

TANZANIA / JUDGMENT

MAGAMBO SAMSON MUDULI 1

COURT
TANZLIIDECIDED
30 July 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SHINYANGA SUB REGISTRY AT SHINYANGA PC. CIVIL APPEAL REF. NO. 202406141000014184 (Arising from Civil Appeal Case No. 2125 of 2024 of Itilima District Court, Original Civil Case No. 44 of 2023 of Itilima District Primary Court at Luguru) MAGAMBO SAMSON MUDULIAPPELLANT
VERSUS MUSA LAZARO LUGATA.....RESPONDENT

JUDGMENT

17th & 30th July 2024 F.H. MAHIMBALI, J The appellant and the respondent in this case are at a tag of war over one lady by name of Christina d/o Dondo where each one claims being husband to her. Whereas the respondent says she married her from her parents at a bride price of 12 heads of cows in 2020 but sometimes later she went missing from her home, and upon reporting her missing before her parents, local leaders and police, he eventually found his disappearing wife at the home of the appellant being under one cover as husband and wife. Thus, the adultery claims against the appellant. On the 1 other hand, the appellant resists the adultery claims against him, also saying the same Christina d/o is his wife, having dully married her. Both lower courts found the appellant adulterous to the respondent. Thus awarded the respondent a compensation of five heads of cattle from the appellant for being adulterous to the respondent. Still undaunted, the appellant has knocked the doors of this court, challenging the decision of the first appellate court upholding the decision of the trial court on the fact of adulterousness on the wife he has married. The interestingness of this case, the said subject of the alleged adultery – Christina Dondo was neither a party nor a witness to the case. As to why the appellant is undaunted with the first appellate court’s decision upholding the trial court’s decision, five grounds of appeal were preferred, namely: -

1. That the learned Resident Magistrate erred in law and facts when he held that the primary court has jurisdiction to entertain and determine the suit on a claim of damages for adultery.
2. That, the learned Resident Magistrate erred in law and fact in holding that the respondent’s case was proved to the required standard. 2
3. That the learned Resident Magistrate erred in law and fact when failed to find that there was no proof of valid marriage between the respondent and the allegedly wife (Christina Dondo).

4. That the Resident Magistrate erred in law and facts by dismissing the appeal regardless of the weak evidence adduced by the respondent during trial.
5. That, the Resident Magistrate erred in law and fact when he upheld the finding by the trial court as regard to the award of general damages as there is no proper and justifiable cause. On these five grounds, the appellant is praying that this appeal be allowed with costs. During the hearing of the appeal, the appellant was represented by Mr. Geni Vitus Dudu, learned advocate whereas the respondent who strongly resisted the appeal had fended himself. Arguing for the appeal, Mr. Dudu learned advocate submitted that in the first ground of appeal, the concern is this the trial court was not justified in reaching that verdict. There has not been evidence at the trial court whether the respondent was really married to the said Christina 3 Dondo. Relying on section 76 of the Law of Marriage Act, Mr. Dudu submitted that for one to institute a suit on adultery claim under part V of the LMA, there ought to have been evidence that there was marriage between the alleged couples and the suit is on divorce. The respondent didn't adduce any evidence on that. In the case of William Andrew V. Stanley John Lugwisha and Another, Civil Appeal No. 226 of 2017, CAT at page 14, the Court of Appeal put it very clear on that where a suit is solely based on adultery, primary court lacks jurisdiction to entertain claims on damages. Otherwise, there was no any evidence that the trial court received any viable evidence in respect of spouse ship between the respondent and the alleged wife Christina Dondo. The degree of establishment or proof must be on balance of probability (see Barelia Karangirangi V. Asteria Nyalwamba, Civil Appeal No. 237 of 2017, CAT). This being an adultery claim, its definition is clear as per oxford dictionary - voluntary sexual intercourse between a married spouse and another. Thus, it was important for the claimant to establish that the woman was his wife and that there was sexual intercourse between the alleged two. A mere allegation that the wife is found detained or locked in someone's house is not a conclusive proof that there was adultery. 4 On the general damages, the quantum awarded is so high and excessive. The law is under section 74(2) a and b of the LMA, the assessment on adultery claims, there must be regards amongst others to customary issues of a particular society. In this case, there was no such consideration. Therefore, in his considered view, there is nothing of that assessment done. Thus, the appeal is meritorious and thus, it be allowed with costs. In resisting the appeal on the raised grounds of appeal, the Respondent submitted that it is not true that the trial court had no jurisdiction to adjudicate such a case. In his considered view, such claims are adjudicated by primary courts. He justified his position by making reference to the case of Gai Ipenzule V. Sumi Magoye (1983) TLR 289, where it was held that adultery is hardly proved by direct evidence but by circumstantial evidence. On the question of fact that the said Christina is not his wife, as per absence of evidence on that fact, the respondent denied this ground propounding that he married the said Christina vide customary rituals. He submitted further that, there is evidence in record from his middleman (mshenga) and his parents and some of the appellant's relatives. He is now astonished as which type of evidence was needed by the appellant to establish that Christina was married to him. 5 He boosted his argument by supplying this court with his marriage photograph with the said

