

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA
DC.CIVIL APPEAL NO.15 OF 2021

(Originating from Civil Case No.3 of 2019 in Ruangwa District Court)

ATASHASTA OWEN APPELLANT

VERSUS

SIMEON SYPRIAN MANJULUNGU.....RESPONDENT

JUDGEMENT

14/5/2023 & 23/5/2023

LALTAIKA, J.

The appellant herein **ATASHASTA OWEN** is dissatisfied with the decision of the District Court of Ruangwa at Ruangwa (the trial court) in Civil Case No.3 of 2019. The impugned decision was delivered on 17/3/2020 by the Hon. Shehagilo, RM. He has appealed to this court on one ground as reproduced bellow:

- 1. That the trial court erred both in law and facts when he overlooked the provision as set by law in taking into consideration the baseless and incredible testimonies from the respondent's part and when not taking into account the*

watertight and credible evidence adduced by the appellant's part."

When the appeal was called on for hearing, both parties enjoyed skillful legal services of learned Advocates: Mr. Mohamed Manyanga and Issa Chiputula for the appellant and respondent respectively.

At this juncture, I find it imperative to provide a brief factual and contextual backdrop. This case is on allegation of adultery. The respondent **SIMEON SYPRIAN MANJULUNGU**, a retired civil servant, sued the appellant **ATASHASTA OWEN** a real estate trader, at the District Court of Ruangwa alleging that he (the appellant) was in an adulterous relationship with his wife namely Josephina Jairos Manjulungu. He prayed for special damages to the tune of TZS 51,000,000, general damages to the tune of TZS 50,000/= and any other relief on the court would have deemed right to grant.

The adulterous relationship was allegedly discovered when, on the night of 30/06/2019, as the respondent would later narrate, his wife went back home very late; well after midnight, 1AM to be exact. Upon being asked where she had been, Mrs. Manjulungu narrated a story that I consider the crux of this appeal. She told her husband that the appellants wife, a member of the people's militia and a hamlet (*kitongoji*) leader had caught her *red-handed* having sex with the appellant in his house.

As a result, Mrs. Manjulungu allegedly opened up to her husband, an agreement was entered to resolve the dispute amicably whereupon the

appellant's wife allegedly demanded to be paid TZS 2,000,000/=. She received 100,000/= on the same day and a pledge was made before a hamlet leader *katibu wa kitongoji* one Juma Mmenjuka for the rest of the monies to be paid on 30/11/2019. The promise was not honored but that is a different story altogether. Of relevance here is that Mr. Manjulungu, firmly believing that what he was told by Mrs. Manjulungu was true, knocked on the doors of the trial court demanding compensation as hinted above.

Having been satisfied that the plaintiff (now respondent) had proved his case on a balance of probability, the learned Magistrate adjudged in his favour. The six-page impugned judgement alluded to above is authoritatively worded. It concludes with a sentence "[t]herefore the defendant **SHALL PAY** the plaintiff Tsh 5,000,000/= as general damages, and the cost of this suit. It is so ordered." (Emphasis mine). In the next parts of this judgement, I provide a summary of oral submissions by the learned counsel for and against the appeal. No doubt, each of the counsel did their very best but one of them must win.

Submitting in support of the appeal, Mr. Manyanga, counsel for the appellant, stated that on the grounds of appeal, they intended to raise points of law regarding contradictory evidence found in the copy of the proceedings. According to Mr. Manyanga, at page 17, PW2 testified that he entered the room with the wife of the defendant and Yusufu, stating, "I found them doing sex," implying adultery. Mr. Manyanga pointed out that PW2, who is Juma Hassan Menjuka, mentioned in paragraph 3 of the same page that he was at his area of leadership when Yusufu, a member of the

People's Militia, approached him and said he had been called into an area to search a house but couldn't do so without the leader of that area.

However, at page 24, PW3 Josephina Jairos Manjulungu, the wife of the respondent (then plaintiff), provided a different account. She stated that the wife of the defendant was the first to enter the room, followed by Juma and Yusufu. She mentioned, "At that time, I was naked continuing with sex." Mr. Manyanga highlighted the contradiction between PW2 and PW3's testimonies. While PW2 claimed to have entered with the wife of the defendant and Yusufu, PW3 asserted that she was the first to enter the room, followed by Juma and Yusufu.

