THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA
(IRINGA SUB-REGISTRY)
AT IRINGA

(PC) CIVIL APPEAL NO. 03 OF 2023

BAKARI CHAPWILA ..... APPELLANT

VERSUS

1. HASSAN ALLY
2. MARIAM ACHINAMBA } **..... RESPONDENT**

(Being an appeal from the Judgment and Decree of the District Court of Njombe at Njombe)
(Hon. I. R. Mlowe (RM))

Dated the 30th day of August, 2022

in

Civil Appeal No. 01 of 2022

JUDGMENT

Date of last order: 28.02.2024
Date of Judgement: 15.03.2024

S.M. KALUNDE, J.:

In 2021 the appellant filed Civil Case No. 23 of 2021 at the Njombe Urban Primary Court (hereinafter **"the trial court"**) against the respondents. In the suit at the trial court the appellant prayed for payment of Tshs. 2,500,000.00, in compensation for adultery. The suit at the trial court terminated in favour of the respondents with the trial court declaring that there was no adultery. The appellant unsuccessfully appealed to the District Court of Njombe at Njombe hereinafter **"the**

first appellate court"). The appeal at the first appellate court was predicated on the following grounds of appeal:

> *"1. That, the trial court erred in law and fact for deciding in favour of the respondents neglecting their own evidence which proved beyond reasonable doubt that the two were seen in the 1st Respondents room at midnight;*
>
> *2. That, the trial court erred in law and fact for failing to analyse evidence adduced by both parties and hence reaching into an erroneous decision; and*
>
> *3. That, the trial primary court erred in law and fact for denying to compensate the Appellant despite proof from the Respondents themselves."*

Having considered the records and submissions of the parties, the first appellate court upheld the findings and conclusions of the trial court. In upholding the decision of the trial court, the first appellate court placed reliance in the decision of **Gai Ipenzule vs Sumi Magoye** [1983] TLR 289 (TZHC); [1985] TZHC 14 (25 May 1985) TANZLII where it was held inter alia that being caught ***in flagrante delicto*** was the only admissible evidence to prove adultery. The appellate court was of the view that, in absence of direct evidence that the respondents were caught committing adultery a conclusion that there was adultery could not be sustained. The appeal was thus dismissed with costs.

Still dissatisfied, he has come to this court on a second appeal. In his petition of appeal, the appellant has raised six grounds of appeal as follows:

1. *That, the District court erred in law and fact in disregarding the admissions of both the respondents in the primary court and the circumstantial evident that they are sexually lovers.*

2. *That, the District Court erred in law and fact when the magistrate agreed with the finding that 2nd respondent (who is the wife of the appellant) was seen at midnight in the room of the 1st respondent Hassan Ally wanting to injure her partner (the 1st respondent) for reason she saw him with another woman.*

3. *That, the District Court erred in law and fact in disregarding the evidence of appellants witness in the primary court that the 2nd respondent;*

4. *That, the district court erred in law and fact in seeking a direct proof of adultery while in fact both the respondents admitted that they are sexually lovers.*

5. *That, the District Court erred in law and fact in construing against the judgment of the primary court that the judgment talks of two lovers who were not sexually partners what circumstantial evidence needed more that expressed by the 1st*

*and 2nd respondent that there were sexually partners – the cited case **GAI IPENZULE VS SUMI MAGOYE** (1983) TLR 289 in favour of the appellant not the respondents.*

6. *That, the District Court erred in law and fact for not giving order of payment of the stated amount as compensation for adultery to the appellant."*

The brief factual background leading to this appeal is as follows: The appellant (**SM1**) and the second respondents (**SU2**) were married couples. Their marriage was confirmed by Omari Saleh Mwakasege (**SM2**), the BAKWATA secretary. However, it would appear that their marriage was riddled with trust issues. As a result, the second respondent engaged herself into an extra-marital affair with the first respondent (**SU1**). It is also worth noting here that, the first respondent was also married.

It would appear that prior to their sexual engagement, the second respondent had informed the first respondent that her husband had died. Later, the appellant discovered about the extra-marital affair and confronted the first respondent. Since the first respondent had entered in the relationship unknowingly, he decided to terminate the relationship. Having terminated the affair with the second respondent,

the first respondent proceeded with his life. However, the second respondent was not ready to let go of the extra-marital affair.

