

TANZANIA / JUDGMENT

KIBERITI JUDGMENT

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HIGH COURT OF TANZANIA (DAR ES SALAAM SUB REGISTRY) AT DAR ES SALAAM PC CIVIL APPEAL NO. 23357 OF 2024 (Arising from Civil Appeal N0.2573/2024 of Ilala District Court before Hon.Lyana R. Originating from Civil Case No.328/2023 of Ukonga Primary Court, before Hon. P.F. Komba SRM.) JAMES KIBERITI.....APPELLANT VERSUS SIMON CHACHA..... RESPONDENT

JUDGMENT

11th February & 27th March, 2025 MWANGA, J. Appellant here filed a Civil Case Number 328 of 2023 before the Ukonga Primary Court against the respondent here, seeking damages for the allegations of adultery. It is claimed that the appellant is the husband of Mary Ryoba, an employee of the Respondent. The Appellant and Mary Ryoba, alleged wife, were blessed with four children. On 02/08/2023, the appellant said to have found the respondent and his wife having sexual intercourse at the appellant's house during night hours. He filed the case at the Ukonga Primary court claiming damages for adultery. At the Primary Court, each side had three witnesses. After a full trial, the trial court concluded that the appellant had proven his case to the required standard. He thus awarded the appellant damages to the tune of Tsh. 10,000,000/=. Dissatisfied with that decision, the respondent successfully appealed before the Ilala District Court, where the decision of the Ukonga Primary Court was set aside. Believing that the District Court's decision is not correct, the appellant is now knocking on the doors of this court, clothed with four grounds of appeal, as follows:

1. The trial court erred in law and fact in deciding in favor of the Respondent based on contradictory evidence in minor discrepancies that do not affect the root of the matter, and holding that the contradictions in the Appellant's case watered down the entire case.
2. The trial court erred in law and fact for neglecting the fact that circumstantial evidence is sufficient to establish an adulterous relationship.
3. The trial court erred in law and fact by dismissing the case on doubts rather than considering the balance of probabilities.
4. The trial court erred in law and fact by failing to consider and evaluate the evidence adduced by the Appellant herein, and reached a shady decision. On the strength of the grounds above, appellant is requesting this court to allow the appeal by quashing and setting

aside the Judgment of the Ilala District Court, costs of the appeal, and any other reliefs this court deems fit to grant. The appeal was disposed of through written submissions, as the appellant had legal assistance from the Legal Human Rights Centre. At the same time, the respondent had hired the services of Ester Nyalanda, a learned advocate. During the hearing, the Appellant sought leave of the court to join grounds 1, 2, and 4, and to argue the 3rd ground separately, a style also adopted by the respondent. In support of the combined grounds, the appellant began by citing the case of Gai Ipenzule vs. Sumi Magoye

[1983] T.R.R. 289, emphasizing that adultery can be proven even through circumstantial evidence. It was the appellant submission that, looking at the judgement on page 3 paragraphs 6 and 7 of the records the testimony testified by SM1 and SM2 it is evident that the Appellant's wife was caught in the Respondent's house in the middle of the night hence leading to the arrest of the Respondent as testified by SU3 who's the Mjumbe. It was his further submission that the magistrate's reasoning of expecting SM2 and SM3 to catch the Appellant's wife with the Respondent red-handed having sexual intercourse is not the only admissible evidence to prove adultery. Still, the circumstances in which they were seen at midnight proved the two were involved in sexual intercourse. He argued that, according to rule 6 of The Magistrates Courts (Rules of Evidence in Primary Courts) Regulations, the law stipulates, "In civil case, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case on it's favour, but it shall be sufficient if the weight of the evidence of one one-party is greater than the weight of the evidence of the other." He contended that, in the given case it is undeniable that the weight of the evidence and the testimonies of SM1, SM2, and SM3 show that the Respondent was caught with the Appellant's wife in the middle of the night, from August 8th to August 9th , 2023 which led to the wife deserting her children for the Respondent, despite knowing that she is married to the Appellant. He had the view that the time the Appellant's wife was caught in the Respondent's home, along with the pictures taken and admitted as Exhibit P1, clearly shows that she was involved in an affair with the Respondent, as testified by SM1, SM2, and SM3. Additionally, her testimony as SU2, stating that she had no sexual relationship with the Appellant (as shown on page 3, paragraph 10), only indicates that on the material date, she was in the Respondent's house to fulfill her needs and passions, as she does not deny the fact that she was caught in the Respondent's home in the middle of the night. On the 3rd ground of appeal, the appellant submitted that the trial magistrate failed to consider the appropriate standard of proof in the case at hand, despite the Appellant having successfully discharged the burden of proof against the Respondent, who was found with his wife at his own home. He said the magistrate treated the civil case as a criminal case, where the standard of proof requires evidence beyond a reasonable doubt. It was therefore his humble submission that this honourable court finds the grounds of appeal to have merit, quashes and sets aside the decision of the Ilala District Court, vide Civil Appeal No. 2573 of 2024, and subsequently upholds the decision of the Kigamboni Primary Court in Civil Case No. 328 of 2023. On the contrary, Ms. Nyalanda submitted that the person alleging has a legal burden to prove the allegation,

