

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL APPEAL NO. 5 OF 2023

(Arising from Case Civil No. 3 of 2013 District Court of Bukoba)

LAURENT DAUD..... APPELLANT

VERSUS

BISHOP BAYONA MUTASHOBYA..... 1ST RESPONDENT

CRIAN PANTALEO..... 2ND RESPONDENT

JUDGMENT

4th and 25th September, 2023.

BANZI, J.:

This appeal traces its origin way back in 2013 when the appellant sued the first respondent before the District Court of Bukoba (the trial court), claiming for payment of Tshs.55,340,000/= being damages for adultery the latter committed with his wife, Aneth John @ Aneth Laurent (DW3) from 1st July, 2013 to 8th July, 2013 and for inducing her to desert her family. After hearing both parties, the trial court decided in favour of the appellant by awarding the claimed amount. Aggrieved with that decision, the first respondent appealed to this Court vide Civil Appeal No. 19 of 2020. In his appeal before this Court, the first respondent raised a legal issue that the proceedings and judgment of the trial court were tainted with irregularities as the case was heard by five Magistrates but either of them assigned

reasons for taking over the case. After hearing the parties, in its judgment dated 29th November, 2021 this Court quashed the proceedings and set aside the judgment and subsequent orders. As a result, an order of retrial was issued before another Magistrate.

When the matter was placed before the trial court for retrial and following a prayer by learned counsel for the appellant, the second respondent was joined as necessary party after it was revealed that, there was a marriage certificate No. 000157828 issued on 23/06/2021 officiating the marriage between the second respondent and DW3. However, despite being served with summons, the second respondent did not appear before the trial court for defence and hence, the trial proceeded in his absence. After full trial, the trial court dismissed the case with costs for want of merit. Aggrieved with that decision, the appellant lodged his appeal before this Court comprising three grounds thus:

1. ***THAT***, the District Court of Bukoba erred in law and fact in holding that the appellant has no lawful marriage with his wife, Aneth John, and has no locus standi to sue for adultery and claim for compensation, while the evidence on record proved the appellant's marriage with the said Aneth, giving the appellant the right to sue for adultery and for compensation against the respondents.

2. **THAT**, the Trial Court erred in fact in holding that the respondents did not induce the appellant's wife to desert him and the respondents did not commit adultery with the appellant's wife, disregarding the evidence tendered before the court.
3. **THAT**, the Honourable trial court erred in law and fact in failing to analyze the evidence on record and reaching a wrong decision.

At the hearing, the appellant was represented by Mr. Joseph Bitakwate, learned counsel whereas, Mr. Eliphazi Bengesi, learned counsel appeared for the second respondent. The appeal was heard *ex-parte* against the first respondent after failing to appear on the hearing date despite being served by substituted summons through publication in Nipashe newspaper dated 31st July, 2023.

Arguing in support of the first ground, Mr. Bitakwate submitted that, the appellant in his evidence explained how he contracted customary marriage with DW3 in 1990 by paying a dowry of Tshs.350,000/= to her father through PW4 who was the representative commonly known as "mshenga." After paying the bride price, they celebrated marriage with relatives and neighbours. This kind of marriage is recognised by section 25 (1) (d) of the Law of Marriage Act [Cap. 29 R.E. 2019] ("the LMA"). He cited

the case of **Francis Leo v. Paschal Simon Maganga** [1978] LRT 22 to support his submission.

In respect of the second ground, Mr. Bitakwate submitted that, according to the testimony of PW1, DW2 and DW3, it is undisputed that, on 1/7/2013, DW3 slept at the house of the first respondent. Likewise, the available evidence proved that, the first and second respondent conspired and enticed DW3 to leave her marriage because despite being serving in the same Chistian Mission Fellowship as Bishop and Pastor respectively, they denied to know each other. Besides, the marriage between the second respondent and DW3 was contracted in the same church in 2021 while the case has already been filed before the trial court. According to him, enticement in Haya custom is as good as adultery and hence, the appellant was entitled to be compensated.

Concerning the third ground, he contended that, the trial court did not analyse evidence before it. Had it been properly analysed, it could not have been reached into conclusion that, DW3 was not the lawful wife of the appellant and hence, the appellant had no *locus standi* to sue for damages on adultery. He urged this Court to quash the decision of the trial court and find that the appellant proved his case to the required standard.

