and in evidence, he is not permitted to set up a new case’

As rightly pointed out in the authorities cited by learned counsel Ms. Kimej, cases of adultery are rarely be proved by direct evidence; it is mostly proved by circumstantial evidence. See. **Ross v. Ross, (1930) AC 1** (Supra). The same position was also taken in the cases of; **Seif A.**

Ngakonda vs Felix Matemu, Civil Appeal No. 10 of 2020 and Gai Ipenzule Vs Sumi Magoye 1983 TLR 289 (TZHC).

From the authorities, I hasten to state further that adultery from its nature is generally a secret act. It is performed with utmost secrecy. Even when the direct evidence is produced, the court should look upon it with disfavors as it is highly improbable that any person can be a witness to such promiscuous acts.

After having laid such foundation, let me now examine the evidence adduced to see if the plaintiff has established the first issue regarding adultery against the 1st and 2nd defendant and, whether the test of preponderance of probability satisfied.

The evidence of the plaintiff substantiating his claims can be classified into three categories. **One**, the trip to South Africa linked to print out of WhatsApp messages in exhibit P2. **Two**, the family gathering of the 2nd respondent in Dubai in the presence of the 1st defendant and, **three** presents and gifts sent by 1st defendant to the 2nd defendant in Singapore.

As regard to the first category of evidence leading to adulterous association, the plaintiff had placed reliance on exhibit P2 stating that intimate pictures of the 2nd defendant with the 1st Defendant taken during

their trip to South Africa in April 2018 and the same being exchanged between them discussing their encounter displayed aspects of their extra-marital -affair. In fact, the plaintiff testified that he saw, what he called, some illicit WhatsApp text messages and several pictures which were being exchanged between the 1st and 2nd Defendant on his wife's mobile phone. In her submission, the counsel Ms. Kimei picked some of text messages which were explicit that... *"I just packed the lube and toy"; "I miss my nyonyo"; "we are like young married couple when together"; and "I was used to shagging you every day"*. The counsel added that, more distressing to the Plaintiff was the fact that the 1st Defendant encouraged the 2nd Defendant in the text messages *"don't pay attention"; "come to me"* and *"be brave"*. Furthermore, that under cross examination both defendants admitted to be the same persons holding each other in the pictures in Exhibit P2.

Per contra, Mr. Mwakibolwa learned counsel refuted such piece of evidence in Exhibit P2. The counsel invited this court to disregard it because it is incompetent and inadmissible under Section 18(2) of the Electronic Transactions Act, [Cap. 442 R.E 2022]. For ease of reference let me reproduce the relevant provision which reads: -

18.-(1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.

(2) In determining admissibility and evidential weight of a data message, the following shall be considered-

*(a) the **reliability** of the manner in which the data message was **generated, stored or communicated**;*

*(b) the reliability of the manner in which the **integrity** of the data message was Electronic Transactions maintained;*

*(c) the manner in which **its originator** was identified; and*

(d) any other factor that may be relevant in assessing the weight of evidence.

From the authorities cited, despite the fact that Exhibit P2 was tendered and admitted in court, the same was without explanation as to how it was generated, stored and communicated, hence it becomes unreliable. The said screenshot WhatsApp messages contains some conversations purported to be chat history between the 1st and 2nd defendant. However, the same do not indicate at least mobile phone number and name of the 2nd Defendant to prove that, the information were retrieved from her mobile phone. On top of that, it contains some insertions by the plaintiff trying to explain meaning of the conversations in the chat history. In that regard, I agree with the counsel Mr. Mwakibolwa that exhibit P2 is not worth it to be relied by the court. The messages though admitted has no evidential value for being unreliable.

The evidence of that nature should be left to speak by itself. The insertions by the plaintiff may amount to alterations or tempering which do

not meet the tests established under section 18(2) of the Electronic Transactions Act. The law requires that weight of such evidence be given if it is authentic, that is its reliability and integrity is not questionable.