Mr. Manyanga argued that these contradictions raised doubts and referred to the cases of **Wilfred Lukago v. R. [1994] TLR 189** and **Michael Haishi v. R. [1992] TLR 92**, where the court held that contradictory evidence creates doubt, which should be decided in favor of the appellant. He further emphasized that the credibility of the witnesses was at issue, citing the case of **Abdallah Musa Mollel @Banjoo v. DPP**, which referred to the case of **MT. 38350 PTE Ledman Maregesi v. R.** The court in that case observed that when a witness is thought to have lied on a material point, their evidence should be approached with great caution, and the court should generally not rely on such evidence.

Mr. Manyanga pointed out that the key witness, Yusufu, who was the militia man and the one who requested permission to search the house on the pretext of adultery, was not summoned to testify. He argued that this omission resulted in a breakdown of the chain of evidence and a lack of

connection. He also highlighted the denial by DW2, the wife of the current appellant, who claimed she never invited the militia man and had never caught her husband in adultery. Mr. Manyanga raised doubts about DW2's credibility, noting that she contradicted the statements of PW1 and PW3.

Furthermore, Mr. Manyanga mentioned that PW2's wife, at page 22 of the proceedings, stated that an agreement to pay two million TZS was made and reduced to writing, but only 100,000 TZS had been paid by then. He argued that this witness was incredible because she claimed to have arrived home late at midnight and confessed to her husband that she had been caught in adultery. Mr. Manyanga expressed doubts about the credibility of this account, considering the absence of the husband at the scene and the fact that the evidence relied solely on hearsay.

In conclusion, Mr. Manyanga requested the honorable court to consider their submissions in favor of the appellant, nullify and quash the trial court's decision, and award costs.

Mr. Chiputula, Counsel for the Respondent, informed the court that he had attended the submission of senior Advocate Mr. Manyanga. He had thoroughly scrutinized it and respectfully objected to his submission. The learned counsel insisted that the decision of Ruangwa District Court should be upheld.

Mr. Chiputula's first objection to the appeal was that the learned counsel had made a submission on a memorandum of appeal that was time-barred. He pointed out that the judgment being appealed against was delivered on July 17, 2020, and the appeal was filed on December 21, 2021, more than

one year after the judgment. He cited **the Magistrates' Courts Act Cap 11 RE 2019, specifically section 25(1)(b)**, which required that any appeal from the District Court to the High Court be filed within 30 days from the date of judgment. The learned counsel for the respondent argued that the 30-day period for filing the appeal had ended on August 27, 2020, and since there was no application for an extension of time, the appeal was time-barred.

Mr. Chiputula further argued that the respondent had proved the claim of adultery against the appellant. He referred to the **Evidence Act Cap 6 RE 2019**, specifically Section 110, 111, and 112, which stated that the one who alleges the existence of certain facts must prove them. He explained that in civil cases, the standard of proof was on the balance of probabilities, not beyond reasonable doubt. He cited the case **of Hemedi Saidi v. Mohamed Mbilu [1987] TLR 133**, which clarified the standard of proof in civil cases.

He presented the three elements that needed to be proved to hold a person liable for adultery: 1) the woman involved was married, 2) she had sexual intercourse with a man who was not her husband, and 3) the man knew that she was married. Mr. Chiputula referred to the case of **Gai Ipenzule v. Sumi Magoye [1986] TLR 289**, which explained that adultery could be proved through circumstantial evidence.

He then provided evidence to support each of the elements. He mentioned the witnesses who testified and their statements in the court proceedings. He argued that the evidence clearly showed that the woman

involved was married, that she had sexual intercourse with the appellant, and that the appellant was aware that she was married.

Addressing the arguments of the learned counsel, Mr. Chiputula dismissed the alleged contradictions between witnesses as minor and not affecting the core of the case. He cited the case of **Dorovico Simeo v. Republic Crim Appeal No 256 of 2008** CAT, Bukoba, which stated that minor errors or inconsistencies should not be taken in favor of the appellant.