It was out of the second respondents' refusal to exist out of the extra-marital affair that on the 23rd day of March, 2021, she confronted the first respondent alleging that he has been cheating her with another woman. The confrontation was not a normal one because the second respondent was armed with a knife and threatened to stab the first appellant. Realizing that things were getting out of hand, the first respondent called his wife to bail him out. Upon arrival at the scene, the first respondent's wife called the ten-cell leader. After the arrival, the ten-cell leader decided to call the appellant (SM1).

Upon arrival at the scene, the appellant caused even more hullabaloo resulting into all the parties involved to be taken to a police station. The police realized that there was really no crime involved. Consequently, they advised the appellant to prefer civil proceedings if he wished. It was out of this background that the suit at the trial court was preferred.

In arguing the appeal, the appellant was unrepresented. He thus fended for himself. The respondent argued the grounds of appeal generally. He contended that the first and second respondents knew one

another as they were neighbours. In saying this, the appellant presupposed that by the time the first and second respondents were engaging in an extra-marital affair the first respondent knew that the second respondent was married to the appellant. He also argued that there was no evidence at the trial court indicating that the second respondent attempted to stab the first respondent. Instead, it was neighbours who were tired of the respondents' adulterous behaviors of the first and second respondents and decided to call the appellant. He also contended that both, the first and second, respondents admitted that they were lovers. Relying on the above submissions, the appellant insisted that the appeal be allowed and the decisions of the two afore courts be quashed and set aside; and a decision in his favour be made.

In response the first respondent submitted that there was no direct evidence indicating that the respondents were caught committing adultery. Relying in the case of **Gai Ipenzule vs. Sumi Magoye** (supra) the respondent submitted that there was no circumstantial evidence indicating that the respondents were adulterers. The first respondent submitted further that, what happened on the 23rd March, 2021, was just a conflict between the first and second respondents. He also added that there was no record before the trial court that the first and second respondents conceded that they were in a relationship. He

also submitted that just because a fight ensued inside the first appellant's room it cannot be said that they were caught committing adultery.

Submitting on whether the appellant discharged his onus to prove the case on the balance of probabilities, the first respondent submitted that the appellant failed to establish the allegations against the respondents. To support his argument, he cited the provisions of rule 2 of **the Magistrates court (Rules of Evidence in Primary Courts) Regulations**, G.N. No. 66 of 1972, and the case of **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama** (Civil Appeal 305 of 2020) [2021] TZCA 699 (29 November 2021) TANZLII. He added that, since the appellant failed to prove that the respondents were involved in an adulterous relationship then the trial curt was right in its conclusion.

Having said that, he concluded that the appeal lacked merits and the same ought to be dismissed with costs. He advised the decision of the trial court and first appellate court be upheld. There was nothing of substance in the appellants rejoinder submissions.

Having narrated the brief facts and summarized the submissions made by the parties, I think it is now the right time to consider the merits or otherwise of the appeal.

This is a second appeal. As demonstrated above, the two afore courts made concurrent findings that there was no proof of adultery between the first and second respondent. It was their conclusion that adultery was not established.

Before delving further, I must state that, I am alive with a salutary principle of law that a second appellate court should not generally interfere with concurrent findings of fact by the trial and first appellate courts, unless for example, the findings of facts are unreasonable or where it is evident that some material points or circumstances were not considered by the two courts below. See **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L. R 31; and **Mohamed Juma @ Mpakama vs Republic** (Criminal Appeal 385 of 2017) [2019] TZCA 518 (26 February 2019) TANZLII. In the former case the Court of Appeal observed that:

> *"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

It is also trite that, a second appellate court will not have jurisdiction to deal with grounds of appeal not canvassed by the first appellate court. The Court of Appeal took this stance in **Julius Josephat vs Republic** [2020] TZCA 1729; (TANZLII) where the Court, having noted that some of the grounds of appeal raised were not canvassed before the first appellate court, the Court stated:

> *"We checked the memorandum of appeal featuring at page 60 of the Record of Appeal and satisfied ourselves that sincerely, those three grounds are new. As often stated, where such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction - See the cases of* ***Abdul Athuman v. Republic*** *[2004] T.L.R.151 and* ***Juma Manjano v. The DPP****, Criminal Appeal No. 211 of 2009, CAT (unreported). In the circumstances, except for the third ground which we are duty bound to address because it is based on a point of law, we are constrained to ignore grounds 2 and 5 as requested by Mr. Njau."*

Looking at the grounds of appeal preferred from the trial to the first appellate court and from there to this court, I am satisfied that, save for the sixth ground of appeal, grounds of appeal number 1, 2, 3, 4 and 5 are new as they were not canvassed or decided upon by the first

appellate court, this court therefore lacks jurisdiction. I shall therefore proceed to deal with the sixth ground of appeal only.

The sixth ground of appeal is that the two lower courts erred in failing to award the appellant Tshs. 2,500,000.00, as compensation for adultery. Since the award of compensation was dependent upon proving that there was adultery, I shall examine the records to see whether the appellant sufficiently established that the first and second respondent were engaged in an adulterous affair.

In accordance with **The Law of Marriage Act [CAP. 29 R.E. 2019]** (henceforth **"the LMA"**) a suit for damages for adultery is maintainable under section 72(1) which reads as follows:

> *"72.- (1)* ***A husband*** *or wife* ***may bring a suit for damages against any person with whom his or her spouse has committed adultery:*** *Provided that, no such proceeding shall lie -*
>
> *(a) where the aggrieved party has consented to or connived at the adultery;*
>
> *(b) where damages in respect of the alleged adultery have been claimed in a petition for divorce.*
>
> *(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."

[Emphasis is mine]

From the wording of section 72(1) quoted above, for claims of damages for adultery to be sustained it must established, in evidence, that the aggrieved part was married to the person with whom that other person committed adultery. Once marriage is established the claimant must proceed to establish, whether through direct or circumstantial evidence, that his/her spouse committed adultery with that other person. In affirming the above view, this court, in the case of **Jumanne Jingi v. Njoka Kiduda** [1984] TLR 51 observed as follows:

"At any rate, the burden was on the appellant to prove that he had been validly married to this woman before he could be heard to complain of adultery. This burden was not discharged as the appellant adduced no evidence of the circumstances in which he came to cohabit with her ..."

In the instant case, the appellant, SM1, initially testified that he got traditionally married to the second respondent in 2005. He later changed his testimony and testified that he was married in the year 2009 upon payment of Tshs. 200,000.00, in dowry. Looking at the

testimony before the trial court, it is without doubts that, the appellant contended that his matrimony with the second respondent was a customary marriage. He also stated that they were blessed with two issues. However, at the time of marriage, the second respondent had three other kids from her previous relation.

That the second respondent was customarily married to the appellant was supposedly supported by the testimony of SM2. The witness testified that the appellant as one of his believers in Kihesa. He added that around 2009 the appellant approached him and notified him that he was living with a woman from Mtwara. He added that the second respondents father went to their house and the appellant conceded that they were living as husband and wife. The appellant was then required to pay around Tshs. 60,000.00. However, he only paid 25,000.00. For her part, the second respondent did not specifically testify about the status of her relationship with the appellant.

The trial court concluded that there subsisted a valid marriage between the appellant and the second respondent. The real question is whether the facts support this conclusion.

There is evidence that, at the time of their engagement, the appellant professed Islamic religion. This is confirmed by SM2, the

Kihesa BAKWATA secretary, who stated that he was one of his subjects in Kihesa. It is also evident on the records that the second respondent, on the other hand, professed Christianity. In view of these revelations, it is clear that the two could not have contracted an Islamic marriage; and there was no evidence whatsoever pointing to this end.