I hasten to state further that, rules on admissibility of data message have to be observed in order to show that the device is what it is purported to be and that the digital information is trustworthy and has not been tempered with or altered. Exhibit P2 only demonstrated what the plaintiff was able to access on a particular date, without providing sufficient context or the ability to test the evidence.

Parties who intend to rely on WhatsApp messages as evidence in their court cases should ensure that; the snapshots of their discussions contain the necessary information to identify the sender, recipient of the messages and; they don't wholly rely on WhatsApp messages to build their case.

As regards to the second category of plaintiff's evidence, it was the 2nd defendant trips in Dubai in a family re-union. The plaintiff contended that the 2nd defendant's trips since 2015, the children would complain that the 1st Defendant was always glued them around and to make matters worse, in one of the trips where the 2nd Defendant travelled with the

children, the children told the Plaintiff upon their return, that they were left alone in a villa while the 2nd Defendant had gone out with the 1st Defendant, the facts which were denied by the defendants.

The above piece of evidence has some shortfalls. It is a told story by the children who travelled with the 2nd defendant in Dubai. If the plaintiff had seen it necessary to bring such piece of evidence to prove his case, he would have called the children to testify in his behalf and the same could be heard virtually as the plaintiff did. Absence of such evidence, at least the testimony on one child, the evidence of the plaintiff would remain a hearsay. It is a general rule which needs not be repeated here that, hearsay evidence is not admissible at trial. The children who are the maker of the statement that they were left alone in a villa while the 2nd Defendant had gone out with the 1st Defendant and that, they slept at close rooms with each other, and that they were distressed as a result of the constant presence of the so called "uncle" (1st defendant), ought to be heard and assessed by the court in respect of such allegations.

In referencing to the third category of the plaintiff's evidence, the plaintiff testified that, the 1st defendant sent a box of chocolates, clothes and money USD 20000.00 to the 2nd defendant in Singapore as a form of

enticement. To the contrary, the 1st and 2nd defendant denied accusations. However, the contradictions mounted in the case of defendants give me some clue that those were not normal gifts as suggested by the 1st defendant. It is my considered view that sending money USD 20000.00 to the wife of another man without the knowledge of her husband, claiming that it was the money sent to the 2nd defendant by her father who did not testify to that effect leaves a lot to be desired.

As rightly pointed out by the learned counsel Ms. Kimei, the 2nd defendant stated that her father sent her money through the 1st Defendant as he is an old man and is not acquainted with the banking system while DW1 confirmed that he was sending the 2nd Defendant money using his account. The 1st Defendant gave his testimony that he has been living in Dubai since 2015, therefore the questions posed by the counsel that; how then could the 2nd Defendant's father transfer the said money to the 1st Defendant and not opt for direct transfer to her? Why would there be a need for the use of a third party for transfer of funds whilst the third party is also in another jurisdiction which would involve bank logistics that the 2nd Defendant's father was not familiar with as claimed? required enough

explanations from the defendants; absence of which, as I have repeatedly said, leaves a lot to be desired.

Be that as it may, it is not enough to prove the claim of the plaintiff that an act of adultery was committed by the defendants herein. From the pleadings and in the evidence of the plaintiff, it was stated that the divorce proceedings in Singapore was a result of adultery allegations, however there was no evidence tendered here in court for its scrutinization. In the results, there was no proof of adultery association of the 1st and 2nd defendants, the claim by the plaintiff cannot succeed.

In light of the above, this court find no substance in dealing with other issues as framed by court, as both depended on successful prosecution of the first issue, which was whether the 2nd Defendant engaged in extra-marital affair with the 1st Defendant during the pendency of her marriage.

Henceforth, the suit is hereby dismissed. Basing on nature of the claim, each party should bear its own costs.

Order accordingly.



H. R. MWANGA

JUDGE

16/03/2023

COURT: Judgement delivered in the presence of the learned counsels for Plaintiff and the defendants.



H. R. MWANGA

JUDGE

16/03/2023