Regarding the credibility of the witnesses, Mr. Chiputula argued that all the witnesses were credible, and their testimonies were not shaken during cross-examination. He referred to the case of **Galus Kitaya v. R. Crim App 196 of 2015** CAT, Sumbawanga, which emphasized that the credibility of a witness included their demeanor.

Mr. Chiputula addressed his fellow counsel's argument about the failure to produce a written agreement as evidence, stating that the admissibility of evidence as an exhibit had nothing to do with the credibility of the witness.

Mr. Chiputula dismissed the argument about the absence of a material witness, Yusufu, stating that his absence did not affect the case since there were other eyewitnesses. He argued that the presence or absence of Yusufu did not make a difference in proving the civil wrong or adultery. He concluded by stating that the cases cited by the learned counsel were distinguishable.

In rejoinder, Mr. Manyanga mentioned that he would address the issue of the appeal being time barred. According to him, on September 18, 2020, the respondent raised a point of objection stating that the appeal was filed

contrary to **Order XXXIX Rule 1(1)** of the CPC Cap 33 RE 2019. The objection was based on the appeal not being accompanied by a copy of the decree. He further stated that they did not object to this point. Mr. Manyanga expressed his regret for not being able to recall the exact date when the appeal was withdrawn before **Hon. Dyansobera J.** However, he emphasized that the records would speak for themselves.

Mr. Manyanga then addressed the issue of credibility, which his learned friend had previously raised. He maintained that the inconsistencies arose during the trial, resulting in lowered credibility. He mentioned that the learned counsel asserted that their failure to cross-examine implied agreement with the submitted evidence. Mr. Manyanga referred to specific pages of the proceedings, such as page 25, where cross-examination took place, and responses were indicated. On page 18, cross-examination occurred to challenge the evidence presented by PW2, a local government leader.

One response indicated that he knocked and pushed the door and was the first person to enter the house. PW3 was also cross-examined and responded that the wife of the husband was the first to enter. Mr. Manyanga argued that these contradictions occurred because the key witness who had led the rest to the scene was not summoned, suggesting that this was done maliciously to hide the fact that the case was staged.

Regarding the tradition mentioned by the opposing counsel, Mr. Manyanga stated that there was no indication in the proceedings that the witness had been pressed down. He claimed that she was simply asked

where she had been, and no force had been applied. He asserted that these inconsistencies were numerous, including those related to the amount advanced, and he wished that the document had been produced, emphasizing that it touched on the core of the incident.

Mr. Manyanga disagreed with the opposing counsel's claim that PW4 and PW5 could be considered key witnesses. He argued that PW4 was not present at the scene, as stated on page 25. Similarly, PW5 had only testified at the police station that the wife of the respondent was his lover.

Regarding the issue of demeanor, Mr. Manyanga disagreed with the opposing counsel's assertion that this court could not measure it since it was not present during the trial. He explained that the appellate court, as an appellant stage, has no chance of cross-examination. However, upon examining the records, the appellate court can come to its own decision, which may result in several remedies.

He considered the opposing counsel's statement that the court cannot measure demeanor as misplaced. Mr. Manyanga mentioned specific cases where he believed the evidence of PW2 and PW3 was cooked because both witnesses had been at the scene. He referred to a conversation that took place between PW2 and her husband, stating that it occurred in the presence of the couple alone, and invited the court to consider it as cooked evidence.

Regarding the difficulty of obtaining the original document, Mr. Manyanga pointed out that there is a law empowering the court to order the production of evidence in the possession of an adverse party upon a prayer by the party intending to produce the document.

Additionally, Mr. Manyanga addressed the issue raised by the opposing counsel that PW2 would find it difficult to provide evidence against her husband. He pointed out that the opposing counsel had not shown any doubt when it happened from the other side.

Having **dispassionately** considered the rival submissions, the issue for my determination is whether the appeal has merit. As the first appellate court, I have exercised the power to analyze the evidence tendered in the trial court.

