

TANZANIA / JUDGMENT

anamary josephat another vs onesmo b semu 2022 tzhc 13775 30 september 2022

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TZHCDECIDED
30 September 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY OF BUKOBA) AT BUKOBA (PC) CIVIL APPEAL NO. 24 OF 2022 (Arising from Muieba District Court in Civil Appeal No. 64 of 2020 and Original Civil Case No. 51 of 2020 at Nshamba Primary Court)

ANAMARY JOSEPHAT..... 1st APPELLANT GILLIARD
LAURENT..... 2nd APPLICANT VERSUS ONESMO B.
SEMU.....RESPONDENT

JUDGMENT

Date of Judgment: 30.09,2022 A. K Mwenda, J, Before Nshamba Primary Court, the respondent filed Civil Suit No. 51 of 2020 against the appellants for adultery and claimed for compensation to a tune of TZS. 3,000,000/=. In his evidence he alleged that on 6/9/2020, at night hours, he surprised his wife (the 1st appellant) making love to the 2nd appellant in a restaurant where his wife was conducting business. On their part, the appellants declined the respondent's accusations, They defended their case to the effect that on the night in question, the respondent, in a companion of his relatives attacked them at the restaurant hall, beat them up, stripped them naked and took some nude photographs while alleging they were making love. i The appellants testified further in that while attacking them, the respondent and his companion (his relatives) had their faces covered with masks. Having analyzed the evidence from both sides, the trial court's magistrate was satisfied that the respondent proved his case and ultimately he awarded him compensation to a tune of TZS. 2,500,000/= only. Aggrieved by the trial court's findings and order, the appellants preferred their first appeal before Muleba District Court. Having heard the submissions by the parties, the Hon, Appellate magistrate partly allowed the said appeal by reducing the amount of compensation awarded to the respondents from TZS. 2,500,000/= to 1,000,000/= on the reasons that the trial court failed to take into consideration the facts that the first appellant and the respondent had voluntarily separated for the period of two years. Again, aggrieved by the first appellate court, the appellants surfaced before this court armed with an appeal consisting three (3) grounds. The said grounds read as follows, that;

1. That, the District Court Magistrate erred in law and fact by reaching into decision without evaluating the evidence as to whether there was occasion of adultery or not. (sic) 2

2. That, the District Court Magistrate erred in law and fact by ignoring the fact that the 1st appellant and the respondent are not husband and wife rather they are just parents, (sic)
3. In totality, the lower court acted unfair and against the weight of evidence, (sic) At the hearing of the present appeal, both parties were in attendance without legal representation. When invited to air out her submission, the first appellant said that on the night in question, the respondent found them (the appellants) in the tea room. She said they (respondent) and his relatives came armed while wearing masks. She said It they seriously battered them (the appellants) stripped them n a eked took some nude pictures and stole some of their belongings. Further to that she submitted that following that attack they (the appellants) sustained injuries and were admitted at the hospital for treatment. She averred further that she later on filed a complaint before the police and the respondent and his relatives were charged for assault causing actual bodily harm and theft where they were convicted and sentenced to a condition not to commit any offence within a period of six months. She said the said case was Criminal Case No. 162 of 2020. The appellant submitted further to the effect that the Hon. Trial Magistrate was biased as he rejected various documents which they attempted to 3 tender and witnesses they attempt to call. She said they lodged complaints before the PCCB Officer and before the Hon. District commissioner. She added to the effect that she had never been married to respondent rather they were paramour who co-parented three children. She said she also attempted to call her mother to prove that she was never married to the respondent but the Hon. Trial magistrate omitted that part of her mother's evidence. Further to that, the first appellant submitted that the adultery case was fabricated by the respondent as even his witnesses in, are his co-convicts in Criminal Case No. 162 of 2020. She then concluded her submission praying the present appeal to be allowed. On his part, the second appellant submitted that on the night in question, they were invaded by the respondent and his relatives while in a tea room where he was severely battered until he lost consciousness. He said some of his belongings such as his mobile phone and shoes were stolen and as such he filed a Criminal Case No. 161 of 2020 where the respondent and his relatives were convicted and sentenced. The second appellant submitted further, to the effect that the respondent's witnesses in the case of adultery which he filed against them are also his co-convicts in Criminal Case No. 162 of 2020. He added in that even the VEO who testified in support of his case denied everything in Criminal Case No. 63 of 4 2020 which they filed against him. He thus concluded his submission with a prayer beseeching the court to allow the present appeal. Responding to the appellant's submissions, the respondent said the second respondent is not Gilliard Joseph rather he is Gilliard Laurent and the court took note of the same. He went further to submit that the first appellant is his wife as he married her in 2004 by paying a dowry of TZS. 60,000/=. He said he then took her to his home where they lived together for 12 years before they got separated. He said he surprised them making love at the hotel. He concluded his submissions praying the present appeal tp be dismissed. In her rejoinder, the first appellant submitted that she was never married to the respondent. On top of that she said the scene of adultery was framed up because although around the area there are neighbors, the respondent purports to have called witnesses from far