Christina on the date of his wedding. With this evidence, he wondered which further evidence was still needed from him? With this submission, he too humbly prayed that this appeal be dismissed with costs. He further lamented that, what pains him much is this, that wife is still under the control of the appellant. That was very painful to him. He inquired, if there was any proof by the appellant that he is married to the said Christina Dongo as he himself has not provided any evidence how lawful is that woman his wife? He humbly prayed that this honorable court be guided by its good wisdom and consider his real position and not a story in fiction. In resting up the appeal submission by way of rejoinder submission, Mr. Dudu reiterated that this being an adultery claim, it was not supposed to be filed by itself at PC. Thus, it being adulterous claim, it cannot stand by its own as a tortious act at PC and remediable as prayed. As regards to the question of evidence on the adulterous claim, it is very clear on record that his three witnesses didn't adduce anything in court whether the said Christina was his wife and that there was adulterous act. With this, he humbly prayed that the appeal be allowed. 6 Having heard the parties extensively and scanned both the trial court and the first appellate court's proceedings and judgment, the vital question is one whether the appeal has been brought with sufficient cause. In arriving at that finding, two issues will be disposed: firstly, whether the trial court had no jurisdiction to entertain the matter, and secondly whether there was evidence that adultery has been committed. As to whether the trial court (primary court) had jurisdiction to hear the suit on claim of adultery in the absence of divorce application, the appellant's counsel while relying on the decision of the case of William Andrew V. Stanley John Lugwisha and Another stated that so long as there was no claim of divorce proceedings in the said case, then the trial court lacked the requisite jurisdiction. In order to appreciate the said legal concern, I have revisited the whole said case. In essence, while reaching its findings on the issue whether the primary court had jurisdiction to adjudicate the claim on adultery, the CAT had traversed both situations i.e firstly where the claim for adultery is made in divorce proceeding and also where there is absence of divorce proceeding. As regards to the claim of adultery proceedings in divorce proceedings, the CAT while making reference to section 109 of the LMA and section 75 of the LMA had this to say, while making an extensive 7 quoting of the enabling provisions that under section 109 of the LMA provides for power of the court on claim to damages for adultery in proceedings for divorce, which is not the case here. It provides as follows: "109 (1) Where, in a petition for divorce, damages for adultery have been claimed against a co-respondent-

- (a) if, after the close of evidence for the petitioner, the court is of the opinion that there is no sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or
- (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and the correspondent has been proved, the court may award the petitioner damages against the co-respondent.