and the standard of proof is on the balance of probabilities. She contended that the Appellant claimed that the Respondent had committed adultery with his wife, without any substantial evidence. She said, there is no proof of any elements of adultery nor any circumstantial evidence that Appellant had shown to the exhibits that the Respondent committed the act. He cited to the court Section 74 of the Law of Marriage Act, Cap 29, R.E. 2019, which provides that: "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. Ms. Nyalanda added that the Appellant had failed to prove adultery in his testimony and even to show a slight element of adultery that the Respondent committed. The Appellant only relied on the statements made by the witnesses who differed in their testimonies before the court. That, from the statements made by the said witnesses, as SMI, SM2, and SM3, all of whom testified before the court, but none of whom testified on how the Respondent committed an act of adultery in the red-handed situation. She lamented that, the appellants witnesses differ from one another whereas Appellant explained that, on 02/09/2023 he saw the Respondent and his wife when they were inside the house while were sleeping, another witness SM2, on 09/08/2023 stated that, around 1:00 night hours when he went to the Respondent's house he find the Respondent together with the Appellant's wife were seated together and the woman had placed her leg on top of the Respondent's leg. However, on 9/08/2023, at midnight, the SM3 stated that he saw the Appellant's wife carrying a bucket of water and taking it to the Respondent's toilet. According to her, the contradiction explains that no person among the three witnesses had witnessed the act of adultery committed, but only the mere words from them. It was her further submission that, when digging deep into the whole issue of adultery and its elements, it is objective, and must be evidenced through an admission or by some other evidence from the court, which can presume that adultery has taken place. However, in this appeal, no Witness testified that they saw the Respondent and the Appellant's wife kissing, hugging, or engaging in any romantic activity in public. No romantic evidence of any hugging or kissing between the Respondent and the Appellant's wife was tendered before the court. The Appellant continued to blame the Respondent, emphasizing that his wife has been living with the Respondent and is still together with them. She contended that these are allegations raised by the Appellant against the Respondent, and he needs the court to believe him and decide in his favour without any direct proof, which the court may rely upon to come to a just decision. She submitted that the relationship between the Respondent and the Appellant's wife is that of employer and employee. The Respondent had employed the wife of the Appellant as his assistant in his Hotel, which is known as "Baba Lishe a place that sells breakfast, lunch, and dinner, and it is closed around 10:00 or 11:00 at night, and then what follows is counting of money and preparation for the following day. According to her, in this situation, the Respondent and the Appellant's wife had to sit after the sales of all food and count their money, then prepare for another day, and give them payment. That, in this

case, the Appellant's wife used the money given by the Respondent to care for her children, whom the Appellant had left behind for two years without any communication. She concluded that there was not enough evidence that was tendered before the court by the Appellant that would crucify the Respondent. To buttress her point, she cited to the court the case of Salum Msami Alii vs. William Madundo, DC. Civil Appeal No.5 of 2012, where it was held that; "In my view, based on the evidence presented, it cannot be found strong enough to establish adultery. The appellant may have suspected that the respondent was having an illicit relationship with his wife, but suspicion, however well-founded, is not a substitute for reliable evidence. Having found so, all grounds of appeal crumble and, in the result, this appeal is devoid of merit and hereby dismissed with cost." She took the view that the Appellant had suspected that the two had an affair, with no substantial evidence that had been adduced to establish an act of adultery. Additionally, the balance of proof should be on the balance of probability. According to her, the Appellant failed to produce sufficient evidence, which the trial proceedings were unable to evaluate due to its lack of weight. This evidence could not withstand the analysis made by the Magistrate and was therefore dismissed. It was his contention, thus, that all three grounds of appeal lack merit and should be dismissed with costs. Regarding the third ground it was Ms. Nyalannda's submission that Civil Proceedings, specifically in Primary Court is being guided by the provision of Regulation 6 of the Magistrates' Courts (Rule of Evidence in Primary Courts) Regulation G.N.No.66 of 1972. She held that the Appellant's weight of evidence did not prove the allegation of adultery against the Respondent; in fact, the Respondent denied the allegations of adultery, so the burden of proof lies with the Appellant. It was her further contention that the Appellant had a duty to present enough evidence with exhibits so that it could have convinced the trial court in the evaluation of the presented proof. She contended that the Appellant had failed to prove his case on the standard required as explained in the case of Salum Msami Alii vs. William Madundo, DC. Civil Appeal No.5 of 2012, High Court, where the court had this to say: "...the burden of proof lies on the Appellant. The Standard is the same as in civil cases on the balance of probabilities. It is not on the standard required in criminal cases, which is proof beyond a reasonable doubt. Proof must be clear from the evidence tendered, as the allegation is grave". She therefore emphasized that the Appellant has failed to prove his case on the balance of probabilities. She was insistent that the appeal lacks merit, thus needs to be dismissed with costs. In a short rejoinder, the appellant almost reiterated what he had discussed in his submission in chief. I have carefully considered the appellant's grounds of appeal and the rival submissions made in response. In determining this appeal, I shall be guided by the principle governing civil cases thus, he who alleges must prove the allegations, and the balance is on balance of probabilities, the doctrine which is enunciated in the case of Pauline Samson Ndawavya Vs Theresia Thomas Madaha, Civil Appeal No 45 of 2017 CAT at Mwanza (Unreported). More significantly, the proof in a Civil case is not as high as required in criminal cases. Expounding this, the court in the above case quoted the case of Miller v. Minister of Pensions [1937]2 All ER 372, where it was held that; "If at the end of the case the evidence turns the scale one way or the other, the

tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not to the same extent as required in a criminal case. If the evidence is such that the tribunal can say - We think it more probable than not the burden is discharged, but, if the probabilities are equal, it is not..." (At page 340). Guided by the above principle, it is now opportune to find whether the present appeal has met the standard required by the law. I had time to review the trial court's records to see whether the appellant's evidence supported the allegations of adultery. The term adultery is not statutorily defined. In Black's Law Dictionary, 8th Edition, the same is defined to mean; "Voluntary sexual intercourse between a married person and someone other than the person's spouse". In terms of section 72(1) of the Law of Marriage Act [Cap 29 R: E 2019], a husband or wife may bring a suit for damages against any person with whom his or her spouse has committed adultery. It is also worth noting that, to prove adultery, three main elements should be proved: one, that the spouse was married; two, that the person had sexual intercourse with someone other than a married person; and three, that the person had knowledge or had reason to know the person was married. In this appeal, there is no evidence of a marriage between the appellant and Su2; the appellant only alleges that Su2 is his wife and that they have four children together. To me that alone can not establish the first element since to prove adultery, the appellant had to confirm that the spouse was married at the time when the incident occurred. That aside, the evidence presented by the appellant and his witnesses did not establish the alleged adultery on the part of the respondent. Their evidence is full of contradictions, which explains that no person among the three witnesses had witnessed the act of adultery committed, but only the mere words from the witnesses. According to Sm1, on 02/08/2023 at 7:20, he came home and did not find his wife. Upon inquiry, he found his wife at the respondent's home, and through the window, he managed to see his wife sleeping naked, with the respondent and hugging each other, having sexual intercourse. And he saw them through torchlight. Later, he stated that the first incident occurred on February 9, 2023, while the second one took place on September 8, 2023. His witness, sm2 Peter Gichogo, told the court that the incident took place on 09/08, where they saw the respondent with Appellant's wife covering herself with one sheet. Sm3 testified that the incident took place on the 8th night. SU3, who is the Mjumbe, testified that the respondent was arrested on August 8, 2023. As can be depicted from that evidence, the same is contradictory on the dates of the alleged adultery. To me, that contradiction cannot be taken as minor because the date when the cause of action or crime is committed is of the essence in setting up the case as well as preparing a defence. Apart from that, considering the relationship Sm1 had with Sm2 and SM3, who were instrumental in discovering the dispute, it was essential to have a neutral witness to testify. However, the police officers allegedly involved were not summoned to testify. I am aware of the terms of Section 143 of the Evidence Act, which states that no particular

number of witnesses is required to prove an inevitable fact. Still, if a person who is unreasonably not called as a witness is a material witness, the plaintiff is bound to produce him, and if not, the Court may, as I hereby do, draw an adverse inference for the omission. Since the police were involved in the incident, in my opinion, they should have testified about its impact. I embrace appellant submissions that adultery can be proved even by circumstantial evidence; however, the circumstances surrounding this case did not confirm the allegations of adultery. The reasons I so hold are not farfetched. According to the witnesses, the two individuals were inside, and all the lights were off. When the police came and knocked, the respondent came out wearing clothes, and the appellant's wife was covered with a Maasai sheet. Indeed, the witness does not mention acts that constitute adultery. They ought to have explained more, because according to them the respondent and appellants wife were found in flagrante delicto thus, ought to explain in detail what exactly they were seen doing, circumstance which may not bring inference other than having sexual intercourse was to be reflected in evidence bearing in mind that Su2, is employed at respondents' business which is at his home. They were expected to have mentioned if they were naked and then dressed up after seeing the appellant or any other environment that brings up a sexual intercourse inference. I have no query concerning the standard of proof in civil cases, which is a balance of probabilities. However, subjecting the evidence to scrutiny, the same was not probable or somewhat plausible to prove the allegations of adultery to the standard required. Based on the above discussion, I conclude that the appellant did not prove his case on the preponderance of the evidence. I therefore find no reason to fault the district court's decision. The appeal is dismissed. From the circumstances of this case, each party shall bear its own costs. It is so ordered accordingly. H.R. MWANGA J JUDGE. 27/03/2025
COURT: Judgment delivered at Dar es Salaam in chambers this 27th March 2025 in the presence of Appellant in person and Ms. Esther Nyalanda, advocate for the Respondent. H.R. MWANGA JUDGE 27/03/2025

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