A starting point would be to acknowledge the fact that adultery is not desirable. It threatens the stability of the institution of marriage. In the past, adultery was punishable by death. Probably not anymore (in most parts of the world). However, scholars agree that deep inside, we are still the same as our ancestors in our attempts to punish those that interfere with our marriage. The feelings of bitterness and distastefulness of adultery hasn't changed much. DE Murray "Ancient Laws on Adultery- A Synopsis" (1961) 89 *Journal of Family Law* 89-104 at p. 89 provides:

*"The history of humankind indicates that when it created the relationship of marriage, adultery was not far behind. A study of ancient laws will show that although we now treat the adulteress and the adulterer more humanely, **our underlying feelings resemble those of the ancient man.**" (Emphasis mine)*

In the Old Testament era, adultery was punishable by stoning the culprit to death. In our communities, the saying "mke wa mtu ni sumu" is indicative of this underlying feeling that hasn't changed much from the ancient time. There is hardly any culture that praises people who are meddlers of the

institution of marriage. Premised on this preambular account, it is with very serious and focused attention that I must decide the matter on adultery before me.

As submitted by Mr. Chiputula the three elements that needed to be proved to **hold a person liable for adultery**: 1) the woman involved was married, 2) she had sexual intercourse with a man who was not her husband, and 3) the man knew that she was married. There is no doubt that Mr. and Mrs. Manjulungu got married in 1983 and lived happily thereafter. I move on to the second and third elements.

I have read all the testimonies to find out how the learned Magistrate considered the second element affirmatively. I am alive to the fact that circumstantial evidence is sufficient to establish an adulterous relationship but the in the matter at hand such evidence is too remote. The law requires establishing that a woman had sexual intercourse with a man who is not her husband. I do not know what made the respondent believe the story of his wife so easily. It defeats logic to imagine a wife coming late to her home, finding her husband wondering where she was and she starts narrating how she was caught *in blazing having sex* with another man. I cannot believe this.

It is with great interest that I read the so called "agreement" to settle the "ugoni" amicably. If the same was anything to go by, the learned Magistrate should have indicated in his judgement what he thought about it. It was allegedly entered between the wives of the appellant and respondent. They agreed to compensate each other for the ugoni.

The trial court records also indicate that Mr. Manjulungu and the appellant knew each other before and had, in fact, worked together in the farming business. This narrative continues to show that at some point Mrs. Manjulungu complained that the appellant had bought a piece of land for her (and her husband, that is) but was not willing to give them the land title. This should have created doubts in the mind of the learned magistrate to assume that there could be some other (hidden) agenda.

In my analysis, I couldn't help but **doubt the entire narrative** after weighing in the evidence of all PW's. I agree with Mr. Manyanga that such contradictions watered down the entire case. Initially, it was claimed that the appellant and Mrs. Manjulungu were inside a room when the appellant's wife, a *mgambo* and a hamlet leaders stormed in to find the duo "having sex." Those were the most important witnesses. Mrs. Owen distanced herself from the story. She testified under oath that she loved her husband and that she had never even suspected him of adultery let alone "catching him live".

The *mgambo* gentleman, on the other hand, was never summoned. So many references to the *gentleman Mgambo* should have prompted the learned Magistrate to go an extra mile. He did not. He took the leeway for granted that adultery could be proved by circumstance. Unfortunately, and I say this with so much respect, whenever a court of justice is called upon to base its decision of circumstantial evidence, such evidence must, first and foremost, pass the test of logic. The narrative in the instant matter does not pass the test.

All said and done, I allow this appeal. I nullify the proceedings and set aside all orders emanating from the impugned judgement.





E.I. LALTAIKA
JUDGE
23/5/2023

Court

Judgement delivered on this 23rd day of May 2023 in the presence of Ms. Anastasia Minja, leaned counsel for the appellant and in the absence of the respondent.





E.I. LALTAIKA
JUDGE
23/5/2023

Court

Right to appeal to the Court of Appeal of Tanzania fully explained.




E.I. LALTAIKA
JUDGE
23/5/2023