distances who are his relatives. She then concluded her rejoinder by reiterating to her previous prayer seeking this court to allow the appeal. On his rejoinder, the second appellant prayed the court to have the present appeal allowed. Having summarized the rival submissions of both parties the issue before me is whether or not the present appeal is meritorious. 5 From the outset, it is important to note here that this is a second appeal. It is trite law that in appeals such as the present one, the court should rarely interfere with the concurrent findings of facts by the lower courts. This principle finds its legal back up in the case of ALLY NGOZI V. THE REPUBLIC, CRIMINAL APPEAL NO. 216 OF 2018, CAT (unreported) where the court held inter alia: that; "... this being a second appeal it is trite law that the court should rarely interfere with the concurrent findings of the lower courts on facts unless there has been a misapprehension of the evidence occasioning a miscarriage of justice or violation of the principle of law or procedure." In the same case, while citing the case of FELIX KICHELE AND ANOTHER V. REPUBLIC, CRIMINAL APPEAL NO. 159 OF 2015 (unreported), the court held inter alia that; "It is an accepted practice that a second appellate court should very sparingly depart from concurrent findings of facts by the trial court and the first appellate court... Before the trial court, the Hon. Trial magistrate decided the case in favor of the respondent basing on the testimony of SMI, SM2 and SM3 in that the appellants 6 were surprised (found *fragrento delicto*) in the tea room making love after the respondent had broken the door and entered therein. The trial court also disregarded the appellants evidence on two reasons, one, that the respondent and his companion, including SM2 had no grudges with the second respondent to lodge an attack against them and two that, appellants were found hacked and that SM3, the village chairman took the appellants nude pictures. In other words the credibility of SMI, SM2 and SM2 and weakness of appellant's evidence is what moved the trial court to decide in the respondent's favor. Before assessing the credibility of the said witnesses, which is the domain of the trial court it is important to note that the second appellate court can also determine it when assessing the coherence of the witness in relation to evidence of other witnesses. In the case of ALLY NGOZI V. THE REPUBLIC (*supra*), the court while citing the case of GOODLUCK KYANDO V. REPUBLIC [2006] TLR 363 and MATHIAS BUNDALA V. REPUBLIC, CRIMINAL APPEAL NO. 62 OF 2004 (unreported) held inter alia that; "Moreover, it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there is cogent and good reasons for not believing the witness which include the fact that, the witness has given improbable or implausible evidence, or 7 the evidence has been materially contradicted by another witness or witnesses." Although the principle above is derived from a criminal case, the same, is also applicable in the circumstances of the present appeal. In the present appeal, the trial and the first appellate court believed the SMI's, SM2's and SM3's evidence in support to claims of adultery against the appellants. They concluded that the appellants were found making love in the hotel room and that they were found naked. On their part the appellants did not dispute the fact that on the night in question they were in the said hotel room. However, the first appellant testified that the second appellant went there at that time to take animal feeds as he called earlier beseeching her (1st appellant) not to close the hotel until when he go and collect the animal feeds. The first appellant testified

further that the respondent and his so called witnesses, went at the hotel wearing masks, broke the door open, stripped them naked, battered them severely took their nude pictures and later parted with assortment of items. In the course of hearing of this appeal, the appellants informed the court that following that incident they (appellants) instituted criminal cases against the respondents, i.e the 2nd appellant filed Criminal Case No. 161 of 2020 and the first appellant filed Criminal Case NO. 162 of 2020 both were before Nshamba Primary Court at Muleba District. s Being so informed, this court found it prudent to take judicial notice of the said cases. Upon going through Criminal Case No. 161 of 2020 the parties are the second appellant one Gerald Laurian (complainant) who sued Onesmo Semu (respondent), Stivin Semu, Renatus Semu and Methodius Zakaria for assault causing actual bodily harm and stealing the incident which occurred at the same hotel and the time the respondent alleged he found the appellants making love. In the said case the respondent and his co-accused were convicted and sentenced to six months, conditional discharge. In Criminal Case No. 162 of 2020, the first respondent sued Onesmo Semu (respondent), Stivin Semu, Renatus Semu and Methodius Zakaria. Again in this case, the respondent and his co-accused were convicted and sentenced to six months conditional discharge. From the records, the convicts in Criminal Case No. 161 of 2020 and in Criminal Case No. 162 of 2020 never preferred any appeal against their convictions, and they are all witnesses in Civil Case No. 51 of 2020 (adultery case). With the above facts in hand, this court found the respondents case left a lot to be desired. Beginning with the respondent evidence, he, while testifying before the trial court said at the area of incident, he found the appellant locked themselves inside while making love. He said he sought assistance from his relatives ie Renatus Semu SM3 (Stivin Semu) and Methodius Zakaria and when they came they broke open the 9 door and found the appellants naked making love. From his evidence, I find it strange, for the appellants who definitely heard the doors being broken, to continue making love. Definitely this kind of scenario defies logic and this court find it difficult to believe the respondent's story. Since the first appellant testified that during invasion the respondent and his relatives were all wearing masks, the fact which was not opposed by the respondent, then this court wonders if at all the respondent and his relative went there with intention to just surprise his wife, why would they wear masks to conceal their identity. Inference drawn from this fact is that they went at the scene (hotel) with intent to commit crime or revenge for cases which they were convicted with. This inference is drawn from Section 122 of TEA which reads as follows that; "77?e court may infer the existence of any fact, which it think likely to have happened, regard being had to the common course of natural events, human conduct and ■ public and private business, in their relation to the facts of the particular case In the same vain, the filing of Criminal Cases No. 161 and 162 of 2020 against the respondent and his relatives, which ended by their conviction and sentence, strengthens the appellants case that the whole adultery case was a mere sham intended to revenge against the appellant following their convictions in Criminal Case No. 161 and 162 of 2020. That being said, I am of the considered view that the respondent failed to prove his case on the balance of probabilities. I thus allow this appeal and the judgments and orders made by the trial and the first appellate court are quashed and set aside. The respondent shall also pay costs. It is

so ordered. ge 30.09.2022 Judgment delivered in chamber under the seal of this court in the presence of the 1st appellant and in the absence of the 2nd appellant with notice and in the absence li

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