Upon being probed by court to address whether DW3 had capacity to contract marriage in 1990 at the age of 10 years, Mr. Bitakwate stated that, although the appellant's evidence is silence on that issue, at the time of marriage, she was adult. Besides, since that issue was raised by the defence side, it was their duty to prove that, at the time when they contracted marriage, she was 10 years old.

In his reply, Mr. Bengesi began his submission by responding to the issue raised by court. He submitted that, since the appellant told the trial court that, he married DW3 in 1990, and considering that DW3 in her evidence stated to be born in 1980, there was no valid marriage because, the same was void ab initio for want of capacity to marry. Also, both DW3 and her father (DW4) stated that, the appellant had never paid bride price. Submitting on the complaint of adultery, Mr. Bengesi stated that, the record does not show if the first respondent was caught red-handed in the act of adultery on the dates, she was alleged to sleep in the house of the first respondent.

In respect of the second ground, Mr. Bengesi stated that, between DW3 and the appellant, there was no valid marriage. Therefore, the marriage between DW3 and the second respondent was valid and so as Exhibit D3 pursuant to section 159 of the LMA because DW3 was a free person after

she and the appellant had agreed to separate before the social welfare officer. Under these circumstances, the issue of enticement and adultery does not arise. Thus, the appellant is not entitled to damages and this appeal deserves to be dismissed with costs.

In his rejoinder, Mr. Bitakwate placed the burden of proof to the respondents on the age of DW3 at the time when she married the appellant in 1990. To him, the respondents failed to prove that in 1990, DW3 was 10 years old. Apart from that, Exhibit D3 is not a proof of age of DW3. Moreover, the issue of denial of DW4 to receive dowry was not proved and the fact about the appellant and DW3 agreed to separate is not on record. Therefore, their marriage still exists and the second respondent was incapable of marrying DW3. He concluded his submission by stating that, section 159 of the LMA is inapplicable as it recognises marriage contracted before enactment of the LMA.

Having considered the submissions of both parties and after perusing the record of the trial court, the issues for determination are; one, whether the appellant was legally married to DW3 and two, whether the first and second respondent committed adultery with DW3.

Section 72 (1) of the LMA provides that:

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

Notably, it is apparent from the cited provision that, in order for a person to sue for adultery, there should be a proof that, he is legally married to the person alleged to commit adultery with a third party. According to section 25 of the LMA, marriage can be contracted in civil form, specified religion form like Christian, Islamic form and in customary form. Apart from that, section 14 of the LMA provides that:

"(1) No person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, has not attained the apparent age of fifteen years.

(2) Notwithstanding the provisions of subsection (1), the court shall, in its discretion, have power, on application, to give leave for a marriage where the parties are, or either of them is, below the ages prescribed in subsection (1) if—

(a) each party has attained the age of fourteen years; and

(b) the court is satisfied that there are special circumstances which make the proposed marriage desirable.

(3) A person who has not attained the apparent age of eighteen years or fifteen years, as the case may be, and in

respect of whom the leave of the court has not been obtained under subsection (2), shall be said to be below the minimum age for marriage."

Observably, according to the extract above, a male person has no capacity to marry until he attains the apparent age of eighteen years. As far as the female person is concerned, she is eligible to get married when she attains the apparent age of fifteen years. However, under special circumstances, the court is vested with jurisdiction to grant leave for marriage where parties or either of them is attained the apparent age of fourteen years.

In the present matter, throughout the trial, the appellant was persistent that, he married DW3 under customary rites after paying bride price followed by celebration. On the other side, DW3 denied to have married to the appellant and her father (DW4) denied to have received dowry from the appellant. It was also their evidence that, DW3 and the second respondent contracted marriage under Christian rite in 2021 as proved by exhibit D3.

Now before determining whether there was adultery or not, it is pertinent to determine whether DW3 had capacity to marry in 1990. The appellant in his testimony, claimed to contract marriage with DW3 under

customary rites in 1990. In her testimony, DW3 claimed to be born on 13th June, 1980. However, this piece of evidence concerning the age of DW3 at the time of the alleged marriage was not confronted by the appellant. In other words, the appellant through his learned counsel Mr. Bitakwate did not cross-examine DW3 on this vital point concerning her age which as a matter of law, implies that, they accepted the truthfulness of DW3's testimony that she was born in 1980. In the case of **Patrick William Magubo v. Lilian Peter Kitali** [2022] TZCA 441 TanzLII it was held that:

"...it is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth."