- (2) The provisions of section 74 shall apply to the assessment of damages awarded under this section.
- (3) The court may award damages against a co-respondent under this section notwithstanding that the petition is, as against the respondent dismissed or adjourned. 8
- (4) The court shall have power, when awarding damages under this section, to direct that such damages, or any part of them, be vested in trustees upon trust to apply to income thereof for the benefit of the infant children, if any, of the marriage or, where the petitioner is required to pay maintenance to the respondent, in or towards the payment of that maintenance, and subject thereto in trust for the petitioner." [Emphasis added]. Also it can be observed that section 76 of the LMA falls under Part IV of the Act which deals with matrimonial proceedings. It reads: "76. Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of resident magistrate, a district court and a primary court." [Emphasis added]. The above quoted provisions suggest that the Primary Court is vested with jurisdiction to entertain claims of damages for adultery in situations where there is a petition for divorce in matrimonial proceedings which is not the case in the present appeal. Is that all? Can a Primary Court not entertain a matter on adultery claim in the absence of a petition of divorce proceeding? 9 Under Part V of the LMA, deals with Miscellaneous Rights of Action in which 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. For ease of reference, we reproduce section 75 which falls under this part as follows: "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 Added]. Thus, as per section 75 of the LMA, the answer is very clear that primary court has jurisdiction to adjudicate a claim on adultery even if in the absence of a proceeding of a petition for divorce provided that the parties are married in accordance with customary law or in Islamic form. In the current matter, the respondent submitted in opposing the appeal that the said Christina is his wife and that on 13th October 2023, he arrested the appellant at mid night being with the said Christina Dondo. This fact of arrest of the appellant and the said Christina whom the 10 respondent claims being his wife was supported by SM1, SM2, and SM3. But none provided evidence that the said Christina is the respondent's wife, nor was there evidence from the said Christina that is married either to the appellant or respondent. Therefore, there was no any evidence from the appellant if he really married the said Christina Dondo and if so on what form? A mere fact that a woman has given birth to his child is not a conclusive proof that parties are married. In the circumstances it is obvious that, since the marriage form of the respondent and the said alleged wife – Christina 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 light of the above observation, I agree with the learned advocate that the Primary Court had no jurisdiction but for different reasons that there was no proof of the existence of marriage between the respondent and the said Christina but not on the fact that for the claim of adultery to stand, there must be a petition for divorce. That view was not correct on the basis that it had jurisdiction on account of the provisions of 11 section 75 of the LMA as stated above and as well reasoned by the CAT in the case of William Andrew V. Stanley John Lugwisha and Another. On the other hand, I agree with the respondent on the principle established in the case of Gai Ipenzule V. Sumi Magoye (1983) TLR 289, that adultery is hardly proved by direct evidence but by circumstantial evidence. His argument would have been relevant in the circumstances established, had there been proof that he really married the said Christina either in Islamic or customary form. That has not been done. There was no evidence as to when they were married and how. It was expected for example, even parents/guardians of both sides to come to court and testify whether the said Christina was married to whom as per their knowledge. In addition, it is a settled position that where a man and a woman live together for a certain period of time (2 years' period) there is a presumption under section 160 of the LMA that they are husband and wife. However, the said presumption is rebuttable and as such, it does not fall under the category of marriages which the Primary Court is vested with jurisdiction to entertain as demonstrated above. In Jumanne Jingi v. Njoka Kiduda (1984) TLR 51; the High Court faced a similar situation where the appellant therein had lost in the Primary Court and the District Court in an action for damages for adultery and therefore appealed to that 12 court. In his decision, the High Court Judge (Lugakingira, J. as he then was) had this to say which I fully subscribe that: "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...." All said and done, I am settled that this appeal has merit. That in the absence as to when, where and how the said marriage was contracted, the Primary Court cannot assume jurisdiction to entertain a claim of damages for adultery. More so, there has not been proof that the said Christina was married to the respondent. Consequently, I allow the appeal. Each party shall bear its own costs. Right to further appeal against any aggrieved party is explained. DATED at SHINYANGA this 30th day of July, 2024. F.H. Mahimbali Judge. 13

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/314920/source_file/cd6e2259fc344d77/MAGAMBO_SAMSON_MUDULI_1.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/magambo-samson-muduli-v-musa-lazaro-lugata-adultery-tanzlii-2024>

Prepared on 13 October 2026 · Esheria