However, as I have pointed out above, the appellant claimed that his marriage with the second respondent was a customary marriage. Admittedly, in accordance with section 25(1)(d) of the LMA, marriage in Tanzania can be contracted customarily. Upon conclusion of a customary marriage, the law requires that the same be registered. This is the requirement under section 43(5) of the LMA which reads:

> *"(5) When a marriage is contracted according to customary law rites and there is no registration officer present, it shall be the duty of the parties to apply for registration, within thirty days after the marriage, to the registrar or registration officer to whom they gave notice of intention to marry."*

Upon satisfaction that a customary marriage was validly contracted a registration officer to whom an application is made under subsection (5) shall complete a statement of particulars relating to the marriage in the prescribed form and shall sign the same and cause it to be signed by

the parties and by two witnesses and shall send the same to the district registrar, if the marriage was contracted according to rites recognized by customary law. See sections 43(6) and 33(2) of the LMA.

In the instant case, the provisions of sections 43(5), 43(6) and 33(2) of the LMA were not complied with, there is no evidence that the appellant or second respondent applied for registration of their alleged customary marriage. In essence, there is no evidence on record that theirs was a customary marriage. I say so because they all professed different religions and there was no evidence that the practiced similar customs or that particular customary rites were followed in their purported union. I must also add here that, payment of Tshs. 25,000.00 or 200,000.00, was in itself not sufficient to conclude that there was a valid customary marriage between the respondents.

For the above reasons, I am satisfied that there was no valid customary marriage between the appellant and the second respondent. I stated earlier that the appellant and the second respondent did not contract an Islamic marriage, in the circumstances, it goes without saying that section 75 of the LMA was not activated to bring in the jurisdiction of the trial court. In accordance with section 75 of the LMA primary courts have jurisdiction to entertain claims for adultery where

there is no petition of divorce in customary law or in Islamic marriages. The said section 75 of the LMA which reads as follows:

> *"75. **A primary court shall have jurisdiction to entertain a suit** under this Part **where the parties were married in accordance with customary law or in Islamic form** or, in the case of a suit under section 69 or section 71, if the court is satisfied that had the parties proceeded to marry, they would have married in accordance with customary law or in Islamic form."*
>
> [Emphasis is mine]

The jurisdiction of primary courts in adultery cases where there is no petition for divorce was also articulated in the case of **Wilson Andrew vs Stanley John Lugwisha & Another** (Civil Appeal 226 of 2017) [2020] TZCA 72 (25 March 2020) TANZLII where the Court of Appeal (Levira, J.A) at page 12 observed that:

> *"The jurisdiction of the Primary Court to entertain claims of damages for adultery where there is no petition of divorce against any person with whom his or her spouse has committed adultery are provided under Part V of the LMA which deals with Miscellaneous Rights of Action."*

Having quoted the provisions of section 75 and observed that it was not stated whether the appellant and the second respondent contracted a marriage either under customary law or Islamic form. The Court, at page 13 and 14, reiterated that:

> *"In the circumstances it is obvious that, since the marriage form of the appellant and the second respondent was not disclosed, the Primary Court could not have assumed jurisdiction to entertain the claim of damages for adultery which was placed before it. This is more so because, it cannot be said with certainty that the couple under discussion contracted either customary or Islamic marriage which would have justified its jurisdiction."*

In the instant case, it is on record that, at the trial court, the appellant did not petition for divorce, he only claimed to be paid damages for adultery between the respondents. However, since it was not established, with certainty, that the appellant and second respondent contracted either customary or Islamic marriage, the trial court proceeded without the requisite jurisdiction as provided for under section 75 of the LMA.

That said, though for different reasons, I dismiss the appellants appeal for being devoid of merits. Since this is sufficient to dispose of

the appeal, I shall not proceed to the merits of the appeal. Consequently, I hold that the trial court had no jurisdiction to entertain the claim for adultery. Accordingly, I invoke the revisionary powers vested to this court under sections 30 and 31 of **the Magistrates' Courts Act [CAP. 11 R.E. 2019]** and 79 of **the Civil Procedure Code [CAP. 33 R.E. 2019]** to quash and set aside the proceedings, judgment and decree of the trial court in Civil Case No. 23 of 2021; and the first appellate court in Civil Appeal Case No. 01 of 2022. Having resolved the appeal on my own efforts, I make no order for costs.

It is so ordered.

DATED at **IRINGA** this **15th** day of **MARCH, 2024**.

S.M. KALUNDE

JUDGE