Since the appellant was represented by learned advocate, it was not expected for the learned advocate to remain silent on that vital point which from all angles, it is clearly seen as detriment to his client's case. This is a clear indication that, they accepted the truth that, DW3 was born in 1980 and in 1990 she was 10 years old. The evidence of DW3 on this vital point is supported by the evidence of her father, DW4 who testified that, DW3 is their only child who was born in 1980. Likewise, Exhibit D3 is another piece of evidence proving that, DW3 was born in 1980. In that regard, and since

the appellant claimed to marry DW3 in 1990, it is apparent that, DW3 was 10 years at the time the appellant alleged to marry her and thus, she had no capacity to contract marriage pursuant to section 25 of the LMA. For that matter, there was no valid marriage between the appellant and DW3 for want of capacity to marry. Therefore, I agree with the contention of Mr. Bengesi that, since she had no capacity to marry, the purported marriage was void ab initio, and hence a nullity. The fact that DW3 admitted to live with the appellant for 16 years as co-parents, does not make them to be legally married while their purported marriage was void ab initio. Equally, the fact that in Exhibit D2 (Minutes of joint meeting between church and local leaders), the appellant and DW3 were introduced as husband and wife, it does not make them to be legally married. Besides, even we opted to base on presumption of marriage, such presumption would be rebutted because it is proved that, DW3 had no capacity to enter into marriage contract in 1990. With such finding, it is the considered view of this Court that, the appellant had no right to claim for adultery because his marriage to DW3 was not valid. This concludes the first issue which is negatively answered.

Assuming that, the marriage between the appellant and DW3 was valid, yet still, the appellant's case would be flopped because the evidence of proving adultery was wanting. In his evidence, the appellant alleged that

on 1st July, 2013 when he returned from her daily activities, he did not find his wife at home. Upon searching, he found her at the first respondent's house whereby, the first respondent told him that, she would go back home the next day as she was there for spiritual ethics. However, she did not return home until 8th July, 2013 after the matter was reported to police and social welfare office. He contended that staying at the first respondent's house for all those days while being his wife, amounts to adultery. On his side, the first respondent denied to have sexual affairs with DW3 and he denied to be at home on 1st July, 2013. He further testified that; on that date he was in Dar es Salaam where he went for a meeting held from 24th June, 2013 to 1st July, 2013. He returned back home on 4th July, 2013. His assertion was supported by his wife, Reveliana Bayona (DW2) who stated that, she was the one who welcomed DW3 to their home who went there complaining to be beaten by the appellant and being threatened by panga. This was also supported by DW3 in her evidence who also denied to have sexual affairs with the first respondent and stated that, she went to the first respondent for prayers as the appellant used to engage in witchcraft and he assaulted her for destroying his witchcraft mission through prayers. She contended further that, the conflict between them emerged because the appellant prohibited her and children to attend church services at the first respondent's church. From the evidence of DW1, DW2 and DW3, even if the first

respondent would be home as alleged by the appellant, the possibility of adultery between the first respondent and DW3 in the presence of his wife, DW2 is far-fetched. Thus, the allegations by the appellant that DW3 was enticed and committed adultery by the first respondent was not proved to the required standard.

Concerning the complaint against the second respondent, although he did not appear before the trial court to defend his case, it is undisputed that, he is legally married to DW3 and this is proved by Exhibit D3. As stated herein above, for the party to claim for adultery, there should be proof that he was married to the other party who is alleged to commit adultery. Although there was no dispute that, the appellant and DW3 are co-parent, since there was no lawful marriage between them, the act of the second respondent marrying DW3 in 2021 does not amount to adultery. In other words, at the time the second respondent married DW3, there was no subsisting valid marriage or even presumption of marriage between the appellant and DW3. Thus, even if the first issue would be answered affirmatively, the second issue would be answered negatively, as there is no evidence to prove adultery against the respondents.

In view of the foregoing, I find no speck of merit on this appeal and it is hereby dismissed entirely. Owing to the nature of the matter, each party shall bear its own costs.

It is accordingly ordered.



I. K. BANZI
JUDGE
25/09/2023

Delivered this 25th day of September, 2023 in the presence of the appellant in person and Mr. Eliphazi Bengesi, learned counsel for the second respondent and in the absence of the first respondent. Right of appeal duly explained.



I. K. BANZI
JUDGE
25/09/2023